

**IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER**

IN THE MATTER OF:

**PHILLIP D. HARGRAVE
THOMAS D. BURMEISTER
GARY L. KELTING**

Cedar County, Iowa

ADMINISTRATIVE CONSENT
ORDER

NO. 2010-AQ- 13
NO. 2010-SW- 12.

TO: Phillip Hargrave
301 Cedar Street
Tipton, Iowa 52772

Thomas Burmeister
2057 260th Street
Bennett, Iowa 52721

Gary Kelting
4738 230th Street
Walcott, Iowa 52773

I. SUMMARY

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and Phillip Hargrave, Thomas Burmeister, and Gary Kelting for the purpose of resolving the air quality and solid waste disposal violations which occurred during the demolition and disposal of the Cove Restaurant located along Interstate 80 near Moscow, Iowa. In the interest of avoiding litigation, the parties have agreed to the provisions below.

Questions regarding this administrative consent order should be directed to:

Relating to technical requirements:

Marion Burnside
Iowa Department of Natural Resources
7900 Hickman Road, Suite 1
Windsor Heights, Iowa 50324
Phone: 515/281-8443

Relating to legal requirements:

Kelli Book, Attorney for the DNR
Iowa Department of Natural Resources
7900 Hickman Road, Suite 1
Windsor Heights, Iowa 50324
Phone: 515/281-8563

Payment of penalty to:

Iowa Department of Natural Resources
Henry A. Wallace Building
502 East Ninth Street
Des Moines, Iowa 50319-0034

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II. JURISDICTION

Pursuant to the provisions of Iowa Code sections 455B.134(9) and 455B.138(1) which authorize the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code chapter 455B, Division II (air quality), and the rules promulgated or permits issued pursuant to that part; Iowa Code section 455B.307(2) which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code chapter 455B, Division IV, Part 1 (solid waste), and the rules adopted pursuant to that part; and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) chapter 10, which authorize the Director to assess administrative penalties, DNR has jurisdiction to issue this administrative consent order.

III. STATEMENT OF FACTS

1. Phillip Hargrave, Thomas Bermeister, and Gary Kelting own the Cove Restaurant located at 1288 307th Street, Moscow, Iowa. The restaurant is located south of Interstate 80 at the Tipton Exit in Cedar County, Iowa. The restaurant was approximately 6,470 square feet. The owners hired Wright Excavating & Bulldozing to demolish the restaurant.

2. On October 14, 2009, Aaron Pickens, DNR Field Office 6 environmental specialist, and Terry Jones, DNR Field Office 6 environmental specialist senior, noted that the Cove Restaurant was being demolished and burned. They visited the property and noted that the structure was being demolished and the demolition waste was being burned directly south of the structure. During the investigation, the field office personnel spoke to Bob Wright with Wright Excavating & Bulldozing regarding the demolition. It was determined that an asbestos inspection had not been conducted prior to the demolition and burning. It was also determined that a demolition notification was not submitted to DNR. The field office personnel ordered Mr. Wright to immediately cease the demolition and burning. The field office personnel notified Marion Burnside, DNR asbestos coordinator, regarding the demolition.

3. On October 16, 2009, DNR Field Office 6 issued a Notice of Violation letter to Mr. Hargrave for the violations identified on October 14, 2009. The letter cited the following violations: open burning, improper solid waste disposal, failure to conduct a thorough inspection, and failure to notify of the demolition. The letter required the owners to: 1) cease demolition until all asbestos requirements were satisfied; 2) cease all open burning of solid waste immediately and dispose of it at a landfill; and 3) submit all disposal receipts to the field office by December 15, 2009. A similar letter was sent to Wright Excavating & Bulldozing as the demolition contractor. On December 14, 2009, Mr. Hargrave submitted the landfill receipts to DNR Field Office 6.

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4. On October 16, 2009, Mr. Burnside conducted an inspection at the Cove Restaurant. He met with Mr. Hargrave and Mr. Wright during the inspection. One room and most of the back portion of the restaurant had been demolished and the demolition debris was burned. Mr. Burnside estimated the area that had been demolished and burned was approximately 1,000 square feet. The flooring in the portions of the remaining standing structure had been disturbed and was crumbled and broken into small pieces. Mr. Burnside took pictures and collected five samples of suspect material from the area of the restaurant that had been demolished. The debris in this area was dry and there was no indication that water was available in the area. The samples included broken floor tile and linoleum.

5. On October 19, 2009, Mr. Burnside submitted the samples he collected to the University of Iowa Hygienic Laboratory for asbestos analysis. On October 22, 2009, DNR received the results of the analysis, two of the five samples contained regulated amounts of asbestos. The sample of the floor covering contained 12% Chrysotile asbestos and the sample of the white backing on the linoleum contained 20% Chrysotile asbestos.

6. On October 21, 2009, DNR issued a Notice of Violation letter to Mr. Hargrave for the violations observed by DNR Field Office 6 and Mr. Burnside. The letter cited the following violations: failure to conduct a thorough inspection, failure to notify, failure to remove all asbestos containing material prior to demolition, failure to keep all asbestos containing material wet, failure to have a trained supervisor on site during the demolition, failure to remove all asbestos containing material prior to burning, failure to seal all asbestos containing material in leak tight containers, and open burning. The letter required Mr. Hargrave to work with Wright Excavating & Bulldozing to obtain the services of an asbestos abatement contractor to clean up the demolition and burn site within 15 days of the receipt of the letter. All of the debris was required to be disposed of at a landfill as asbestos containing material and documentation of the waste shipment records were to be provided to the DNR. Wright Excavating & Bulldozing and Mr. Hargrave were also required to conduct a thorough inspection prior to continuing work on the standing portion of the building. If asbestos material was found during the inspection, it was to be properly removed prior to the demolition of the remainder of the building. A similar letter was also sent to Wright Excavating & Bulldozing.

7. On October 29, 2009, DNR received a notification from Active Thermal Concepts, Inc. indicating that it was to remove an estimated 120 cubic yards of asbestos containing construction waste, 198 square feet of asbestos containing linoleum, and 1,800 square feet of asbestos containing floor tile and mastic from the Cove Restaurant between October 28, 2009 and November 6, 2009. The notification indicated that the asbestos containing material would be disposed of at the Quad Cities Landfill. On January 28, 2010, Mr. Pickens visited the site to determine if the cleanup had been completed. He noted that the demolition of the structure was

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complete and that the solid waste from the demolition site and burn pile appeared to have been cleaned up as well. Because of the snow cover, Mr. Pickens intends to return to the area when the snow melts for further evaluation of the area.

IV. CONCLUSIONS OF LAW

1. Iowa Code section 455B.133 provides that the Environmental Protection Commission (Commission) shall establish rules governing the quality of air and emission standards. The Commission has adopted 567 IAC chapters 20-35 relating to air quality.

2. 567 IAC 23.2(1) prohibits any person from allowing, causing, or permitting open burning of combustible materials, except as provided in 23.2(2) (variances) and 23.2(3) (exemptions). Wright Excavating & Bulldozing had demolished a portion of the Cove Restaurant and burned it on site. The debris was burning when the field office personnel conducted their inspection on October 14, 2009. The above facts demonstrate noncompliance with this provision.

3. Iowa Code section 455B.133 provides for the Commission to establish rules governing the quality of air and emission standards. Pursuant to Iowa Code section 455B.133, 567 IAC 23.1(3) was established, which adopts by reference the federal regulations regarding asbestos removal. The United States Environmental Protection Agency has delegated to the State of Iowa the authority to implement and enforce the demolition and renovation portions of the federal National Emission Standards for Hazardous Air Pollutants (NESHAP), found at 40 CFR part 61, subpart M.

4. 40 CFR section 61.145(a) specifies that the owner or operator of a demolition or renovation activity shall thoroughly inspect a regulated facility for the presence of asbestos prior to the commencement of demolition or renovation. The DNR has no evidence that an asbestos inspection was ever completed prior to the demolition of the building. The above facts indicate a violation of this provision.

5. 40 CFR section 61.145(b) states that the owner or operator of a demolition or renovation shall submit a complete and timely notification prior to the commencement of the demolition or renovation operations. The specific requirements for this notification are contained in the subsection. DNR has no record of receiving the required notification for the demolition of the building. The above facts indicate a violation of this provision.

6. 40 CFR section 61.145(c) details the procedures for asbestos emission control and states that each owner or operator to whom the provisions apply shall comply with the procedures. The facts in this case indicate that the owners of the property were not in compliance with these provisions when the demolition occurred.

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7. 40 CFR 61.145(c)(1) provides that all regulated asbestos containing material shall be removed from a regulated facility before any activity begins that would break up, dislodge, or similarly disturb the material or preclude access to the material for subsequent removal. During an inspection on October 16, 2009, Mr. Burnside found that the asbestos containing material, in the form of floor tile and linoleum, had not been removed prior to the demolition. The facts in this case indicate a violation of this provision.

8. 40 CFR 61.145(c)(6)(i) provides that all regulated asbestos containing material, including material that has been removed or stripped, shall be adequately wet and shall remain wet until collected and contained. During an inspection on October 16, 2009, Mr. Burnside found dry asbestos containing material, in the form of floor tile and linoleum. The facts in this case indicate a violation of this provision.

9. 40 CFR 61.145(c)(8) provides that effective one year after promulgation of this regulation, no regulated asbestos containing material shall be stripped, removed, or otherwise handled or disturbed at a facility regulated by this section unless at least one on-site representative, such as a foreman or management level person or other authorized representative, trained in the provisions of this regulation and the means of complying with them, is present. The facts in this case indicate there was not a trained supervisor on site during the demolition. The facts of this case indicate noncompliance with this provision.

10. 40 CFR 61.145(c)(10) provides that if a facility is demolished by intentional burning all regulated asbestos containing material must be removed in accordance with the regulations before burning. Asbestos containing material was not removed from the Cove Restaurant prior to burning it. The facts of this case indicate noncompliance with this provision.

11. 40 CFR 61.150 contains standards for asbestos waste disposal for demolition and renovation operations. Specifically, 40 CFR 61.150(a) provides that there is to be no discharge of visible emissions to the outside air during the collection, processing (including incineration), packaging, or transporting of any asbestos containing waste material generated by the source, or use of one of the emission control and waste treatment methods specified in paragraphs (a)(1) through (4) of this section. The facts in this case indicate that the demolition debris was burned and smoke was still rising from the demolition debris at the time of inspection. The above facts demonstrate noncompliance with this provision.

12. 40 CFR 61.150(a)(1)(iii) provides that after all asbestos containing waste material is wet, it must be sealed in leak-tight containers while still wet; or, for materials that will not fit into containers without additional breaking, materials must be put into leak-tight wrapping. The facts in this case indicate that the demolition debris was not sealed in a leak-tight container and it was dry. The above facts demonstrate noncompliance with this provision.

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13. 40 CFR 61.150(b) states that all asbestos containing waste material shall be deposited as soon as is practical by the waste generator at a waste disposal site operated in accordance with the provisions of 40 CFR 61.154. The facts in this case indicate that the waste was not taken to a landfill operated in accordance with 40 CFR 61.154. The above facts demonstrate noncompliance with this provision.

14. Iowa Code section 455B.304 provides that the Commission shall establish rules governing the handling and disposal of solid waste. The Commission has adopted such rules at 567 IAC chapters 100-123.

15. 567 IAC 100.4 prohibits a private or public agency from dumping or depositing or allowing the dumping or depositing of any solid waste at any place other than a sanitary disposal project approved by the Director. The demolished portion of the Cove Restaurant was burned on site rather than disposed of at a landfill. The above facts demonstrate noncompliance with this provision.

V. ORDER

THEREFORE, it is hereby ordered and Phillip Hargrave, Thomas Burmeister, and Gary Kelting agree to do the following:

1. Phillip Hargrave, Thomas Burmeister, and Gary Kelting shall pay a penalty of \$7,000.00 within 30 days of the date the Director signs this administrative consent order.

VI. PENALTY

Iowa Code section 455B.146 authorizes the assessment of civil penalties of up to \$10,000.00 per day of violation for the air quality violations involved in this matter. More serious criminal sanctions are also available pursuant to Iowa Code section 455B.146A. Iowa Code section 455B.307(3) provides for civil penalties of up to \$5,000.00 per day for solid waste violations involved in this matter.

Iowa Code section 455B.109 authorizes the Commission to establish by rule a schedule of civil penalties up to \$10,000.00 that may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties through 567 IAC chapter 10. Pursuant to this rule, the DNR has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an administrative consent order with a \$10,000.00 penalty. Phillip Hargrave, Thomas Burmeister, and Gary Kelting are jointly and severally liable for the penalty. The administrative penalty assessed by this administrative consent order is determined as follows:

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Economic Benefit - 567 IAC chapter 10 requires that the DNR consider the costs saved or likely to be saved by noncompliance. 567 IAC 10.2(1) states that "where the violator received an economic benefit through the violation or by not taking timely compliance or corrective measures, the department shall take enforcement action which includes penalties which at least offset the economic benefit." 567 IAC 10.2(1) further states, "reasonable estimates of economic benefit should be made where clear data are not available." Failure to follow the proper asbestos NESHAP regulations and solid waste disposal regulations by the improper open burning and disposal of the restaurant has allowed the owners to save time and money. The owners were able to avoid the cost of an asbestos inspection and saved time by not notifying the DNR of the demolition. It is estimated that the cost of the asbestos removal for the portion of the restaurant that was demolished was \$4,300.00. The estimated cost of an inspection is \$500.00. Significant savings was achieved by burning the building rather than taking it to the landfill. It is estimated that the burning a portion of the building resulted in an estimated landfill savings of \$1,780.00. The total economic benefit estimate is \$6,580.00. DNR considers both the owners and demolition contractor responsible for these costs; therefore the economic benefit estimate has been divided evenly between the owners and the demolition contractor. Based on the above considerations, \$3,290.00 is assessed for this factor.

Gravity of the Violation - One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for that type of violation. As indicated above, substantial civil penalties are authorized by statute. Despite the high penalties authorized, the DNR has decided to handle the violations administratively at this time, as the most equitable and efficient means of resolving the matter. Open burning of solid waste results in the release of large amounts of particulates, carbon monoxide, and hydrocarbons. Such open burning may violate ambient air standards. Open burning releases toxins which pollute the air, may pollute groundwater, and pose a risk to human health and the environment. Asbestos is known to cause cancer and is a hazardous air pollutant. Failure to inspect for asbestos and notify prior to demolition has caused possible asbestos fibers to be released into the air through the demolition and burning of the structures. These violations threaten the integrity of the regulatory program because compliance with the open burning, asbestos, and solid waste regulations is required of all persons in this state. Improper disposal of solid waste creates nuisance conditions for surrounding property owners and the potential contamination of soil and groundwater. Therefore, \$2,500.00 is assessed for this factor.

Culpability - Phillip Hargrave, Thomas Burmeister, and Gary Kelting have a duty to remain knowledgeable of DNR's requirements and to be alert to the probability that their conduct is subject to DNR's rules. The open burning and solid waste disposal regulations have been in place for more than 20 years. Based on the above considerations, \$1,210.00 is assessed for this factor.

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VII. WAIVER OF APPEAL RIGHTS

This administrative consent order is entered into knowingly and with the consent of Phillip Hargrave, Thomas Burmeister, and Gary Kelting. For that reason, Phillip Hargrave, Thomas Burmeister, and Gary Kelting waive the right to appeal this administrative consent order or any part thereof.

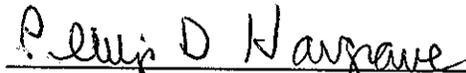
VIII. NONCOMPLIANCE

Compliance with Section V of this administrative consent order constitutes full satisfaction of all requirements pertaining to the violations described in this administrative consent order. Failure to comply with this administrative consent order may result in the imposition of administrative penalties pursuant to an administrative order or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code sections 455B.146 and 455B.307.



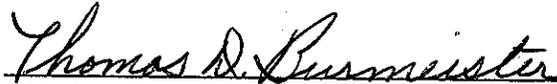
RICHARD A. LEOPOLD, DIRECTOR
Iowa Department of Natural Resources

Dated this 23 day of
March, 2010.



PHILLIP D. HARGRAVE

Dated this 17 day of
March, 2010.



THOMAS D. BURMEISTER

Dated this 17 day of
March, 2010.



GARY L. KELTING

Dated this 17 day of
March, 2010.

Barb Stock (Con 10-6 Cedar County); Kelli Book; Marion Burnside; DNR Field Office 6; EPA; VI.C, VII.C.1, and VII.C.4