

**ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT**

IN THE MATTER OF:

**Dunn Construction Company, Inc.  
East Thomas Asphalt Plant  
Birmingham, Jefferson County, AL  
EPA Identification Number ALR000044768**

ORDER NO. 15-XXX-CHW

**PREAMBLE**

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter “the Department” or “ADEM”) and Dunn Construction Company, Inc. (hereinafter “Dunn Construction”) pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-16, as amended, and the Alabama Hazardous Wastes Management and Minimization Act (hereinafter “AHWMMMA”), Ala. Code §§ 22-30-1 to 22-30-24, (2006 Rplc. Vol.), and the regulations promulgated pursuant thereto.

**STIPULATIONS**

1. Dunn Construction owns and operates East Thomas Asphalt Plant, an asphalt manufacturing plant and a used oil transportation business with EPA ID No. ALR000044768, located at 1200 10<sup>th</sup> Street West in Birmingham, Jefferson County, Alabama. At all times relevant to these findings, Dunn Construction was a used oil transporter and used oil processor/re-refiner.

2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.).

3. Pursuant to Ala. Code § 22-22A-4(n) (2006 Rplc. Vol.), the Department is the state agency responsible for the promulgation and enforcement of solid and hazardous waste regulations in accordance with the federal Solid Waste Disposal Act §§ 1002 to 11012, 42

U.S.C. §§ 6901 to 6992k, as amended. In addition, the Department is authorized to administer and enforce the provisions of the AHWMMA, Ala. Code §§ 22-30-1 to 22-30-24 (2006 Rplc. Vol.).

#### **DEPARTMENT'S CONTENTIONS**

4. On December 9, 2014, a representative of the Department conducted a compliance evaluation inspection (CEI) of Dunn Construction to determine compliance with all applicable requirements of Division 14 of the ADEM Administrative Code.

5. Based on the CEI, the Department determined that Dunn Construction violated certain requirements of Division 14 of the ADEM Administrative Code. Specifically, the Department identified the following violations:

(a) Pursuant to ADEM Admin. Code r. 335-14-17-.05(3)(d), a non-rail transporter must not transport used oil without having received an Alabama Used Oil Transport Permit in compliance with rules 335-14-8-.09 through 335-14-8-.13.

Dunn Construction knowingly transported used oil without a valid Alabama Used Oil Transport Permit. Dunn Construction's most recent used oil transporter permit expired on August 26, 2011. A review of the facility's 2014 records revealed that, on at least sixteen occasions, Dunn Construction collected used oil from Hayes Waste Oil Services, Inc. (ALD982121410), a used oil transporter and used oil processor/re-refiner, and transported the used oil to its used oil transfer facility in Birmingham, Alabama. Subsequently, Dunn Construction transported the used oil to various other Dunn Construction facilities throughout the southeast.

(b) Pursuant to ADEM Admin. Code r. 335-14-17-.05(3)(e), a used oil transporter whose base of operations is located in the State of Alabama must submit a correct and complete ADEM Form 8700-12 (including all appropriate attachment pages and fees) reflecting current used oil activities to the Department annually.

A review of Department records revealed that Dunn Construction has not submitted to the Department an ADEM Form 8700-12, Notification of Regulated Waste Activity, or paid the annual notification form processing fee(s) since July 31, 2008.

(c) Pursuant to ADEM Admin. Code r. 335-14-17-.06(6), owners or operators of used oil processing and re-refining facilities must develop and follow a written analysis plan describing the procedures that will be used to comply with the analysis requirements of rule 335-14-17-.06(4) and, if applicable, rule 335-14-17-.08(3). The owner or operator must keep the plan at the facility. ADEM Admin. Code r. 335-14-17-.05(7)(a) states that transfer facilities that store used oil for more than 35 days are subject to regulation under rule 335-14-17-.06 as used oil processors and re-refiners.

Dunn Construction stored used oil at its used oil transfer facility for greater than 35 days, which made it subject to regulation as a used oil processor/re-refiner, but did not develop and follow a written waste analysis plan.

(d) Pursuant to ADEM Admin. Code r. 335-14-17-.05(7)(i)1., containers and aboveground used oil tanks used to store used oil at transfer facilities must be labeled or marked clearly with the words "Used Oil".

Dunn Construction did not mark any of the eight used oil tanks at the transfer facility with the words "Used Oil".

(e) Pursuant to ADEM Admin. Code r. 335-14-17-.05(9)(c), records of analyses conducted or information used to comply with rule 335-14-17-.05(6)(a) must be maintained by the used oil transporter for at least three years. ADEM Admin. Code r. 335-14-17-.05(6) requires the used oil transporter to determine whether the total halogen content of used oil being transported or stored at a transfer facility is above or below 1,000 ppm to ensure that the used oil is not a hazardous waste under the rebuttable presumption of rule 335-14-17-.02(1)(b)1.(ii).

Dunn Construction did not furnish or maintain documentation to rebut the presumption that the used oil during shipment to its used oil transfer facility has not been

mixed with halogenated hazardous waste. According to a representative of Dunn Construction and a review of sampling records, the facility does not sample incoming loads of used oil. Instead Dunn Construction conducts batch sampling of the outbound loads.

6. Pursuant to Ala. Code § 22-22A-5(18)c. (2006 Rplc. Vol.), as amended, in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation(s), including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent, and degree of success of such person's efforts to minimize or mitigate the effects of such violation(s) upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty. Any civil penalty assessed pursuant to this authority shall not exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the department shall not exceed \$250,000.00. Each day such a violation continues shall constitute a separate violation.

7. In arriving at this civil penalty, the Department has considered the following:

(a) **SERIOUSNESS OF THE VIOLATIONS:** The Department noted twelve violations of ADEM Admin. Code div. 335-14. In arriving at the civil penalty, the Department considered the general nature and magnitude of the violations along with the available evidence of irreparable harm to the environment or threat to the health or safety of the public.

(b) **THE STANDARD OF CARE:** In considering the standard of care manifested by Dunn Construction, the Department noted that the violations listed above were non-technical and easily avoidable. Consequently, Dunn Construction did not exhibit a standard of care commensurate with applicable regulatory standards.

(c) **ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED:** The Department has determined that there was significant economic benefit gained by Dunn Construction as a result of the violations referenced herein. Dunn

Construction avoided the costs associated with obtaining an Alabama Used Oil Transport Permit.

(d) EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT: There are no known environmental effects to mitigate as a result of the alleged violations.

(e) HISTORY OF PREVIOUS VIOLATIONS: Based on a review of Department records, Dunn Construction does not have a documented history of noncompliance with respect to the ADEM Administrative Code.

(f) THE ABILITY TO PAY: The Department does not have any evidence indicating that Dunn Construction is unable to pay the civil penalty.

(g) OTHER FACTORS: It should be noted that this Consent Order is a negotiated settlement and, therefore, the Department has compromised the amount of the penalty that is warranted in the spirit of cooperation and the desire to resolve this matter amicably without incurring the unwarranted expense of litigation (see Attachment A, which is made a part of Department's Contentions).

11. The Department neither admits nor denies Dunn Construction's contentions, which are set forth below. The Department has agreed to the terms of this Consent Order in an effort to resolve the alleged violations cited herein without the unwarranted expenditure of State resources in further prosecuting the above violations. The Department has determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

#### **DUNN CONSTRUCTION'S CONTENTIONS**

12. Dunn Construction neither admits nor denies the Department's contentions. Dunn Construction consents to abide by the terms of this Consent Order and to pay the civil penalty assessed herein.

13. Dunn Construction maintained proper permits for this facility through August 26th 2011. Dunn's safety manager had the responsibility to assure all permits were updated. Unfortunately, the safety manager left the company and Dunn's failure to renew the permit in a timely manner was due to inadvertence during the transition to a new safety manager. Dunn has established a system to assure the permit is renewed as required. Dunn was issued a new used oil transporters permit for this facility on February 19th 2015. Dunn has submitted ADEM form 8700-12, notification of regulated waste activity and paid the appropriate fees. Dunn has a written waste analysis plan and incoming loads as well as outgoing loads are sampled as required by applicable regulations. Dunn has properly marked its used oil tanks and maintains documentation required by the applicable regulations. Dunn thanks ADEM for their assistance assuring Dunn is in compliance with all regulations at this time.

#### **ORDER**

THEREFORE, without admitting that it has violated any statutes or regulations, Dunn Construction, along with the Department, desires to resolve and settle the alleged violation cited above. The Department has carefully considered the facts available to it and has considered the six penalty factors enumerated in Ala. Code § 22-22A-5(18)c., as amended, as well as the need for timely and effective enforcement; the Department believes that the following conditions are appropriate to address the violations alleged herein. Therefore, the Department and Dunn Construction agree to enter into this Consent Order with the following terms and conditions:

A. Dunn Construction agrees to pay to the Department a civil penalty in the amount of \$14,000 in settlement of the violation alleged herein within forty-five days from the effective date of this Consent Order. Failure to pay the civil penalty within forty-five days from the effective date may result in the Department's filing a civil action in the Circuit Court of Montgomery County to recover the civil penalty.

B. Dunn Construction agrees that all penalties due pursuant to this Consent Order shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check or other payment methods acceptable to the Department and shall be remitted to:

Office of General Counsel

Alabama Department of Environmental Management

P.O. Box 301463

Montgomery, Alabama 36130-1463

Any payment submitted to the Department pursuant to this Order shall reference Dunn Construction's name and address, and the ADEM Administrative Order number of this action.

C. Dunn Construction agrees that, independent of this Consent Order, Dunn Construction shall comply with all terms, conditions, and limitations of the AHWMMMA, Ala. Code §§ 22-30-1 to 22-30-24, as amended, and the regulations promulgated pursuant thereto.

D. The Department and Dunn Construction (hereinafter the "parties") agree that this Consent Order shall apply to and be binding upon both parties, their directors, officers, and all persons or entities acting under or for them. Each signatory to this Consent Order certifies that he or she is fully authorized by the party he or she represents to enter into the terms and conditions of this Consent Order, to execute the Consent Order on behalf of the party represented, and to legally bind such party.

E. The parties agree that, subject to the terms of these provisions and subject to provisions otherwise provided by statute, this Consent Order is intended to operate as a full resolution of the violations cited in this Consent Order.

F. Dunn Construction agrees that it is not relieved from any liability if it fails to comply with any provision of this Consent Order.

G. For purposes of this Consent Order only, Dunn Construction agrees that the Department may properly bring an action to compel compliance with the terms and conditions contained herein in the Circuit Court of Montgomery County.

H. The parties agree that the sole purpose of this Consent Order is to resolve and dispose of all allegations and contentions stated herein concerning the factual circumstances referenced herein. Should additional facts and circumstances be discovered in the future which would constitute possible violations not addressed in this Consent Order, then such future violations may be addressed in Orders as may be issued by the Director, litigation initiated by the Department, or such other enforcement action as may be appropriate; Dunn Construction agrees not to object to such future orders, litigation, or enforcement action based on the issuance of this Consent Order if future orders, litigation, or other enforcement action address new matters not raised in this Consent Order.

I. The parties agree that this Consent Order shall be considered final and effective immediately upon signature of all parties. This Consent Order shall not be appealable, and Dunn Construction does hereby waive any hearing on the terms and conditions of this Consent Order.

J. The parties agree that this Consent Order shall not affect Dunn Construction's obligation to comply with any Federal, State, or local laws or regulations.

K. The parties agree that final approval and entry into this Consent Order are subject to the requirements that the Department give notice of proposed Orders to the public, and that the public have at least thirty days within which to comment on the Consent Order.

L. The parties agree that, should any provision of this Consent Order be declared by a court of competent jurisdiction or the Environmental Management Commission to be inconsistent with Federal or State law and therefore unenforceable, the remaining provisions hereof shall remain in full force and effect.

M. The parties agree that any modifications of this Consent Order must be agreed to in writing signed by both parties.

N. The parties agree that, except as otherwise set forth herein, this Consent Order is not and shall not be interpreted to be a permit or modification of an existing permit under Federal, State or local law, and shall not be construed to waive or relieve Dunn Construction of its obligations to comply in the future with any permit.

Executed in duplicate, with each part being an original.

Dunn Construction Company, Inc.

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

*Harry A. Thomas*

(Signature of Authorized Representative)

Harry A. Thomas

(Printed Name)

Vice President of Operations

(Printed Title)

3/23/15

(Date Signed)

\_\_\_\_\_  
Lance R. LeFleur  
Director

\_\_\_\_\_  
(Date Executed)

**Attachment A**

**Dunn Construction  
Birmingham, Jefferson County  
EPA Identification Number ALR000044768**

<b>Violation*</b>	<b>Number of Violations*</b>	<b>Seriousness of Violation*</b>	<b>Standard of Care*</b>	<b>History of Previous Violations*</b>	
Transporting used oil without a valid transporter permit	1	\$10,000	\$5,000	\$0	
Failure to notify annually as a used oil transportation, transfer facility, and processor/re-refiner	1	\$150	\$150	\$0	
Failure to develop and follow a waste analysis plan	1	\$500	\$500	\$0	
Failure to mark one tank with the words Used Oil	8	\$400	\$400	\$0	
Failure to document the total halogen content of used oil accepted for transport	1	\$500	\$500	\$0	
					<b>Total of Three Factors</b>
<b>TOTAL PER FACTOR</b>		\$11,550	\$6,550	\$0	<b>\$18,100</b>

<b>Adjustments to Amount of Initial Penalty*</b>	
<b>Mitigating Factors (-)</b>	\$0
<b>Ability to Pay (-)</b>	\$0
<b>Other Factors (+/-)</b>	\$(5,855)
<b>Total Adjustments (+/-)</b>	\$(5,855)
<i>Enter at Right</i>	

<b>Economic Benefit* (+)</b>	\$1755
<b>Amount of Initial Penalty</b>	<b>\$19,855</b>
<b>Total Adjustments (+/-)</b>	\$(5,855)
<b>FINAL PENALTY</b>	<b>\$14,000</b>

*Footnotes:\** See the "Department's Contentions" portion of the Order for a detailed description of each violation and the penalty factors.