

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

<p>IN THE MATTER OF:</p> <p>PORTZEN CONSTRUCTION, INC. Dubuque County, Iowa</p>	<p>ADMINISTRATIVE CONSENT ORDER</p> <p>NO. 2016-AQ- 18</p>
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TO: Mike Portzen, Registered Agent
Portzen Construction, Inc.
205 Stone Valley Drive
Dubuque, Iowa 52003

I. SUMMARY

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and Portzen Construction, Inc. (Portzen Construction) for the purpose of resolving the asbestos violations which occurred as a result of a demolition of a warehouse in Dubuque, 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: **Relating to legal requirements:**

Tom Wuehr
Iowa Department of Natural Resources
7900 Hickman Road, Suite 1
Windsor Heights, Iowa 50324
Phone: 515/725-9576

Kelli Book, Attorney for the DNR
Iowa Department of Natural Resources
7900 Hickman Road, Suite 1
Windsor Heights, Iowa 50324
Phone: 515/725-9572

Payment of penalty to:

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

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 and the rules promulgated or permits issued pursuant to that division; and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) chapter 10, which

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authorize the Director to assess administrative penalties, DNR has jurisdiction to issue this administrative consent order.

III. STATEMENT OF FACTS

1. The City of Dubuque (City) owns a storage warehouse located at 460 19th Street in Dubuque, Iowa. The warehouse was approximately 3,750 square feet.
2. On January 11, 2016, DNR received a complaint alleging that the warehouse was demolished without complying with the asbestos National Emission Standards for Hazardous Air Pollutants (NESHAP) regulations.
3. On January 12, 2016, Tom Wuehr, DNR asbestos environmental specialist senior, conducted a complaint investigation. During the investigation, Mr. Wuehr discovered that the entire warehouse had been demolished. An excavator with the Portzen Construction logo was at the site during Mr. Wuehr's investigation. Mr. Wuehr observed that the roof had been broken into a large number of pieces and remained at the site. The demolished building had not been removed from the site. The roofing debris was in dry, friable condition. Mr. Wuehr collected samples of the roofing debris. The laboratory analysis of the samples indicated the debris contained 7% Chrysotile asbestos and 13% Chrysotile asbestos. The area was fenced off but the roofing debris was not contained. Following the inspection, Mr. Wuehr contacted Mark Hogan with Environmental Management Services of Iowa, Inc. and Steve Sampson-Brown, project manager with the City's engineering department. Mr. Hogan and Mr. Sampson-Brown informed Mr. Wuehr that the City hired Portzen Construction to remove only the north wall of the warehouse because it was crumbling and was a safety hazard. The City had authorized Portzen Construction to only push in the north wall of the warehouse so as to not disturb the roof of the structure because it contained asbestos. Portzen Construction charged the City \$8,000.00 for the project and Mr. Sampson-Brown estimated that a quarter of the cost was the result of the unauthorized demolition of the remaining structure.
4. Following the inspection, Mr. Wuehr confirmed with Mr. Hogan that the demolition debris was all properly disposed of as asbestos containing material.
5. On March 17, 2016, DNR issued a Notice of Violation letter to Portzen Construction for the asbestos violations discovered during Mr. Wuehr's inspection. The letter informed Portzen Construction that the matter may be referred for further enforcement.
6. In 2011, Portzen Construction was issued a Notice of Violation letter for failing to inspect prior to beginning a remodeling project at the Guttenberg, Iowa hospital.

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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. 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.

3. 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 warehouse. The above facts indicate a violation of this provision.

4. 40 CFR section 61.145(b)(1) requires written notification to be submitted to the DNR prior to beginning renovation. The specific requirements for this notification are contained in the subsection. 40 CFR section 61.145(b)(3)(iii) states if an ordered demolition is required, the written notification must be postmarked no later than 24 hours after the beginning of the ordered demolition. The building must be structurally unsound and in imminent danger of collapse. The DNR has no evidence that a notification was ever submitted either prior to the demolition or within 24 hours of the demolition of the warehouse. The above facts indicate a violation of this provision.

5. 40 CFR 61.145(b)(C) requires that a copy of the demolition order shall be submitted with the notification if the project is an ordered demolition. A copy of the order was not submitted to the DNR. 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 Portzen Construction was not in compliance with these provisions when the demolition occurred.

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

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material for subsequent removal. Mr. Wuehr observed regulated asbestos containing material that had not been removed prior to the demolition project. 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. Mr. Wuehr found dry regulated asbestos containing material exposed to the open air at the demolition site. 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 above facts indicate noncompliance with this provision.

V. ORDER

THEREFORE, it is hereby ordered and Portzen Construction agrees to do the following:

1. Portzen Construction shall pay an administrative penalty in the amount of \$2,000.00 within 30 days of the date the Directors 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. Iowa Code section 455B.146A provides for more serious criminal sanctions for the air quality violations.

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 \$2,000.00 penalty. The administrative penalty assessed by this administrative consent order is determined as follows:

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

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“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.” This project was conducted as an emergency project, Portzen Construction likely did not gain an economic benefit from the project. Therefore no economic benefit is being 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. Asbestos is known to cause cancer and is a hazardous air pollutant. Failure to comply with the proper asbestos removal has likely caused asbestos fibers to be released into the air through the removal of the asbestos containing material. These violations threaten the integrity of the regulatory program because compliance with the asbestos regulations is required of all persons in this state. Based on the above considerations, \$1,500.00 is assessed for this factor.

Culpability – Portzen Construction has a duty to remain knowledgeable of DNR’s requirements and to be alert to the probability that its conduct is subject to DNR’s rules. Based on the above considerations, \$500.00 is assessed for this factor.

VII. WAIVER OF APPEAL RIGHTS

This administrative consent order is entered into knowingly and with the consent of Portzen Construction. For that reason, Portzen Construction waives the rights 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.

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CHUCK GIPP, DIRECTOR
Iowa Department of Natural Resources

Dated this 02nd day of
November, 2016.



PORTZEN CONSTRUCTION, INC.

Dated this 27th day of
October, 2016.

Kelli Book; Tom Wuehr; DNR Field Office 1; EPA; VII.C.4.