

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

IN THE MATTER OF: M. A. MORTENSON COMPANY	ADMINISTRATIVE CONSENT ORDER NO. 2021-AQ- 04 NO. 2021-SW- 04
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TO: M. A. Mortenson Company
Aka Mortenson Construction
Corporation Service Company, Registered Agent
505 5th Avenue, Suite 729
Des Moines, Iowa 50309

M. A. Mortenson Company
Aka Mortenson Construction
Nick McCann, Project Manager, Wind Energy
700 Meadow Lane North
Minneapolis, Minnesota 55422

M. A. Mortenson Company
Aka Mortenson Construction
Graham McFall, Sr. Environmental Specialist
700 Meadow Lane North
Minneapolis, Minnesota 55422

I. SUMMARY

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and M. A. Mortenson Company, aka Mortenson Construction (Mortenson Construction) for the purpose of resolving air quality violations. In the interest of avoiding litigation, the parties have agreed to the provisions below.

Any questions regarding this administrative consent order should be directed to:

Relating to technical requirements:

Jacob Simonsen
Iowa Department of Natural Resources
Field Office 3
1900 N. Grand Avenue, Suite E17
Spencer, Iowa 51301
Phone: 712-262-4177

Relating to legal requirements:

Anne Preziosi, Attorney for the DNR
Iowa Department of Natural Resources
Wallace State Office Building
502 East Ninth Street
Des Moines, Iowa 50319-0034
Phone: 515-238-3429

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Payment of penalty to:

Director of the Iowa DNR
Wallace State Office Building
502 East Ninth Street
Des Moines, Iowa 50319-0034

II. JURISDICTION

This administrative consent order is issued 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; and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) chapter 10, which authorize the director to assess administrative penalties.

III. STATEMENT OF FACTS

1. Mortenson Construction is a construction and real estate development company based in Minneapolis, Minnesota. On November 2, 2020, Iowa Department of Natural Resources Field Office 3 received an anonymous complainant reporting the open burning of crane mats and pallets in a large hole. The burning materials, which consisted of trade waste, were located in a grove of trees located at 3142 530th Avenue in Cylinder, Iowa (the site). The site is owned by Scott Thompson.

2. On November 2, 2020, DNR Field Office 3 Environmental Specialist Jacob Simonsen and Environmental Engineer Paul Petitti investigated the site of open burning and spoke to the Mortenson Construction Project Manager for Wind Energy, Nick McCann. DNR staff notified Mr. McCann that the burning was illegal open burning. They requested that the fire be put out immediately. Mr. McCann stated that he was not aware that the burning of trade waste was against the law.

3. On November 3, 2020, DNR Field Office 3 Environmental Specialist Matt Jefferson revisited the site and observed more trade waste burning.

4. On November 4, 2020, Mr. Jefferson visited the site once more and observed a Mortenson Construction employee backing a trailer full of trade waste to the burn pit in preparation to continue the illegal open burning of the waste.

5. On November 30, 2020, DNR sent a Notice of Violation letter (NOV) to Mortenson Construction for the illegal open burning of trade waste. During the site visits on November 2 through 4, DNR personnel observed that

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there were multiple stacks of crane mats being burned. A 16' crane mat weighs approximately 2,500 lbs. Northern Plains Regional Landfill, located near the site, charges \$59.49 per ton.

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 subrule 23.2(2) (variances) and subrule 23.2(3) (exemptions). The illegal open burning of trade waste is specifically prohibited by the provisions of 567 IAC 23.2. The open burning of solid waste materials and trade waste by Mortenson Construction, as described above, is a violation of the provisions of 567 IAC 23.2.

V. ORDER

THEREFORE, DNR orders and Mortenson Construction agrees to the following:

1. Mortenson Construction shall cease all illegal solid waste disposal activity and all illegal open burning of combustible materials at the site and at any location in the State of Iowa, and shall comply in the future with the regulations concerning disposal of solid waste and open burning;

2. Within 30 days of the date this order is signed by the director, Mortenson Construction shall remove any remaining trade waste and shall properly disposed of the waste at a landfill or recycling center; and within 30 days of the date this order is signed by the director, Mortenson Construction shall provide disposal receipts to DNR Field Office 3; and

3. Within 30 days of the date this order is signed by the director, Mortenson Construction shall pay a penalty of \$10,000.00.

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.

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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, 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. The administrative penalty assessed by this 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 “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.”

The economic benefit of disposal by illegal open burning is primarily disposal fees for hauling the trade waste to a landfill or recycling center. A 16’ crane mat weighs approximately 2,500 lbs. Northern Plains Regional Landfill charges \$59.49 per ton. There were multiple stacks of crane mats being burned.

Therefore, the economic benefit for failing to properly dispose of all materials is assessed at \$3,000.00.

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. Improper solid waste disposal and illegal open burning can degrade air and water quality and contribute contaminants to both land and water resources as well as threaten public health.

Smoke from burning trade waste degrades the air quality in the surrounding area and releases toxins and other pollutants. The burning of non-exempted waste, including but not limited to trade waste, threatens the integrity of the air quality and solid waste programs that promote healthy communities and environment.

The illegal open burning conducted at the site by Mortenson Construction was in close proximity to homes, which increased the potential for human exposure. The industry standard for disposal of trade waste is not open burning.

Therefore, \$3,000.00 is assessed for the gravity of the violations.

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Culpability – Factors to be considered in determining the amount to be assessed for culpability include the degree of intent or negligence; the standard of care required by the laws of the state; and whether the violator has taken remedial measures or mitigated the harm caused by the violations.

Mortenson Construction has a duty to remain knowledgeable of DNR regulations and to be alert to the probability that its conduct is subject to DNR's rules. Mortenson Construction personnel at the site claimed to be unaware of the prohibition against illegal open burning of trade waste. Open burning prohibitions have been in place for over 45 years and improper solid waste disposal regulations have been in place for many years.

The aim of burning the trade waste was to avoid the cost of proper disposal. Whether by intentional disregard of the law or negligence, there are no remedial or mitigating measures that can be taken to recover the burned material.

Therefore, \$3,000.00 is assessed for culpability.

Aggravating Factors – On November 2, 2020, DNR personnel spoke at the site with the Mortenson Construction Project Manager and requested the fire be put out immediately and that all illegal open burning cease. DNR personnel observed more trade waste being illegally open burned on November 3, 2020, the day following the initial contact with the Project Manager. On November 4, 2020, DNR personnel observed employees of Mortenson Construction in the act of dumping more trade waste into the fire. Considering these aggravating factors and the clear disregard of DNR requests, \$1,000 is assessed for the violation.

VII. WAIVER OF APPEAL RIGHTS

This administrative consent order is entered into knowingly and with the consent of Mortenson Construction. For that reason, Mortenson Construction waives its right to appeal this order or any part thereof.

For purposes of this order, Mortenson Construction admits to the jurisdictional allegations, but does not admit or deny the findings of fact, conclusions of law and basis for penalty.

VIII. NONCOMPLIANCE

Failure to comply with this administrative consent order, including failure to timely pay any penalty, may result in the imposition of further administrative penalties or referral to the attorney general to obtain injunctive relief and civil

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penalties pursuant to Iowa Code sections 455B.146 and 455B.307. Compliance with Section "V. Order" of this administrative consent order constitutes full satisfaction of all requirements pertaining to the specific violations described in Section "IV. Conclusions of Law" of this administrative consent order.



Kayla Lyon, Director
Iowa Department of Natural Resources

Dated this 26th day of
January, 2021.



M. A. Mortenson Company,
aka Mortenson Construction

Dated this 26 day of
January, 2021.

DNR Field Office 3; Anne Preziosi; VI.C; VII.C.1.