

LANCE R. LEFLEUR
DIRECTOR



ROBERT J. BENTLEY
GOVERNOR

Alabama Department of Environmental Management
adem.alabama.gov

1400 Coliseum Blvd. 36110-2400 ■ Post Office Box 301463
Montgomery, Alabama 36130-1463
(334) 271-7700 ■ FAX (334) 271-7950

June 13, 2013

CERTIFIED MAIL NO: 91 7108 2133 3935 0329 0867
RETURN RECEIPT REQUESTED

91 7108 2133 3935 0329 0867

MR DOUGLAS M DUNGAN
THE DUNGAN COMPANY LLC
3302 OLD SAWMILL ROAD
MOODY AL 35004

RE: Consent Order No. 13-106-CAP

Dear Mr. Dungan:

Please find enclosed ADEM Consent Order No. 13-106-CAP which requires Dungan to take certain actions in regard to alleged violations of the Alabama Air Pollution Control Act. This Order has been issued with the consent of Dungan and the Department. Please refer to Order Items A and B for the dates by which the monetary penalties must be paid.

If you have any questions concerning this matter, please contact Samantha Bowen at (334) 274-4225 in Montgomery.

Sincerely,

A handwritten signature in black ink, appearing to be "JG" or similar, written over a horizontal line.

Ronald W. Gore, Chief
Air Division

Enclosure

cc: Tom Johnston, Office of General Counsel

Birmingham Branch
110 Vulcan Road
Birmingham, AL 35209-4702
(205) 942-6168
(205) 941-1603 (FAX)

Decatur Branch
215 Sandlin Road, S.W.
Decatur, AL 35603-1333
(256) 353-1713
(256) 340-9359 (FAX)

Mobile Branch
104 Perimeter Road
Mobile, AL 36615-1131
(251) 450-3400
(251) 470-2593 (FAX)

Mobile-Coastal
111 Commanders Drive
Mobile, AL 36615-1421
(251) 432-6533
(251) 432-6508 (FAX)

**ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT**

IN THE MATTER OF:)

The Dungan Company LLC)

Moody, St. Clair County, Alabama)

Company Tank Truck No. 113)

JCDH Air Permit No.: 4-07-4175-0013)

CONSENT ORDER

No. 13-106-CAP

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter, “the Department” or “ADEM”) and The Dungan Company LLC (hereinafter, “Dungan”) pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 through 22-22A-16 (2006 Rplc. Vol.), and the Alabama Air Pollution Control Act, Ala. Code §§22-28-1 through 22-28-23, (2006 Rplc. Vol.), and the regulations promulgated pursuant thereto.

STIPULATIONS

1. Dungan is the permitted owner and/or operator of gasoline tank truck no. 13 (hereinafter, the “Tank Truck”), operating in and from Moody, St. Clair County, Alabama. The Tank Truck is operating under the authority of Jefferson County Air Permit 4-07-4175-0013 (Jefferson County Air Sticker #210) (hereinafter, the “Permit”).

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

3. Pursuant to Ala. Code §22-22A-4(n) (2006 Rplc. Vol.), the Department is the state air pollution control agency for the purposes of the federal Clean Air Act, 42 U.S.C. 7401 through 7671q, as amended. In addition, the Department is authorized to administer and enforce the provisions of the Alabama Air Pollution Control Act, Ala. Code §§22-28-1 through 22-28-23 (2006 Rplc. Vol.).

4. ADEM Admin. Code r. 335-3-6-.07(5)(a) states:

Each owner or operator of a gasoline dispensing facility subject to this rule shall not permit the transfer of gasoline between a gasoline tank truck and a stationary storage tank unless the gasoline tank truck complies with rule 335-3-6-.20 and the vapor control system is connected and operating in accordance with paragraph (4) of this rule.

5. ADEM Admin. Code r. 335-3-6-.20(3) states:

After October 1, 1991, no person shall allow a gasoline tank truck subject to this rule to be filled or emptied unless the gasoline tank truck has a vapor collection system that meets the test requirements of subparagraph (4) (a) of this rule; and a valid Department Air Sticker attached and visibly displayed; or, a valid Jefferson County Department of Health Air Sticker attached and visibly displayed.

DEPARTMENT'S CONTENTIONS

6. On February 21, 2013, Department personnel observed Dungan delivering gasoline to an underground gasoline storage tank at The Store in Calera, Shelby County, Alabama (hereinafter, the "Facility") without utilizing the required vapor balance system.

7. On February 27, 2013, the Department issued a Notice of Violation (NOV) to Dungan for allowing gasoline to be transferred between a tank truck and a gasoline storage tank at the Facility without utilizing the vapor balance system, in violation of ADEM Admin Code r. 335-3-6-.07(5).

8. On March 19, 2013, the Department received Dungan's response to the NOV, which stated that the driver did not use the vapor recovery equipment during the delivery of gasoline to the Facility in order to complete the delivery in less time.

9. Pursuant to Ala. Code §22-22A-5(18)c., *as amended*, in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation, 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 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 that such violation continues shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. SERIOUSNESS OF THE VIOLATION: Dungan, during the transfer of gasoline from the Tank Truck to the gasoline storage tank, failed to process the gasoline vapors through a vapor control system and allowed gasoline vapors to be emitted into the atmosphere. The Department considers this violation to be serious.

B. THE STANDARD OF CARE: By not operating the Tank Truck in such a manner as to comply with ADEM regulations, Dungan did not exhibit the required standard of care.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: There is no determinable economic benefit from non-compliance in this matter.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT: The Department is not aware of any efforts made by Dungan to minimize or mitigate the effects upon the environment due to its non-compliance.

E. HISTORY OF PREVIOUS VIOLATIONS: There is no history with the Department of prior enforcement actions for similar violations by Dungan.

F. THE ABILITY TO PAY: Dungan has not alleged an inability to pay the civil penalty.

G. OTHER FACTORS: It should be noted that this Special Order by Consent is a negotiated settlement and, therefore, the Department has compromised the amount of the penalty that is warranted in this matter in the spirit of cooperation and the desire to resolve this matter amicably, without incurring the unwarranted expense of litigation.

10. The Department has carefully considered the six statutory penalty factors enumerated in Ala. Code § 22-22A-5(18)c, *as amended*, as well as the need for timely and effective enforcement and,

based upon the foregoing and attached contentions, has concluded that the civil penalty herein is appropriate and consistent with the historical penalty range imposed by the Department for similar violations (see Attachment A, which is made a part of Department's contentions).

11. The Department neither admits nor denies Dungan'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.

DUNGAN'S CONTENTIONS

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

ORDER

THEREFORE, Dungan, along with the Department, desires to resolve and settle the compliance issues 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, and the Department has determined that the following conditions are appropriate to address the violations alleged herein. Therefore, the Department and Dungan agree to enter into this ORDER with the following terms and conditions:

A. Dungan agrees to pay to the Department a civil penalty in the amount of \$4,000.00 in settlement of the violations 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. Dungan 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 and shall be remitted to:

Office of General Counsel
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130-1463

C. Dungan agrees to comply with the terms, limitations, and conditions of ADEM Admin. Code r. 335-3-6-.07(5).

D. 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. That, subject to the terms of these presents and subject to provisions otherwise provided by statute, this Consent Order is intended to operate as a full resolution of the violations which are cited in this Consent Order.

F. Dungan 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, Dungan 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. Dungan also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, Dungan shall be limited to the defenses of *Force Majeure*, compliance with this Agreement and physical impossibility. A *Force Majeure* is defined as any event arising from causes that are not foreseeable and are beyond the reasonable control of Dungan, including its contractors and consultants, which could not be overcome by due diligence (i.e., causes which could have been overcome or avoided by the exercise of due diligence will not be considered to have been beyond the reasonable control of Dungan) and which delays or prevents performance by a date required by the Consent Order. Events such as unanticipated or increased costs of performance, changed economic circumstances, normal precipitation events, or failure to obtain federal, state, or local permits

shall not constitute *Force Majeure*. Any request for a modification of a deadline must be accompanied by the reasons (including documentation) for each extension and the proposed extension time. This information shall be submitted to the Department a minimum of ten working days prior to the original anticipated completion date. If the Department, after review of the extension request, finds the work was delayed because of conditions beyond the control and without the fault of Dungan, the Department may extend the time as justified by the circumstances. The Department may also grant any other additional time extension as justified by the circumstances, but it is not obligated to do so.

H. The Department and Dungan 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 concerning the facility 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, and Dungan shall not 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 Department and Dungan 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 Dungan does hereby waive any hearing on the terms and conditions of same.

J. The Department and Dungan agree that this Order shall not affect Dungan's obligation to comply with any Federal, State, or local laws or regulations.

K. The Department and Dungan agree that final approval and entry into this 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 Order.

L. The Department and Dungan agree that, should any provision of this 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 Department and Dungan agree that any modifications of this Order must be agreed to in writing signed by both parties.

N. The Department and Dungan agree that, except as otherwise set forth herein, this 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 Dungan of its obligations to comply in the future with any permit.

Executed in duplicate, with each part being an original.

THE DUNGAN COMPANY LLC

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

Douglas M. Dungan
(Signature of Authorized Representative)

Marilyn Elliott
Lance R. LeFleur
Director

Douglas M. Dungan
(Printed Name)

PARTICIPANT
(Printed Title)

Date Signed: 04/12/2013

Date Executed: 6/13/13

Attachment A

**The Dungan Company LLC
Company Trailer #13
Moody, St. Clair County, Alabama
JCDH Permit No. 4-07-4175-0013**

Violation*	Number of Violations*	Seriousness of Violation & Base Penalty*	Standard of Care*	History of Previous Violations*
Delivering gasoline without utilizing vapor recovery equipment.	1	\$ 2,000.00	\$ 2,000.00	
<i>TOTAL</i>	<i>1</i>	<i>\$ 2,000.00</i>	<i>\$ 2,000.00</i>	<i>\$ -</i>

Economic Benefit	\$ -
Mitigating Factors	\$ -
Ability to Pay	\$ -
Other Factors	
CIVIL PENALTY	\$ 4,000.00

Footnotes

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