

**ARKANSAS DEPARTMENT OF ENERGY AND ENVIRONMENT,
DIVISION OF ENVIRONMENTAL QUALITY**

IN THE MATTER OF:

AFIN: 70-01553

LIS No. 20-196

CUNNINGHAM APARTMENT HOMES, LLC
826 W HILLSBORO STREET
EL DORADO, AR 71730

CONSENT ADMINISTRATIVE ORDER

This Consent Administrative Order (CAO) is issued pursuant to the authority delegated under the federal Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and the federal regulations issued thereunder. In addition, this CAO is issued pursuant to the authority of the Arkansas Water and Air Pollution Control Act (the Act), Ark. Code Ann. § 8-4-101 *et seq.*, the Removal of Asbestos Material Act, Ark. Code Ann. § 20-27-1001 *et seq.*, Arkansas Pollution Control and Ecology Commission (APC&EC) Regulation 7, APC&EC Regulation 8, and APC&EC Regulation 21.

The issues herein having been settled by agreement of Cunningham Apartment Homes, LLC (Respondent) and the Director of the Division of Environmental Quality¹ (DEQ), it is hereby agreed and stipulated that the following FINDINGS OF FACT and ORDER AND AGREEMENT be entered.

FINDINGS OF FACT

1. During a complaint investigation conducted on April 2, 2020, DEQ personnel observed that renovation had begun on a structure identified as Cunningham Court Apartments, which is owned by Respondent. The structure is located at 427 West Oak Street, El Dorado,

¹Pursuant to Act 910 of 2019, the Arkansas Transformation and Efficiencies Act, the former Arkansas Department of Environmental Quality is now the Division of Environmental Quality in the newly created Arkansas Department of Energy and Environment.

Union County, Arkansas 71730 (the Site).

2. Ark. Code Ann. § 20-27-1007(2) and (4) provides:

It shall be unlawful for any person:

...

(2) To participate in any response action, demolition, or renovation contrary to the rules or orders issued under this subchapter or contrary to the Arkansas Water and Air Pollution Control Act, § 8-4-101 *et seq.*, and the Arkansas Solid Waste Management Act, § 8-6-201 *et seq.*, and the rules promulgated thereunder, whether or not such person is required to have a license or certificate pursuant to this subchapter;

...

(4) To violate any provision of this subchapter or any rule or order adopted or issued under this subchapter.

3. Ark. Code Ann. § 8-4-103(c)(1)(A) provides, “Any person that violates any provision of this chapter and rules, permits, or plans issued pursuant to this chapter may be assessed an administrative civil penalty not to exceed ten thousand dollars (\$10,000) per violation.”

4. Pursuant to Ark. Code Ann. § 8-4-103(c)(1)(B) as referenced by Ark. Code Ann. § 20-27-1002(a), “Each day of a continuing violation may be deemed a separate violation for purposes of penalty assessment.”

5. The structure(s) in question constitutes a “facility” as defined in APC&EC Regulation 21, Chapter 4.

6. Respondent meets the definition of an “owner or operator of a demolition or renovation activity” as defined in APC&EC Regulation 21, Chapter 4.

7. APC&EC Reg. 21.501 requires the owner or operator of a demolition, renovation, or response action to conduct, or have conducted, a thorough inspection of the affected facility or part of the facility for the presence of asbestos including category I and category II nonfriable asbestos prior to the commencement of the demolition, renovation, or response action.

8. APC&EC Reg. 21.701(A) requires Respondent to keep at the Site, a copy of the asbestos inspection report, including results of any bulk sample analysis, and any air monitoring data.

9. APC&EC Reg. 21.703 requires Respondent to make available upon request by DEQ any information related to a site, including, but not limited to, the information as set forth at APC&EC Reg.21.701.

10. On April 2, 2020, DEQ personnel conducted a complaint investigation of a reported renovation of a facility located at the Site. While at the Site, DEQ personnel observed that sheetrock, ceiling tiles, and carpet had been removed from Apartment Unit 1 as part of a renovation of the Site. Photographs of Apartment Unit 1 at the time of the investigation were included in the complaint investigation report.

11. On April 2, 2020, DEQ personnel informed Respondent of the complaint investigation by telephone. During the conversation, Respondent revealed that they had failed to conduct or have conducted an asbestos inspection of the Site. Respondent stated that they were told by the City of El Dorado Code Enforcement that an asbestos inspection was not required because the structure had been a residence for over 30 years. DEQ personnel explained to Respondent that the structure constitutes a facility because it was a building used for commercial purposes and is therefore subject to the requirements of APC&EC Regulation 21. Thus, Respondent was unable to provide DEQ with an asbestos inspection report or results of any bulk sample analysis. Such failure violates APC&EC Reg.21.501, APC&EC Reg.21.701(A), and APC&EC Reg.21.703, and therefore violates Ark. Code Ann. § 20-27-1007(4).

12. In an email dated April 3, 2020, DEQ personnel provided Respondent with a copy of APC&EC Regulation 21.

13. In correspondence dated April 17, 2020, Respondent disclosed that in early January 2020, a contractor had been hired to renovate Apartment Unit 1 at the Site. The contractor was dismissed in late February or early March without having completed the renovation project. The contractor did not provide Respondent with waste disposal receipts of the material removed as part of the renovation.

14. On April 27, 2020, Respondent provided DEQ with a copy of an asbestos polarized light microscopy (PLM) report of analyses that were performed by Eurofins EMLab P&K on thirteen (13) samples that were collected from Apartment Unit 1 of the facility. The samples were received by the lab on April 24, 2020, and analyzed for asbestos content on April 27, 2020.

15. The asbestos PLM report identified four (4) of the thirteen (13) samples as containing asbestos. The sample material containing asbestos included tan floor tile, black mastic, and ceiling plaster varying in content of 3 to 5 percent chrysotile asbestos. Respondent disclosed that the materials that were found to contain asbestos had not been part of the renovation nor had they been disturbed during the renovation project.

16. In correspondence dated April 30, 2020, DEQ informed Respondent of the compliance issues identified during the April 2, 2020 complaint investigation of the Site. This was intended to provide Respondent with the opportunity to review the violations and submit any additional information Respondent deemed appropriate regarding the compliance issues.

17. In correspondence dated June 8, 2020, DEQ informed Respondent that formal enforcement action was proceeding in this matter.

ORDER AND AGREEMENT

WHEREFORE, Respondent, neither admitting nor denying the factual and legal allegations

contained in this CAO, and DEQ do hereby agree and stipulate as follows:

1. This CAO addresses all violations contained in the FINDINGS OF FACT.
2. In compromise and full settlement for instances of noncompliance specified in the FINDINGS OF FACT, Respondent agrees to pay the sum of **ONE THOUSAND SIX HUNDRED EIGHTY DOLLARS (\$1,680.00)**. Payment is due within thirty (30) calendar days of the effective date of this CAO. Such payment shall be made payable to:

DEQ, Fiscal Division
5301 Northshore Drive
North Little Rock, Arkansas 72118-5317.

In the event that Respondent fails to pay the civil penalty within the prescribed time, DEQ shall be entitled to attorneys' fees and costs associated with collection.

3. All applicable submissions required by this CAO are subject to approval by DEQ. In the event of any deficiency, Respondent shall, within fifteen (15) calendar days of notification by DEQ, submit any additional information requested. Failure to respond adequately to the notice of deficiency within fifteen (15) calendar days constitutes a failure to meet a deadline and is subject to the civil penalties established in the following Paragraph.

4. Failure to meet the limits, requirements, or deadlines of this CAO or the applicable approved schedules provided for herein constitutes a violation of this CAO. If Respondent fails to meet any limits, requirements, or deadlines, Respondent shall pay, on demand, to DEQ civil penalties according to the following schedule:

- | | |
|--|----------------|
| (a) First day through the fourteenth day: | \$100 per day |
| (b) Fifteenth day through the thirtieth day: | \$500 per day |
| (c) More than thirty days: | \$1000 per day |

Stipulated penalties shall be paid within thirty (30) calendar days of receipt of DEQ's demand to Respondent for such penalties. These stipulated penalties may be imposed for delay in

scheduled performance and shall be in addition to any other remedies or sanctions that may be available to DEQ by reason of Respondent's failure to comply with the requirements of this CAO. DEQ reserves its rights to collect other penalties and fines pursuant to its enforcement authority in lieu of the stipulated penalties set forth above.

5. If any event, including, but not limited to, an occurrence of nature, causes or may cause a delay in the achievement of compliance by Respondent with the requirements or deadlines of this CAO, Respondent shall notify DEQ in writing as soon as reasonably possible after it is apparent that a delay will result, but in no case after the due dates have passed. The notification shall describe in detail the anticipated length of the delay, the precise cause of the delay, the measures being taken and to be taken to minimize the delay, and the timetable by which those measures will be implemented.

6. DEQ may grant an extension of any provision of this CAO, provided that Respondent requests such an extension in writing and provided that the delay or anticipated delay has or will be caused by circumstances beyond the control of and without the fault of Respondent. The time for performance may be extended for a reasonable period, but in no event longer than the period of delay resulting from such circumstances. The burden of proving that any delay is caused by circumstances beyond the control of and without the fault of Respondent and the length of the delay attributable to such circumstances shall rest with Respondent. Failure to notify DEQ promptly, as provided in the previous Paragraph of the ORDER AND AGREEMENT, shall be grounds for a denial of an extension.

7. This CAO is subject to public review and comment in accordance with Ark. Code Ann. § 8-4-103(d), and therefore is not effective until thirty (30) calendar days after public notice of the CAO is given. DEQ retains the right and discretion to rescind this CAO based on

comments received within the thirty (30) day public comment period.

8. As provided by APC&EC Regulation 8, this matter is subject to being reopened upon Commission initiative or in the event a petition to set aside this CAO is granted by the Commission.

9. Nothing contained in this CAO shall relieve Respondent of any obligations imposed by any other applicable local, state, or federal laws.

10. Nothing in this CAO shall be construed as a waiver by DEQ of its enforcement authority over alleged violations not specifically addressed herein. In addition, this CAO neither exonerates Respondent from any past, present, or future conduct that is not expressly addressed herein, nor does it relieve Respondent of the responsibilities for obtaining any necessary permits.

SO ORDERED THIS 17TH DAY OF DECEMBER, 2020.

Becky W Keogh
BECKY W. KEOGH, DIRECTOR
ARKANSAS DEPARTMENT OF ENERGY AND ENVIRONMENT,
DIVISION OF ENVIRONMENTAL QUALITY

APPROVED AS TO FORM AND CONTENT:

CUNNINGHAM APARTMENT HOMES, LLC

BY: [Signature] (Signature)

Jamar Cunningham (Typed or printed name)

TITLE: Owner

DATE: 11/25/2020