

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

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In the Matter of:	)	
	)	
In re Lu Vern G. Kienast	)	
L.G. Kienast Utility Construction	)	Appeal No. CAA 03-(03)
	)	
	)	
Docket No. CAA-5-2001-007	)	
	)	

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**ORDER REVOKING ELECTION OF *SUA SPONTE REVIEW***

On August 7, 2003, Administrative Law Judge Stephen J. McGuire (“ALJ”) issued an Initial Decision in this matter. *See In re Lu Vern G. Kienast/L. G. Kienast Utility Construction*, Dkt. No. CAA-5-2001-007 (ALJ, Aug. 7, 2003). The Initial Decision concerned the May 18, 2001 complaint and notice of opportunity for hearing (“Complaint”) filed against L.G. Kienast Utility Construction and Lu Vern G. Kienast (“Respondents”) by U.S. Environmental Protection Agency Region V (“Region V”).

The Complaint alleged that Respondents, in the course of their demolition activities at the H.D. Hudson Manufacturing Plant, committed eleven violations of Section 112 of the Clean Air Act, 42 U.S.C. § 7412, by failing to comply with the National Emission Standards for Hazardous Air Pollutants for Asbestos regulations, 40 C.F.R. Part 61, Subpart M. Region V sought a civil administrative penalty of \$113,600 for the alleged violations. The ALJ found Respondents

partially liable for the violations alleged in Region V's Complaint and assessed a \$35,000 civil penalty against Respondents, rather than the \$113,600 penalty sought by Region V.

Pursuant to 40 C.F.R. § 22.30(a), the parties' deadline for filing an appeal with the Environmental Appeals Board ("Board") was September 8, 2003, thirty days after the Initial Decision was served. The Board did not receive an appeal from either party. By order dated September 23, 2003, the Board exercised its *sua sponte* review authority pursuant to 40 C.F.R. § 22.27(c)(4). Order Electing to Review *Sua Sponte* ("*Sua Sponte* Order") (Sept. 23, 2003). In particular, the Board determined that the ALJ's penalty assessment warranted further review. Although the *Sua Sponte* Order did not provide additional details, the Board had concerns regarding the sufficiency of the ALJ's rationale for reducing Region V's proposed penalty from \$113,600 to \$35,000. *See* Initial Decision at 25. This portion of the Initial Decision is the weakest link in an otherwise well-reasoned decision.

The Board has now completed a more in-depth examination of the case. Notwithstanding our reservations about the sufficiency of the ALJ's explanation for reducing the proposed penalty, the Board is disinclined to disturb the ALJ's \$35,000 penalty assessment in view of the totality of the circumstances, including that fact that neither of the parties has filed a timely appeal. Accordingly, we decline to review the matter and hereby **REVOKE** our earlier election of *sua sponte* review. Having revoked our election, the Initial Decision stands as the final Agency order in this case. For the reasons stated in the Initial Decision, Respondent, L.G. Kienast Utility Construction and Lu Vern G. Kienast, shall pay the full amount of the civil

penalty assessed, **\$35,000**, within thirty (30) days after the filing of today's order. Payment shall be made by forwarding a certified cashier's check payable to the Treasurer, United States of America, at the following address:

U.S. Environmental Protection Agency  
Region V  
Sonja R. Brooks  
Regional Hearing Clerk  
P.O. Box 70753  
Chicago, IL 60673

So ordered.<sup>1</sup>

ENVIRONMENTAL APPEALS BOARD

By: \_\_\_\_\_/s/\_\_\_\_\_  
Ronald L. McCallum  
Environmental Appeals Judge

Dated: Sept. 16, 2004

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<sup>1</sup> The three-member panel deciding this matter is comprised of Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Kathie A. Stein. *See* 40 C.F.R. § 1.25(e)(1).

