

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.II
2007 AUG 21 AM 9:12
REGIONAL HEARING
CLERK

In re:

Commonwealth of Puerto Rico
Department of Housing

Fullana Heavy Works

Respondents

In a proceeding under Section 113(d) of the
Clean Air Act

**COMPLAINT AND NOTICE
OF OPPORTUNITY TO
REQUEST A HEARING**

CAA-02-2007-1214

Complaint

The United States Environmental Protection Agency (EPA) issues this Complaint and Notice of Opportunity for Hearing (Complaint) and proposes to assess penalties pursuant to the Clean Air Act ("CAA" or "Act"), as amended, 42 U.S.C. § 7401 *et seq.*, at Section 113(d) of the Act, in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22 (Consolidated Rules of Practice). The Complainant, the Director of the Caribbean Environmental Protection Division, EPA Region 2, is duly delegated the authority to issue Complaints, on behalf of EPA Region 2, for violations of the CAA that occurred and/or are occurring in the Commonwealth of Puerto Rico and the Territory of the U.S. Virgin Islands.

EPA alleges herein that the Department of Housing of the Commonwealth of Puerto Rico and Fullana Heavy Works (Respondents) have violated, or are in violation of, requirements or prohibitions of Sections 112 and/or 114 of the Act, and 40 C.F.R. Part 61, Subpart M, the national emission standard for hazardous air pollutants for asbestos (Asbestos NESHAP), promulgated, pursuant to Section 112 of the Act.

I. Preliminary Statement and Description of Respondents

1. Respondent Department of Housing of the Commonwealth of Puerto Rico (DOH) is a government agency organized and authorized to do business under the laws of the Commonwealth of Puerto Rico, specifically by Law Number 97, June 10, 1972, as amended. DOH's central offices are located at 606 Barbosa Avenue, Hato Rey Ward, San Juan, Puerto Rico.
2. DOH is the owner and operator of a housing and commercial construction development known as the Santurce Rehabilitation Project, located in Santurce Ward, San Juan, Puerto Rico.
3. Respondent Fullana Heavy Works (Fullana) is a corporation duly organized under the laws of the Commonwealth of Puerto Rico.
4. Each Respondent is a "person" within the meaning of Section 302(e) of the Act, and is therefore, subject to the assessment of administrative penalties pursuant to Section 113(d) of the Act.
5. DOH hired Fullana to demolish structures located at the Santurce Rehabilitation Project, specifically in blocks 195, 196 and 197 (the "Facility"). Fullana is an operator of the Facility. The Facility is located between the Puerto Rico Museum of Art (north), Antonsanti Street (south), Elementary School (east), and the De Diego Street (west), in Santurce Ward, San Juan, Puerto Rico. The neighborhood is a blend of residential and commercial uses. Also, an elementary school is located adjacent to the Facility.

II. General Statutory and Regulatory Authority

6. Section 113(a)(3) of the Act authorizes the Administrator of the EPA to issue an administrative penalty order, in accordance with Section 113(d) of the Act, against any person that has violated or is in violation of the Act.
7. Section 113(d) of the Act authorizes EPA to prosecute violations by means of an administrative penalty action in circumstances where the total penalty sought does not exceed \$270,000 and where the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action. On August 1, 2007, DOJ granted EPA's July 3, 2007 request for a waiver of the CAA § 113(d) one year time limitation on EPA's authority to initiate an action in this matter.

8. Section 302(e) of the Act defines the term "person" as an individual, corporation, partnership, association, State municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.
9. Section 112(b)(1) of the Act provides an initial list of hazardous air pollutants (HAPs).
10. Section 112(d) of the Act directs the EPA to promulgate regulations establishing emission and/or work practice standards for HAPs.
11. Section 114 of the Act authorizes the Administrator to require that information be provided by affected sources to determine compliance with the Act.
12. The term "owner or operator of a renovation or demolition activity" is defined by 40 C.F.R. § 61.141 to mean "any person who owns, leases, operates, controls or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls or supervises the demolition or renovation operation, or both."
13. The term "demolition" is defined by 40 C.F.R. § 61.141 to mean "the wrecking or taking out of any load-supporting structural member of a facility together with any related handling operations or the intentional burning of any facility."
14. The term "facility" is defined by 40 C.F.R. § 61.141 to include any commercial, public, industrial, or residential structure of more than four (4) dwelling units.
15. The term "facility component" is defined by 40 C.F.R. § 61.141 to mean "any part of a facility including equipment."
16. 40 C.F.R. § 61.145(a) provides that the affected facility, or part of a facility, where a demolition or renovation is to take place must be thoroughly inspected for the presence of asbestos prior to the commencement of the demolition or renovation activity.
17. 40 C.F.R. § 61.145(b) provides that each owner or operator of a demolition or renovation activity to which this Section applies shall: (1) provide the Administrator with written notice of the intention to demolish or renovate; (2) update the notice as necessary; and (3) postmark or deliver the notice as follows: at least ten (10) working days before demolition or renovation activity begins.

III. Findings of Fact and Conclusion of Law

18. Paragraphs 1-17 are realleged and incorporated herein by reference.
19. Respondent DOH authorized demolition activities at its Facility, which is a blend of residential and commercial developments. The Facility had more than four (4) dwelling units.
20. The Facility is a "facility" within the meaning of 40 C.F.R. § 61.141.
21. Respondent DOH hired Respondent Fullana to demolish structures at the Facility.
22. Respondents are either an "owner and/or operator" of a "renovation/demolition activity," within the meaning of 40 C.F.R. § 61.141.
23. In 2003, the Respondents hired two (2) surveyors to conduct an asbestos assessment at the Facility.
24. On December 13, 2005, a duly delegated EPA official conducted an inspection at the Facility (Inspection) to investigate the demolition activities and to determine if Respondents were in compliance with the applicable requirements of the CAA and its implementing regulations.
25. During the Inspection the EPA official observed that the former buildings in the Facility had recently undergone demolition, as defined by 40 C.F.R. § 61.141. It appeared to the EPA official that the demolition was accomplished using bulldozers and other heavy machinery.
26. During the Inspection the EPA official also observed crushed window caulking, crushed vinyl floor tiles, crushed transite panels and crushed roofing material.
27. After the Inspection the EPA official conducted a search of EPA's and EQB's files (File Review) to determine whether Respondents were in compliance with the applicable requirements of the CAA and the Asbestos NESHAP regulations.
28. During the File Review, EPA reviewed the Facility's asbestos assessment reports prepared by the surveyors, which were submitted to EQB by the Respondents, and noticed that the reports revealed the presence of a significant amount of asbestos containing material (ACM) at the Facility.
29. During the File Review, EPA also discovered that Respondents had not filed the required EPA Notification of Demolition and Renovation form for this Facility.

COUNT

30. Based on the Findings of Fact and Conclusions of Law, EPA determined that Respondents violated 40 C.F.R. § 61.145(b), a regulation promulgated pursuant to Sections 112 and 114 of the Act, by failing to provide EPA with a notice of intent to demolish at least ten (10) working days before the demolition activities began.

Proposed Civil Penalty

Section 113(d) of Act provides that the Administrator may assess a civil administrative penalty of up to Twenty-Five Thousand Dollars (\$25,000) per day for each violation of the Act. The Debt Collection Improvement Act of 1996, requires EPA to periodically adjust its civil monetary penalties for inflation. On December 31, 1996 and February 13, 2004, EPA adopted regulations entitled "Adjustment of Civil Monetary Penalties for Inflation," 40 C.F.R. Part 19, which provide that the maximum civil penalty should be adjusted up to \$27,500 for each violation that occurred on or after January 30, 1997 and up to \$32,500 for violations which occurred on or after March 15, 2004.

In determining the amount of a penalty to be proposed, Section 113(e) of the Act requires the Administrator to consider the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence, the payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, the seriousness of the violation, and other factors as justice may require. EPA considered these factors and proposes a total penalty for the violations alleged in this Complaint of **\$25,790**.

The proposed penalty has been prepared in accordance with Section 113(e) of the Act, EPA's "Clean Air Act Stationary Source Civil Penalty Policy" (CAA Penalty Policy), and Appendix III to the CAA Penalty Policy, the "Asbestos Demolition and Renovation Civil Penalty Policy" dated May 5, 1992 (Asbestos Penalty Policy), copies of which are enclosed with this Complaint. The CAA Penalty Policy is EPA's policy concerning the application of the factors to be considered, under Section 113(e) of the CAA, in proposing a penalty for violations of the Act.

The short narrative below explains the reasoning behind the penalty proposed for the violation alleged in this Complaint, and the reasoning behind various general penalty factors and adjustments that were used in the calculation of the total penalty amount.

1. **Gravity Component**

To ensure that the penalty amount reflects the gravity of the violation, the Penalty Policies instruct EPA to examine the actual or possible harm resulting from the violation, the sensitivity of the environment, the length of time of violation, and the importance to the regulatory scheme. Each sub-component is discussed below:

- A. **Count 1:** EPA's CAA Penalty Policy provides that a penalty of \$15,000 be proposed for failure to notify. Therefore, EPA proposes a penalty of **\$15,000**.
- B. **Size of the violator:** Consistent with the CAA Penalty Policy, EPA scales the penalty to the "size of violator" by calculating Respondents' net worth.

EPA was not able to obtain Respondent DOH's net worth. Nonetheless, Respondent DOH is a government agency that has a consolidated budget for fiscal year 2007 of \$104,598,000. The budget is formed by monies assigned from the general budget authorized by the Commonwealth of Puerto Rico Legislature, special funds authorized by the Commonwealth of Puerto Rico Government, federal funds, and from self generated income. EPA has no information as of the date of issuance of this Complaint which would indicate that Respondent DOH is unable to pay the proposed penalty.

With respect to Respondent Fullana, a review of the 2005 Corporate Annual Report that it filed at the Puerto Rico State Department revealed that the company had a net worth of \$468,309 for year 2005.

The Asbestos Penalty Policy states that where there are multiple defendants, EPA has discretion to base the size of the violator calculation on any or all of the defendant's assets. Accordingly, EPA has decided to base the size of the violator calculation on Respondent Fullana's net worth. The CAA Penalty Policy indicates that the penalty amount corresponding to a net worth between \$100,001 and \$1,000,000 is \$5,000. This results in a size of violator adjustment of \$5,000 which increases the penalty to \$20,000.

Sub-total: \$20,000.

- C. **Inflationary Adjustment Rule:** The penalty proposed above must be adjusted for inflation. Pursuant to the September 21, 2004 memorandum from Thomas V. Skinner, Acting Assistant Administrator, to the Regional Administrators entitled "Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule (Pursuant

to the Debt Collection Improvement Act of 1996, Effective October 1, 2004)" which modified all existing civil penalty policies to conform to a final rule that increased statutory penalties, for penalty policies which were issued prior to January 31, 1997, gravity components are to be calculated according to the penalty policy, then, for violations that occurred after March 15, 2004, the gravity component should be multiplied by 1.2895, reflecting both the 10% increase for the first penalty inflation adjustment, effective on January 30, 1997, and the 17.23% increase for the second penalty inflation adjustment, effective on March 15, 2004. As the violation alleged in this Complaint was discovered during an inspection performed on December 13, 2005, EPA proposes a \$5,790 adjustment for inflation (\$20,000 multiplied by 1.2895) resulting in the new total gravity component penalty of **\$25,790**.

2. **Economical benefit**

The CAA Penalty Policy also provides that in addition to assessing a gravity component, an economic benefit component should be assessed. EPA determined that, in this case, the economic benefit resulting from noncompliance was de minimus, therefore, the total penalty proposed is **\$25,790**.

IV. **Notice of Opportunity to Request a Hearing**

The hearing in this matter is subject to the Administrative Procedure Act, 5 U.S.C. § 552, et seq. The procedures for this matter are found in EPA's Consolidated Rules of Practice, a copy of which is enclosed with the transmittal of this Complaint. References to specific procedures in this Complaint are intended to inform you of your right to contest the allegations of the Complaint and the proposed penalty and are not intended to supersede any requirement of the Consolidated Rules of Practice.

You have a right to request a hearing: (1) to contest any material facts set forth in the Complaint; (2) to contend that the amount of the penalty proposed in the Complaint is inappropriate; or (3) to seek a judgment with respect to the law applicable to this matter. In order to request a hearing you must file a written Answer to this Complaint along with the request for a hearing with the EPA Regional Hearing Clerk within thirty (30) days of your receipt of this Complaint. The Answer and request for a hearing must be filed at the following address:

Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 2
290 Broadway - 16th Floor
New York, New York 10007-1866.

A copy of the Answer and the request for a hearing, as well as copies of all other papers filed in this matter, are to be served on EPA to the attention of EPA counsel at the following address:

Héctor L. Vélez Cruz, Esq.
Office of Regional Counsel - Caribbean Team
U.S. Environmental Protection Agency - Region 2
Centro Europa Bldg., Suite 417
1492 Ponce de León Ave.
San Juan, PR 00907-4127.

Your Answer should, clearly and directly, admit, deny, or explain each factual allegation contained in this Complaint with regard to which you have any knowledge. If you have no knowledge of a particular factual allegation of the Complaint, you must so state and the allegation will be deemed to be denied. The Answer shall also state: (1) the circumstances or arguments which you allege constitute the grounds of a defense; (2) whether a hearing is requested; and (3) a concise statement of the facts which you intend to place at issue in the hearing.

If you fail to serve and file an Answer to this Complaint within thirty (30) days of its receipt, Complainant may file a motion for default. A finding of default constitutes an admission of the facts alleged in the Complaint and a waiver of your right to a hearing. The total proposed penalty becomes due and payable without further proceedings thirty (30) days after the issue date of a Default Order.

Settlement Conference

EPA encourages all parties against whom the assessment of civil penalties is proposed to pursue the possibilities of settlement by informal conferences. However, conferring informally with EPA in pursuit of settlement does not extend the time allowed to answer the Complaint and to request a hearing. Whether or not you intend to request a hearing, you may confer informally with the EPA concerning the alleged violations or the amount of the proposed penalty. If settlement is reached, it will be in the form of a written Consent Agreement which will be forwarded to the Regional Administrator with a proposed Final Order. You may contact EPA counsel, Héctor L. Vélez Cruz, at (787) 977-5850 or at the address listed above, to discuss settlement. If Respondent is represented by legal counsel in this matter, Respondent's counsel should contact EPA.

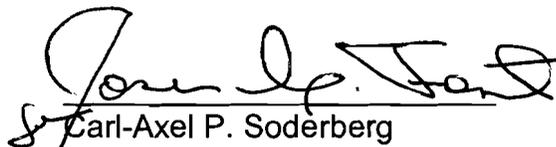
Payment of Penalty in lieu of Answer, Hearing and/or Settlement

Instead of filing an Answer, requesting a hearing, and/or requesting an informal settlement conference, you may choose to pay the full amount of the penalty proposed in the Complaint. Such payment should be made by a cashier's or certified check payable to the Treasurer, United States of America, marked with the docket number and the name of the Respondent(s) which appear on the first page of this Complaint. The check must be mailed to:

Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 2
P.O. Box 360188M
Pittsburgh, Pennsylvania 15251.

A copy of your letter transmitting the check and a copy of the check must be sent simultaneously to EPA counsel assigned to this case at the address provided under the section of this Complaint entitled Notice of Opportunity to Request a Hearing. Payment of the proposed penalty in this fashion does not relieve one of responsibility to comply with any and all requirements of the Clean Air Act.

Dated: August 17, 2007


Carl-Axel P. Soderberg
Director
Caribbean Environmental
Protection Division

To: Mr. Jorge Rivera Jiménez
Secretary
Department of Housing
Commonwealth of Puerto Rico
Apartado 21365
San Juan, PR 00928-1365

Mr. Pedro Fullana
President
Fullana Heavy Works, Corp.
P.O. Box 190115
San Juan, P.R. 00919-0115

cc: Evelyn Rodríguez Cintrón, Director
Air Quality Area
Puerto Rico Environmental
Quality Board