



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

In the Matter of:)
)
School District of Upper Dublin)
1580 Fort Washington Avenue)
Maple Glen, PA 19002)
)
Sargent Enterprises, Inc.)
732 Center Street)
Jim Thorpe, PA 18229)
)
RESPONDENTS)

DOCKET NO. CAA-03-2009-0189
COMPLAINANT'S INITIAL
PREHEARING EXCHANGE

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COMPLAINANT'S INITIAL PREHEARING EXCHANGE

Pursuant to 40 C.F.R. § 22.19(a) of the Consolidated Rules of Practice, and in response to Administrative Law Judge Barbara A. Gunning's September 24, 2009 Prehearing Order, Complainant, the Division Director of the Land and Chemicals Division, United States Environmental Protection Agency, Region III ("EPA"), hereby sets forth its Initial Prehearing Exchange.

A. NAMES OF EXPECTED WITNESSES

At this time, Complainant expects to call as witnesses the following individuals, whose testimony is expected to include, but may not be limited to, the matters described generally below. Complainant reserves the right to revise and supplement the matters to which each witness identified below may testify.

1. Mr. Stephen Forostiak
Environmental Scientist
Pesticides and Asbestos Programs Branch
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Mr. Forostiak is an EPA official responsible for conducting inspections and developing cases under the Clean Air Act, the asbestos NESHAP, and other asbestos and pesticide authorities. Mr. Forostiak is the EPA official that conducted the inspection at the Upper Dublin

High School located at 800 Loch Ash Avenue in Fort Washington, Pennsylvania on August 11, 2008. Mr. Forsotiak is also the case development officer in this matter.

Mr. Forostiak may be called as to testify as both an FACT WITNESS and as an EXPERT WITNESS with respect to: a) his prior asbestos-related training and experience, his training and experience relevant to conducting inspections to determine compliance with the requirements of the CAA and asbestos NESHAP, and his training and experience relevant to case development for violations of the CAA and asbestos NESHAP; b) the various types and categories of asbestos containing materials (ACM) and the factors that determine whether ACM is regulated pursuant to the asbestos NESHAP; c) relevant asbestos abatement regulatory requirements, practices, procedures and equipment; d) the reasons in support of these regulatory requirements; e) the facts and circumstances leading to the August 2008 inspection at the Upper Dublin High School; f) the notifications submitted in connection with the asbestos abatement project at the Upper Dublin High School; g) his August 11, 2008 inspection observations, communications, sampling, photographs and findings; h) the practices he employed during the inspection with respect to the collection of samples and the taking of photographs; i) chain of custody with respect to the samples and photographs; j) the analytical results of the samples provided by Criterion Laboratories, Inc.; k) EPA's January 22, 2009 Clean Air Act, Section 114 information collection request letters issued to the School District of Upper Dublin, D'Huy Engineering, Inc., Sargent Enterprises, Inc. ("Sargent") and 1 Source Safety and Health, Inc. and the parties' responses thereto; l) applicable provisions of relevant EPA guidance documents as they pertain to the facts and circumstances of the asbestos abatement project at the Upper Dublin High School and the conduct of the relevant parties; m) the factual bases supporting his conclusion that the asbestos NESHAP applied to the asbestos abatement project at the Upper Dublin High School; n) the factual bases supporting his conclusions that the asbestos NESHAP requirement to keep all RACM wet until collected and contained for disposal, and possibly other asbestos NESHAP work practice requirements, were violated; and o) the calculation and appropriateness of the proposed penalty in consideration and application of the Clean Air Act Section 113(e) statutory factors, and applicable penalty policies.

Mr. Forostiak may also be called to testify as a rebuttal witness to provide testimony in rebuttal to that provided by Respondent Sargent's witnesses.

2. Mr. Richard Ponak
Environmental Scientist
Pesticides and Asbestos Programs Branch
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Mr. Ponak is an EPA official responsible for conducting inspections and developing cases under the Clean Air Act, the asbestos NESHAP, and other asbestos and pesticide authorities. Mr. Ponak has previously testified as an expert (in the field of asbestos) in numerous asbestos-related administrative and criminal cases. Mr. Ponak was a temporary custodian of the

samples collected by Mr. Forostiak during his August 11, 2008 inspection at the Upper Dublin High School, and is the custodian for all suspect asbestos-containing material sample chain of custody records for EPA Region III's Pesticides and Asbestos Programs Branch (PAPB). Mr. Ponak is also currently acting as PAPB's Asbestos Enforcement Coordinator.

Mr. Ponak may be called to testify as both a FACT WITNESS and as an EXPERT WITNESS with respect to: a) his prior asbestos-related training and experience, his training and experience relevant to conducting inspections to determine compliance with the requirements of the CAA and asbestos NESHAP, and his training and experience relevant to case development for violations of the CAA and asbestos NESHAP; b) the various types and categories of asbestos containing materials (ACM) and the factors that determine whether ACM is regulated pursuant to the asbestos NESHAP; c) relevant asbestos abatement regulatory requirements, practices, procedures and equipment; d) the reasons in support of these regulatory requirements; e) his role as the custodian for all suspect asbestos-containing material sample chain of custody records for PAPB; f) the routine sampling and sample chain of custody procedures and practices employed by his office; and, g) the specific sample chain of custody procedures and practices employed by him with respect to the samples collected by Mr. Forsotiak during the August 11, 2008 inspection at the Upper Dublin High School.

Mr. Ponak also may be called to testify as rebuttal witness to provide testimony in rebuttal to that provided by Respondent Sargent's witnesses.

3. Mr. Garret Vliet
Criterion Laboratories, Inc.
3370 Progress Drive, Suite J
Bensalem, PA 19020

Mr. Vliet is the laboratory manager with Criterion Laboratories, Inc. (Criterion). Mr. Vliet was the analyst for the samples collected by Mr. Forostiak during the August 11, 2008 inspection at the Upper Dublin High School. Mr. Vliet may be called to testify as both a FACT WITNESS and as an EXPERT WITNESS with respect to: a) his asbestos-related background, training and experience; b) Criterion's receipt of the samples provided by EPA that had been collected by Mr. Forostiak during the August 11, 2008 inspection at the Upper Dublin High School; c) the chain of custody methods and other relevant procedures employed by the laboratory generally and with respect to the subject samples; d) a description of samples provided by EPA; e) the methods employed in the care and analysis of the samples provided by EPA; f) the analytical results of the samples provided by EPA; g) an explanation of the analytical results and the conclusions which properly may be drawn on the basis of these analytical results; and h) Criterion's communication of results back to EPA.

Mr. Vliet may also be called to testify as a rebuttal witness to provide testimony in rebuttal to that provided by Respondent Sargent's witnesses.

4. Jennifer Whittaker
1 Source Safety and Health, Inc.
140 South Village Avenue
Exton, PA 19341

Ms. Whittaker is a Health and Safety Professional with 1 Source Safety and Health, Inc. Ms. Whittaker was 1 Source Safety and Health, Inc.'s on-site representative at the time of EPA's August 11, 2008 inspection, and throughout the duration the asbestos abatement project at the Upper Dublin High School. Ms. Whittaker may be called as a FACT WITNESS to testify as to: (a) 1 Source Safety and Health, Inc.'s role in the asbestos abatement project at the Upper Dublin High School; (b) her duties as a 1 Source Safety and Health, Inc. on-site representative; (c) her observations of the equipment used and work practices employed during the asbestos abatement project, and her documentation thereof; and (d) activities at the asbestos abatement project site before, during and after EPA's August 11, 2009 inspection.

Upon adequate notice to Respondent Sargent, Complainant additionally reserves the right to call: a) witnesses to authenticate documents, procedures, and protocols; b) witnesses to rebut the testimony of Respondent Sargent's witnesses, c) financial expert or experts; and d) witnesses listed by Respondent Sargent in its Prehearing Exchange.

B. LIST OF EXHIBITS

The following exhibits may be introduced by Complainant at hearing. In accordance with 40 C.F.R. § 22.19(a), a copy of the exhibits identified below has been filed with the EPA Region III Regional Hearing Clerk, and have been provided to Respondent Sargent and to Administrative Law Judge Barbara A. Gunning.

Complainant's Ex.1: Copy of inspection report of EPA inspector Stephen Forostiak pertaining to the August 11, 2008 inspection at the Upper Dublin High School.

Complainant's Ex.2: Copy of Photo Identification Log Sheet of EPA inspector Stephen Forostiak pertaining to thirteen (13) photographs taken during the August 11, 2008 inspection at the Upper Dublin High School.

Complainant's Ex.3: Print copies of the thirteen (13) photos (numbered 1 through 13) taken by EPA inspector Stephen Forostiak during the August 11, 2008 inspection at the Upper Dublin High School. (Note that at hearing, Complainant also may present enlargements of one or more of these identified photos in the nature of demonstrative aids).

Complainant's Ex.4: Copy of Sample Collection Log of EPA inspector Stephen Forostiak pertaining to samples collected during the August 11, 2008 inspection at the Upper Dublin High School.

Complainant's Ex.5: Copy of the Chain of Custody Record for the relinquishment for laboratory testing of the eight (8) samples (081108-SF01 – 081108-SF08) of suspect asbestos-containing material collected by EPA inspector Stephen Forostiak during his August 11, 2008 inspection at the Upper Dublin High School.

Complainant's Ex.6: Copy of the September 3, 2008 facsimile from Criterion Laboratories, Inc. pertaining to the results of Criterion's Polarized Light Microscopy ("PLM") laboratory testing of the eight (8) samples sent by EPA for analysis.

Complainant's Ex.7: Copies of the September 5, 2008 letter and attached Asbestos Bulk Sample Report and Drop-off Project Control Record/Chain of Custody form from Criterion Laboratories, Inc., pertaining to the results of Criterion's Polarized Light Microscopy ("PLM") laboratory testing of the eight (8) samples sent by EPA for analysis.

Complainant's Ex.8: Copy of EPA's January 22, 2009 Clean Air Act ("CAA") Section 114 information request letters issued to the School District of Upper Dublin, D'Huy Engineering, Inc., Sargent and 1 Source Safety and Health, Inc.

Complainant's Ex.9: Copy of 1 Source Safety and Health, Inc.'s February 2, 2009 response to EPA's CAA Section 114 information request.

Complainant's Ex.10: Copy of the School District of Upper Dublin's February 10, 2009 response to EPA's CAA Section 114 information request.

Complainant's Ex.11: Copies of D'Huy Engineering, Inc.'s February 10, 2009 narrative response to EPA's CAA Section 114 information request, and printouts of all files on enclosed disk.

Complainant's Ex.12: Copy of EPA's February 26, 2009 fax to Sargent concerning its failure to respond to EPA's CAA Section 114 information request.

Complainant's Ex.13: Copy of Sargent's response to EPA's CAA Section 114 information request.

Complainant's Ex.14: A one (1) page list entitled "Penalty Assessment Criteria under Section 113(e) of the Clean Air Act".

Complainant's Ex.15: Copy of EPA's October 25, 1991 "Clean Air Act Stationary Source Civil Penalty Policy"(without Appendices).

Complainant's Ex.16: Copy of EPA's "Asbestos Demolition and Renovation Civil Penalty Policy" (Appendix III to EPA's Asbestos Demolition and Renovation Civil Penalty Policy, Revised May 5, 1992).

Complainant's Ex.17: Copy of December 30, 2005 Initial Decision and Default Order. In re: Sargent Enterprises, Inc. (Docket No.: CAA-3-2004-0207).

Complainant's Ex.18: Copies of documentation pertaining to the status of Sargent's payment of the penalty In re: Sargent Enterprises, Inc. (Docket No.: CAA-3-2004-0207).

Complainant's Ex.19: Copy of Dun & Bradstreet, Inc. report for the School District of Upper Dublin (Duns No: 06-989-3865), printed November 5, 2008.

Complainant's Ex.20: Copy of Dun & Bradstreet, Inc. report for 1 Source Safety and Health, Inc. (Duns No: 12-402-7330), printed November 5, 2008.

Complainant's Ex.21: Copy of Dun & Bradstreet, Inc. report for Sargent Enterprises, Inc. (Duns No: 79-911-3761), printed November 5, 2008.

Complainant's Ex.22: Copy of Dun & Bradstreet, Inc. report for Sargent Enterprises, Inc. (Duns No: 79-911-3761), printed November 16, 2009.

Complainant's Ex.23: Copy of EPA's December 29, 2008 "Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009).

Complainant's Ex.24: Copy of EPA's September 21, 2004 "Modifications to EPA Penalty Policies to Implement the Civil Monetary Inflation Rule (Pursuant to Debt Collection Improvement Act of 1996, Effective October 1, 2004)".

Complainant's Ex.25: Copy of the August 13, 2009 Consent Agreement and Final Order as to 1 Source Safety and Health, Inc.

Complainant's Ex.26: Copy of the September 29, 2009 Consent Agreement and Final as to the School District of Upper Dublin.

Complainant's Ex.27: Three (3) page copy of the resume of Stephen Forostiak.

Complainant's Ex.28: Two (2) page copy of the resume of Richard D. Ponak.

Complainant's Ex.29: One (1) page copy of the resume of Garret Vliet.

Complainant's Ex.30: Copy of EPA's December 1990 "Asbestos/NESHAP Adequately Wet Guidance."

Complainant's Ex.31: Eight (8) actual samples (081108-SF01 – 081108-SF08) of suspect asbestos-containing material collected by EPA inspector Stephen Forostiak during the August 11, 2008 inspection at the Upper Dublin High School. (At the time of filing this prehearing exchange, these samples are in the custody of Criterion Laboratories, Inc. Prior to the hearing, EPA case developer Stephen Forostiak may request the return of the samples and upon receipt will be their sole custodian prior to the hearing. Upon request by Respondent Sargent, the samples can be made available for inspection).

Complainant reserves the right to offer additional documents or exhibits as may become necessary, including, but not limited to, any documents identified by Respondent Sargent in its Prehearing Exchange and documents in rebuttal thereof.

C. LOCATION/TIME NEEDED FOR HEARING

EPA prefers that the hearing be held in Philadelphia, Pennsylvania due to the support facilities that are available to all parties in Philadelphia, where EPA Region III's offices are located, and because of the proximity of Philadelphia to all parties and potential witnesses in this litigation. In the alternative, EPA does not object to conducting the hearing at a suitable location in a county where Respondent Sargent resides.

Counsel for Complainant estimates that the time needed to present Complainant's case in chief will require one full day.

D. CIVIL PENALTY CALCULATION/JUSTIFICATION

In accordance with 40 C.F.R. § 22.19(a)(3), Complainant provides the following explanation:

The proposed civil penalty is calculated on the basis of the guidelines set forth in EPA's "Asbestos Demolition and Renovation Civil Penalty Policy" as revised on May 5, 1992 (hereinafter "the Asbestos Penalty Policy"), EPA's October 25, 1991 "Clean Air Act Stationary Source Civil Penalty Policy" (the "General Penalty Policy"), 40 C.F.R. Part 19, and EPA's December 29, 2008 and September 21, 2004 guidances for modifying EPA penalty policies to implement the Civil Monetary Penalty Inflation Rule (the "2008 Modification Policy" and "2004 Modification Policy", respectively). The General Penalty Policy applies the statutory penalty factors enumerated in Section 113(e) of the CAA, 42 U.S.C. § 7413(e) which are: 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, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, the seriousness of the violation, and such other factors as justice may require. EPA's penalty policies seek to achieve the goal of deterrence by deriving a penalty that removes the economic benefit of noncompliance and that reflects the gravity of the violation. By using EPA's penalty policies, the agency is able to apply the statutory penalty factors in a consistent and equitable manner so that members of the regulated community are treated similarly for similar violations across the country.

EPA's proposed penalty is calculated pursuant to the methodology described in the 2008 Modification Policy. As the alleged violation(s) occurred after March 15, 2004 and prior to January 12, 2009, page 3 of the 2008 Modification Policy directs EPA to calculate the civil penalty pursuant to the 2004 Modification Policy. On pages 2 and 3, the 2004 Modification Policy directs EPA to calculate the civil penalty taking the inflationary adjustment into account by first calculating economic benefit pursuant to the General and Asbestos Penalty Policies. Next, the gravity component is calculated pursuant to General and Asbestos Penalty Policies and multiplied by 1.2895. Lastly, the economic benefit component is added to the adjusted gravity component, and the General and Asbestos Penalty Policies adjustment factors are applied.

Penalties for asbestos NESHAP work practice and emission violations are set forth on page 17 of the Asbestos Penalty Policy. The matrix on Page 17 of the Asbestos Penalty Policy includes consideration of past violations, and the amount of asbestos involved and days of violation. The matrix also groups penalties by "units" of asbestos involved in the operation - with one unit being the threshold for the applicability of the substantive requirements. One unit equals 260 linear feet, 160 square feet or 35 cubic feet. Proposed penalties under the Asbestos Penalty Policy are smallest where less than 10 units of asbestos are involved, greater where there are between 10 and 50 units, and greatest where there are more than 50 units. Here, the asbestos notification submitted in connection with the asbestos abatement project indicates that: twenty-five thousand (25,000) square feet of Category I nonfriable asbestos containing flooring and mastic, one-thousand six hundred and twelve (1,612) linear feet of friable asbestos containing pipe insulation, seven hundred and eighty two (782) linear feet of friable asbestos containing fittings, one hundred (100) square feet of friable asbestos containing door caulk, and two thousand four hundred (2,400) square feet of friable asbestos containing ceiling plaster was to be removed from the Upper Dublin High School. Converting the amounts described above into units, the total amount of asbestos falls within the 'greater than 50 units' grouping of the matrix. Converting only the total amount of *friable* material described above into units, the amount of asbestos falls within "greater than 10 units but less than or equal to 50 units' grouping of the matrix. Converting only the amount of *friable asbestos containing pipe insulation* described above into units, the amount of asbestos falls within the less 'than or equal to 10 unit' grouping of the matrix.

EPA believes that Respondents likely derived an economic benefit from failing to keep the friable asbestos containing pipe insulation wet prior to being collection and contained for disposal in terms of savings in labor expenses, material usage, equipment usage, and/or collection and disposal costs. For asbestos on pipes or other facility components, the Asbestos Penalty Policy indicates a "\$20 per linear, square or cubic foot of asbestos for any substantive violation" multiplier for the economic benefit factor. Using one-thousand six hundred and twelve (1,612) linear feet, the amount of *friable asbestos containing pipe insulation* indicated in the asbestos notification submitted in connection with this project, an economic benefit amount of \$32,240 is calculated. While this amount is significantly greater than the \$5,000 'insignificant amount' threshold set forth on page 7 of the General Penalty Policy, EPA does not possess any specific information on which to quantify the actual economic benefit Respondents derived from failing to keep the friable asbestos containing pipe insulation wet prior to being collection and

contained for disposal in this matter. Based on the facts and circumstances of this case, EPA has not proposed an economic benefit component to its proposed penalty amount in this proceeding.

EPA alleges that Respondents violated the 40 C.F.R. § 61.145(c)(6) work practice requirement to keep regulated asbestos containing material wet prior to being collection and contained for disposal. Based on Respondent Sargent’s prior history of asbestos NESHAP violations, the “second violation” column of the matrix is used. Using the number of units associated with the amount of *friable asbestos containing pipe insulation* only, the less than or equal to 10 units row of the matrix on Page 17 of the Asbestos Penalty Policy recommends the assessment of an initial gravity-based penalty of \$15,000 for the violation.

EPA also considers the size of a violator’s business (as reflected by net worth pursuant to the General Penalty Policy, page 10) in proposing an appropriate penalty. In the present instance, and pursuant to the discretion afforded by Asbestos Penalty Policy, page 6, the size of violator component of the penalty is based solely on the net worth of Respondent Sargent, the party who actually performed and had direct control over the asbestos removal at the Upper Dublin High School. While EPA consulted a Dun & Bradstreet Report in an effort to determine Respondent Sargent’s net worth, as it is one of the few available public sources of financial information available with respect to privately owned businesses, the Dun & Bradstreet Report did not contain any specific information as to Respondent Sargent’s ‘net worth’. For penalty calculation purposes, Respondent Sargent’s net worth is considered to be in the smallest category of “under \$100,000” on page 14 for which the General Penalty Policy recommends an assessment of a \$2,000 for the “size of violator” component of the penalty.

EPA’s proposed penalty against all three Respondents can be broken down and summarized as follows:

<u>Step I: Economic Benefit</u>	\$ 0
<u>Step 2: Gravity Component</u>	
<i>Regulatory requirement(s):</i> 40 C.F.R. § 61.145(c)(6)	
<i>Violation:</i> failure to keep wet	
<i>Quantity of asbestos:</i> < or = 10 units	
<i>Second Violation</i>	
<i>Proposed Penalty:</i>	\$ 15,000
 <u>Size of the Violator:</u>	
(Based on worth/net assets < \$ 100,000):	\$ 2, 000
	UNADJUSTED GRAVITY: \$ 17,000
\$ 17,000 X 1.2895	ADJUSTED GRAVITY: \$ <u>21,900</u>

Step 3: Total plus Adjustment Factors

Economic Benefit + Adjusted Gravity	\$21,900
Degree of Willfulness/Cooperation	\$ 0
History of Noncompliance	\$ 0
Previous payment for Same Violation	\$ 0
TOTAL PROPOSED PENALTY AGAINST ALL THREE RECONDENTS:	<u>\$21,900</u>
1 SOURCE SAFETY AND HEALTH SETTLEMENT:	\$2,700
SCHOOL DISTRICT OF UPPER DUBLIN SETTLEMENT:	\$1,800
BALANCE OF PENALTY AGAINST SARGENT:	<u>\$17,400</u>

E. APPLICABILITY OF THE PAPERWORK REDUCTION ACT

EPA does not believe that the violation alleged in the Complaint is based on a "collection of information" as defined under the Paperwork Reduction Act ("PRA"). Accordingly, EPA does not believe that the provisions of Section 3512 of the PRA are implicated.



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RESPONDENTS)	

CERTIFICATE OF SERVICE

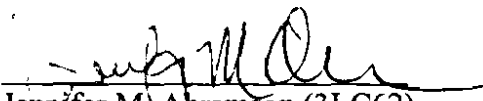
I hereby certify that I caused the original and one copy of the foregoing COMPLAINANT'S INITIAL PREHEARING EXCHANGE to be hand-delivered to the Regional Hearing Clerk, EPA Region III, and that true and correct copies were mailed to each of the following persons in the following manner:

Copy by FEDERAL EXPRESS

Brian Sargent, President
Sargent Enterprises, Inc.
732 Center Street
Jim Thorpe, PA 18229

The Honorable Judge Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1099 14th Street, NW
Suite 350
Washington, DC 20005

Date NOV 24 2009


Jennifer M. Abramson (3LC62)
Senior Assistant Regional Counsel