



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

TRANSMITTED BY TELEFAX TO: 717-949-2634

Monday, April 7, 2008

In Reply Refer To Mail Code: 3RC10

Lester S. Zimmerman
President, L&N Zimmerman Excavating, Inc.
2 Moonstown Lane
Newmanstown, Pennsylvania 17073

Re: EPA Docket No. CAA-03-2007-0329

Dear Mr. Zimmerman:

Attached is the fully executed consent agreement and the issued and filed final order in the above-referenced matter. The final order became effective on Friday, April 4, 2008 upon its filing with the Regional Hearing Clerk. The assessed civil penalty of \$12,056.83 is now required to be paid by L&N Zimmerman Excavating, Inc. within seven (7) calendar days of that April 4 date, i.e., by April 11, 2008, in accordance with Section II., Paragraph 2 of the final order. Thank you for your cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "James M. Baker". The signature is written in a cursive style with a large initial "J".

James M. Baker
Senior Assistant Regional Counsel
Office of Regional Counsel

Attachment (6-page consent agreement and 2-page final order)

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

In the Matter of:

Ebersole Associates, Inc.,

and

L & N Zimmerman Excavating, Inc.,

Respondents.

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CONSENT AGREEMENT

Docket No. CAA-03-2007-0329

I. PRELIMINARY STATEMENT

1. On September 28, 2007, the Complainant, Director, Waste and Chemicals Management Division, Region III, United States Environmental Protection Agency (EPA), filed an Administrative Complaint and Notice of Opportunity for Hearing (Complaint) issued to Ebersole Associates, Inc. (Ebersole), and L & N Zimmerman Excavating, Inc. (L&N), Respondents, under Section 113(a)(3)(A) and (d) of the Clean Air Act (CAA), 42 U.S.C. § 7413(a)(3)(A) and (d), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22, for alleged violations of a rule establishing a national emission standard for asbestos promulgated under Section 112 of the CAA, 42 U.S.C. § 7412.

2. Respondent L&N filed an answer to the Complaint on or about October 20, 2007.

3. The Complaint arose under the CAA, 42 U.S.C. §§ 7401-7671q. On April 5, 1984, under Section 112 of the CAA, 42 U.S.C. § 7412, the Administrator of EPA promulgated a rule establishing a national emission standard for asbestos. That rule is codified at 40 C.F.R. Part 61, Subpart M (§§ 61.140-61.157).

4. 40 C.F.R. Part 61, Subpart M, § 61.145(a), provides, in pertinent part, that "the owner or operator of a demolition...activity" is required to, "prior to the commencement of the demolition..., thoroughly inspect the affected facility...for the presence of asbestos, including Category I and Category II nonfriable ACM".

5. 40 C.F.R. Part 61, Subpart M, § 61.145(b)(1), provides, in pertinent part, that "[e]ach

owner or operator of a demolition...activity...shall provide the Administrator with written notice of intention to demolish...”.

6. Section 113(a)(3)(A) of the CAA, 42 U.S.C. § 7413(a)(3)(A), provides, in pertinent part, that “...whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated...[any requirement of various provisions of the CAA, including Section 112 of the CAA], including, but not limited to, a requirement...of any rule...promulgated...under those provisions..., the Administrator may issue an administrative penalty order in accordance with [Section 113(d) of the CAA]...”.

7. Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1), provides, in pertinent part, that “...The Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to \$25,000 per day of violation, whenever, on the basis of any available information, the Administrator finds that such person...has violated...any... requirement...of [various provisions of the CAA, including Section 112 of the CAA], including, but not limited to, a requirement...of any rule...promulgated...under [those provisions]...”.

8. EPA and the U.S. Department of Justice have made a joint determination that this administrative penalty action is appropriate and that, as a consequence, the 12-month time limitation of Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1), is waived.

II. STIPULATIONS

1. Respondent, Ebersole Associates, Inc. (Ebersole), is a Pennsylvania corporation which owns and, at all times relevant hereto, has owned the premises of the former JDM Outlet office supply store (at 1500 East Cumberland Street) and the premises of the former Eatwell Diner (at 1539 East Cumberland Street) in Lebanon, Pennsylvania. Respondent, L&N Zimmerman Excavating, Inc. (L&N), is a Pennsylvania corporation which, at all times relevant hereto, was a demolition contractor hired by Ebersole to demolish the former JDM Outlet office supply store and the former Eatwell Diner.

2. Each of the Respondents is a "person" as that term is defined in Section 302(e) of the CAA, 42 U.S.C. § 7602(e), and as that term is used in Section 113(a)(3)(A) and (d) of the CAA, 42 U.S.C. § 7413(a)(3)(A) and (d), and in 40 C.F.R. Part 61, Subpart M.

3. Ebersole owns, operates, controls, or supervises, and at all times relevant hereto has owned, operated, controlled, or supervised, the premises of the former JDM Outlet office supply store and the former Eatwell Diner in Lebanon, Pennsylvania.

4. Throughout the demolition of the former JDM Outlet office supply store and the former Eatwell Diner, L&N operated, controlled, or supervised the premises of the former JDM Outlet

office supply store and the former Eatwell Diner in Lebanon, Pennsylvania.

5. The premises of both the former JDM Outlet office supply store and the former Eatwell Diner in Lebanon, Pennsylvania are and, at all times relevant hereto, have been a "facility" as that term is defined in 40 C.F.R. Part 61, Subpart M, § 61.141.

6. With respect to the premises of the former JDM Outlet office supply store (at 1500 East Cumberland Street) and the premises of the former Eatwell Diner (at 1539 East Cumberland Street) in Lebanon, Pennsylvania, Ebersole was operating as the property owner, and L&N was operating as Ebersole's demolition contractor.

7. Ebersole owned, operated, controlled, or supervised the above-referenced "demolition" operations.

8. L&N operated, controlled, or supervised the above-referenced "demolition" operations.

9. With respect to the above-referenced "demolition" operations, each of the Respondents was an "owner or operator of a demolition or renovation activity" as that term is defined in 40 C.F.R. Part 61, Subpart M, § 61.141.

10. With respect to the above-referenced "demolition" operations, 40 C.F.R. Part 61, Subpart M, § 61.145, including but not limited to the introductory paragraph of § 61.145(a), § 61.145(a)(1), § 61.145(b), and § 61.145(c), applied to each Respondent as an "owner or operator of a demolition or renovation activity".

III. GENERAL PROVISIONS

1. This proceeding is governed by the Consolidated Rules, 40 C.F.R. Part 22. As noted in the Complaint, and as provided in 40 C.F.R. Part 22, § 22.18(b)(1), EPA encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the CAA and applicable regulations. In the event a settlement is reached, the provisions of 40 C.F.R. Part 22, § 22.18(b)(2) and (3), and (c), govern the process of effectuating the settlement and concluding the proceeding.

2. Any and all terms and conditions of this settlement are recorded herein.

3. For the purpose of this proceeding, Respondent L&N only admits the jurisdictional allegations of the Complaint and those other allegations of the Complaint which Respondent L&N admitted in its written answer to the Complaint.

4. The factual allegations and legal conclusions of the Complaint are incorporated by reference into this consent agreement. However, for the purpose of this proceeding, except as otherwise provided herein, Respondent L&N neither admits nor denies the factual allegations and legal conclusions of the Complaint.

5. For the purpose of concluding this proceeding with respect to Respondent L&N, Respondent L&N waives any right to contest the allegations of the Complaint and any right to appeal the proposed final order accompanying this consent agreement. Respondent L&N consents to the issuance of the proposed final order accompanying this consent agreement.

6. The parties agree to bear their own costs and attorneys fees.

IV. SETTLEMENT

1. As noted in Paragraph I.7. above, Section 113(d) of the CAA, 42 U.S.C. § 7413(d), authorizes the assessment of a civil administrative penalty of up to \$25,000 per day of violation. However, for any violation which occurs on January 31, 1997 through March 15, 2004, the assessment of a civil administrative penalty of up to \$27,500 per day of violation is authorized, and for any violation which occurs after March 15, 2004, the assessment of a civil administrative penalty of up to \$32,500 per day of violation is authorized (See 40 C.F.R. Part 19). The proposed civil penalties for the above-described CAA violations were determined in accordance with 1) Section 113(e) of the CAA, 42 U.S.C. § 7413(e), and 2) EPA's Clean Air Act Stationary Source Civil Penalty Policy, dated October 25, 1991 (CAA penalty policy), as modified, including Appendix III thereto (for violations of 40 C.F.R. Part 61, Subpart M), as revised May 5, 1992. Relevant modifications to the CAA penalty policy since its issuance on October 25, 1991 include modifications, dated May 9, 1997 and September 21, 2004, to implement the above-referenced Civil Monetary Penalty Inflation Rule (40 C.F.R. Part 19), pursuant to the Debt Collection Improvement Act of 1996 (inflation modifications). These inflation modifications essentially increased penalty policy amounts by 10% and 17.23%, respectively.

2. In determining the amount of the CAA penalty to be assessed, Section 113(e) of the CAA, 42 U.S.C. § 7413(e), requires EPA to take into consideration 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, and the seriousness of the violation (in addition to such other factors as justice may require).

3. To develop the proposed CAA penalty, EPA took into account the CAA penalty policy, as revised and modified, and the particular facts and circumstances of this case. EPA's CAA penalty policy, as revised and modified, represents an analysis of the statutory penalty factors enumerated above and guidance on their application in particular cases.

4. After considering the statutory factors, the CAA penalty policy, as revised and modified, and the facts and circumstances of this case, Complainant proposed that Respondents be collectively assessed a CAA civil penalty of \$28,369 for the CAA violations alleged in the Complaint. For settlement purposes, in a case with two respondents, Complainant presumptively looks to each of the two respondents for 50% of the proposed penalty (or in this case \$14,184.50) before any respondent-specific adjustment.

5. Based upon information available to Complainant at the time of the issuance of the Complaint, Complainant did not consider there to be a basis for adjustment (upward or downward) of the proposed civil penalty of \$28,369 as to either respondent. However, as noted in Section V. of the Complaint, to the extent that relevant facts or circumstances unknown to Complainant at the time of issuance of the Complaint become known to Complainant thereafter, such relevant facts or circumstances may be considered as a possible basis for adjusting the proposed civil penalty set forth in the Complaint.

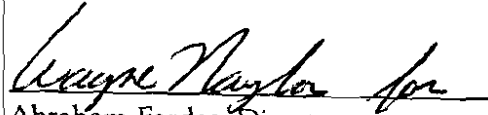
6. Based upon certain facts and circumstances unknown to Complainant at the time of the issuance of the Complaint, which were presented to Complainant by Respondent L&N after issuance of the Complaint, and for the purposes of settlement of this proceeding, Complainant agrees to adjust the CAA civil penalty to be assessed against Respondent L&N downward to \$12,056.83. For the purpose of this proceeding, Respondent L&N consents to the assessment of a civil penalty of \$12,056.83 against it. Respondent L&N agrees to pay the full amount of this civil penalty in accordance with the proposed final order accompanying this consent agreement.

7. Full payment of the civil penalty provided for herein shall only resolve Respondent L&N's civil penalty liability for the violations alleged in Paragraph 2 of each of the two counts in Section IV. of the Complaint. Nothing in this consent agreement is intended to, or shall be construed to, operate in any way to resolve any criminal liability of Respondents. Nothing in this consent agreement shall be construed to limit the authority of EPA to undertake action against any person, including Respondents, in response to any condition which EPA determines may present an imminent and substantial endangerment to the public health or welfare, or the environment.

8. Respondent L&N certifies that, as of the time of its execution of this consent agreement, it is in compliance with all applicable requirements of 40 C.F.R. Part 61, Subpart M. On and after the date of Respondent L&N's execution of this consent agreement, Respondent L&N shall maintain compliance with all applicable requirements of 40 C.F.R. Part 61, Subpart M.

9. The undersigned representative of Respondent L&N certifies that he is fully authorized by that Respondent to execute this consent agreement and to legally bind that Respondent to its terms and conditions.

Date: 3/13/08



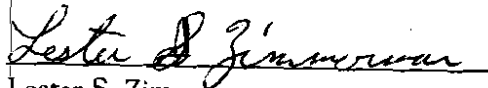
Abraham Ferdas, Director
Waste and Chemicals Management Division
U.S. EPA - Region III
Representative of Complainant

Date: 1-11-08



James M. Baker
Senior Assistant Regional Counsel
U.S. EPA - Region III
Counsel for Complainant

Date: 1-4-08



Lester S. Zimmerman
President, L & N Zimmerman Excavating, Inc.
Representative of Respondent L&N

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

In the Matter of:

Ebersole Associates, Inc.,

and

L & N Zimmerman Excavating, Inc.,

Respondents.

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FINAL ORDER

Docket No. CAA-03-2007-0329

NOW, THEREFORE, pursuant to 40 C.F.R. Part 22, Subpart C, § 22.18(b)(2) and (3), and Subpart G, § 22.31, it is hereby ORDERED that:

I. GENERAL PROVISIONS

1. This proceeding is governed by the Consolidated Rules of Practice, 40 C.F.R. Part 22. The provisions of 40 C.F.R. Part 22, §§ 22.18(b)(2) and (3) and 22.31 govern the process of concluding this proceeding by final order.
2. The undersigned ratifies and incorporates by reference into this final order the consent agreement executed by the parties in this proceeding. The factual allegations and legal conclusions of the Complaint in this proceeding were incorporated by reference into the consent agreement. However, as provided in the consent agreement, for the purpose of this proceeding, except as otherwise provided in the consent agreement, Respondent L&N neither admits nor denies the factual allegations and legal conclusions of the Complaint.
3. This final order constitutes the final Agency action in this proceeding as to Respondent L&N but not as to Respondent Ebersole Associates, Inc.
4. Nothing in this final order is intended to, or shall be construed to, operate in any way to resolve any criminal liability of Respondents. Nothing in this final order shall be construed to limit the authority of EPA to undertake action against any person, including Respondents, in response to any condition which EPA determines may present an imminent and substantial endangerment to the public health or welfare, or the environment.

5. As provided in the aforementioned consent agreement, this final order resolves only Respondent L&N's civil penalty liability for the violations alleged in Paragraph 2 of each of the two counts in Section IV. of the Complaint.

6. This final order does not waive, extinguish or otherwise affect Respondent L&N's obligations to comply with all applicable provisions of the federal Clean Air Act (CAA), 42 U.S.C. § 7401 *et seq.*, and regulations promulgated thereunder.

7. This final order is effective upon filing with the Regional Hearing Clerk.

II. CIVIL PENALTY

1. A civil penalty in the amount of twelve thousand fifty six dollars and eighty-three cents (\$12,056.83) is assessed against Respondent L & N Zimmerman Excavating, Inc. (L&N).


2. In light of Section II., Paragraph 1 immediately above, Respondent L&N shall pay its assessed civil penalty as follows:

Within seven (7) calendar days after the effective date of this final order, Respondent L&N shall pay the full amount of the assessed civil penalty. This final order shall not terminate or otherwise lapse until the assessed civil penalty is paid in full. Respondent L&N shall make timely payment of the assessed civil penalty by sending a cashier's check or certified check, made payable to the Treasurer of the United States of America, to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

The check shall note the case title and docket number. Copies of the check shall be served upon the Regional Hearing Clerk and the Complainant as follows: Ms. Lydia Guy, Regional Hearing Clerk (3RC00), U.S. EPA - Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103-2029, and Counsel for Complainant, James M. Baker (3RC10), Senior Assistant Regional Counsel, U.S. EPA - Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103-2029.

Date: 3/17/08


Renée Sarajian
Regional Judicial Officer