10/13/95

UNITED STATES ENVIRONMENTAL AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Northern Improvement Company,	)	Docket No. CAA-VIII-(113)-93-10
	)	
Respondent	)	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS AND GRANTING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION

The Environmental Protection Agency, Region VIII, initiated this proceeding by issuing a complaint on April 20, 1993, pursuant to Section 113(d)(1) of the Clean Air Act (CAA), 42 U.S.C. § 7413(d)(1), against Respondent, Northern Improvement Company (Northern Improvement). The complaint charged Respondent with violating the provisions of the Asbestos National Emission Standards for Hazardous Air Pollutants (NESHAPs), 40 C.F.R. Part 61, Subpart M, specifically failure to provide the Administrator or the State of North Dakota with written notice of intention to demolish as required by § 61.145(b)(1) and (3). Respondent as "owner or operator" of a "stationary source" as defined in the Act had allegedly demolished the former Salem Luthern Church located 3/4 of a mile south of Fargo, North Dakota on June 4, 1992, without providing the required notification. For this alleged violation, it was proposed to assess Respondent a penalty of $30,000.

Respondent answered, admitting that it had demolished the former Salem Luthern Church, but denying that there were any hazardous air pollutants involved, because there was no asbestos

RULINGS OF THE ADMINISTRATIVE LAW JUDGES

In the matter of Northern Improvement Company, (10/13/95), Order Denying Respondent's Motion to Dismiss and Granting Complainant's Motion for Partial Accelerated Decision; Judge Nissen

Summary:

Complaint alleged violations of the Asbestos National Emission Standards for Hazardous Air Pollutants (NESHAPs), 40 C.F.R. Part 61, Subpart M, for failure to provide the Administrator or the State of North Dakota with written notice of intention to demolish as required by 40 C.F.R. § 61.145(b)(1) and (3). Respondent answered, admitting that it had demolished the building in question, but denying that there were hazardous air pollutants involved because there was no asbestos or asbestos-containing materials in the building. Complainant filed a motion for accelerated decision on the grounds that there were no genuine issues of material fact with respect to Respondent's liability. Respondent answered claiming that it was not an "owner or operator," and that the facility was not a "stationary source.

The court concluded that EPA's determination that enforcement of the Clean Air Act requires notification of all proposed demolition of buildings and structures irrespective of whether asbestos is present is reasonable. The court further concluded that, in light of Northern Improvement's acknowledgment that no notice of intent to demolish was furnished, there was no dispute of material fact that Respondent violated the Act and regulation, and therefore Complainant was entitled to judgement as a matter of law.

or asbestos-containing materials in the church building.[1/] Respondent denied that it was the "owner or operator"[2/] of a "stationary source",[3/] denied that it had any obligation to notify, contested the Agency's authority to impose any penalty and the appropriateness of the proposed penalty in relation to the statutory factors. Respondent requested a hearing.

On November 2, 1993, Complainant filed a motion to amend the complaint to reduce the proposed penalty to $10,000. Complainant determined that the violations involved "no notice but probable substantive compliance,"[4/] and that a $5,000 preliminary deterrence amount and a $5,000 "size of violator" gravity component were appropriate under the terms of EPA's "Clean Air Act Stationary Source Penalty Policy", dated October 25, 1991, and Appendix III to the Penalty Policy, dated May 11, 1992, entitled "Asbestos Demolition and Renovation Civil Penalty Policy". By an order,

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[1/] Asbestos is a listed hazardous air pollutant under § 112(b) of the Act (42 U.S.C. § 7412(b)).

[2/] Owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source (42 U.S.C. § 7412(a)(9)).

[3/] Stationary source" is defined in § 111(a)(3) of the Act (42 U.S.C. § 7411(a)(3)) as "any building, structure, facility, or installation which emits or may emit any air pollutant".

[4/] Respondents's demolition activities at the site occurred before any notification was given to Complainant. In addition, all material had been disposed of prior to notification. Therefore, Complainant had no opportunity to inspect and sample materials in order to ascertain whether asbestos was present.

dated January 5, 1994, the motion to amend the complaint was granted.

By letter, dated September 2, 1993, the ALJ directed the parties to submit pre-hearing exchanges on or before November 12, 1993, if a settlement had not been reached by that time. In accordance with this order, both parties filed all necessary materials in a timely manner. Respondent indicated that one of the bases for its assertion that no asbestos was present was the fact that the Salem Luthern Church building had been constructed in 1891.

On January 5, 1994, Complainant filed a Motion for Accelerated Decision regarding liability pursuant to 40 C.F.R. § 22.20 and a memorandum in support thereof (motion). The motion asserted that there are no genuine issues of material fact with respect to Respondent's liability and therefore Complainant is entitled to judgment as a matter of law. Specifically, Complainant argues that Respondent's assertion that it was not subject to the notification requirement, because no asbestos was present, is inaccurate.[5/] Complainant alleges that the regulation clearly provides that the notification requirement must be met for all demolition activities, regardless of whether asbestos is present.

[5/] Pursuant to 40 C.F.R. § 61.145(b), owners and operators of demolition activities are required to submit written notification to EPA or the delegated state 10 working days before demolition begins.

40 C.F.R. § 61.145(a)(2).[6] The preamble to the proposed rule states that this language was added to clarify that "notifications must be made for all demolitions, even when no asbestos is present, in order to promote compliance and aid enforcement." 54 Fed. Reg. 912, 917 (January 10, 1989).

In addition, Complainant avers that Respondent's claims that it was not an "owner or operator" and that the facility was not a "stationary source" are, at best, legal issues rather than genuine issues of material fact. Complainant contends that the site in question did have the potential to emit asbestos and therefore was, in fact, a stationary source. Because the site was a "facility"[7], the notification requirements of 40 C.F.R. § 61.145(a)(2), actually § 61.145 (b), must be met. Complainant also cites 40 C.F.R. § 61.141 to further define "owner or operator" as "any person who owns, leases, operates, controls, or supervises the facility being demolished. . ." Respondent acknowledged

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[6] Section 61.145(a)(2) states:

(2) In a facility being demolished, only the notification requirements of paragraphs (b)(1), (2), (3)(i) and (iv), and (4)(i) through (vii) and (4)(ix) and (xvi) of this section apply, if the combined amount of RACM is

(i) Less than 80 linear meters (260 linear feet) on pipes and less than 15 square meters (160 square feet) on other facility components, and

(ii) Less than one cubic meter (35 cubic feet) of facility components where the length of area could be measured previously or <u>there is no asbestos</u>. (Emphasis added).

[7] The regulation, 40 C.F.R. § 61.141, defines "facility" with specified exclusions as "any institutional, commercial, public, industrial, or residential structure, installation, or building. . ."

responsibility for the demolition (Paras. IV, VI, and X of answer) and therefore Complainant asserts that Respondent was an "owner or operator".

Northern Improvement responded to the motion under date of January 17, 1994. Respondent stated that, by definition (supra note 3), the facility in question was not a "stationary source" because it contained no asbestos on the premises. Therefore, it could not possibly emit any air pollutant. Moreover, Respondent argues that Complainant's expansion of the definition of "stationary source" to include facilities which have no possibility of emitting air pollutants is invalid, because EPA's regulations must be consistent with the statutes which authorized their promulgation. United States v. Larionoff, 431 U.S. 864, 973 (1977). Because Complainant's action is based on the facility being a "stationary source", Respondent claims the action necessarily fails. Respondent requests that Complainant's motion for accelerated decision be denied and moves that the complaint be dismissed.

On January 31, 1994, Complainant replied to Northern Improvement's response to the motion for accelerated decision. Complainant argued that the facility's status as a "stationary source" is not critical to the present action. Under § 114 of the CAA, 42 U.S.C. § 7414, Complainant says that it has the authority to request information reasonably required to promote compliance

with the Clean Air Act.[8/] In addition, Complainant avers that it has determined that any facility may emit asbestos material. Complainant argues that the notification requirement is crucial to enforcement of the entire Asbestos NESHAP. Without notification, owners or operators who may not possess the knowledge needed for proper identification of asbestos material are given full control over testing for such materials. Therefore, Complainant asserts that it is well within its power to require notification of all demolition activities and the motion for accelerated decision in its favor should be granted.

With respect to Respondent's motion to dismiss, Complainant argues that it is procedurally deficient. Respondent failed to caption the response appropriately and state the proper procedural rule governing the motion, the standard required to grant the motion and the particular grounds supporting the motion.

[8/] Although § 114 is among sections of the CAA cited as authority for the National Emission Standard for Asbestos (40 C.F.R. Part 61, Subpart M), in Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978) the Supreme Court held that the regulation governing demolition was not an "emission standard" but a" work practice standard". The Act has been amended to allow the Administrator to, inter alia, promulgate a work practice standard, if, in his judgment, promulgation of an emission standard is not feasible (§ 112(e), CAA Amendments of 1977, P.L.95-95, Aug. 7, 1977, presently § 112(h)). No similar expansion of the Administrator's authority to require the submission of information appears in § 114 (a), however, and, although the Administrator may require the submission of information for the purpose of determining whether any person is in violation of any "standard of performance" under § 7411 (new sources), any "emission standard" under § 7412, or any requirement of an "implementation plan", these enforcement information limitations exclude the regulation at issue here. Accordingly, the regulation may be supported under § 114 only if it is for the purpose of "(iii) carrying out any provisions of this chapter. . . ."

Therefore, Complainant asserts the motion to dismiss should be denied on these procedural grounds alone.[2/]

D I S C U S S I O N

Respondent contends that, because no asbestos was present, no hazardous air pollutants within the meaning of the Act were, or could have been, emitted during the demolition at issue. Accordingly, it argues that EPA has no authority to require notification of such demolition activities. It is concluded that the EPA does have the authority to require such notification and that no genuine issues of material fact exist.

Although Respondent's argument that the demolition activity at issue could not be a "stationary source", because it had no potential to emit any "air pollutant" has considerable force, § 114(a)(1) of the Act authorizes the Administrator to require "any person" to "(G) provide such information as he may reasonably require" for the purpose, inter alia, "(iii) of carrying out any provision of this chapter" (supra note 8). Additionally, § 301(a)(1) of the Act authorizes the Administrator to "prescribe such regulations as are necessary to carry out his functions under this chapter [Act]". It is concluded that the Agency's determination that enforcement of the Act requires notification of all proposed demolition of buildings and structures irrespective of whether

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[2/] Because the purpose of pleadings is to facilitate a decision on the merits, these arguments, which are lacking in substance, are rejected.

asbestos is present is reasonable and would be upheld by the courts.

Moreover, it is well settled that challenges to the validity of Agency regulations are rarely entertained in administrative enforcement proceedings. See, e.g., In re South Coast Chemical, Inc., FIFRA 84-4, 2 EAD 139, 145 (CJO, March 11, 1986). This is particularly true where, as here, the environmental statute involved contains a "preclusive review" provision designed to preclude challenges to the validity of regulations in enforcement proceedings. Section 307(b)(1) (42 U.S.C. § 7607(b)(1)) of the CAA provides in pertinent part "(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard of performance under secton 7412 of this title,....or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia." Such a petition is to be filed within 60 days of the date of promulgation of the regulations or final action taken and § 307(b)(2) provides that "(a)ction of the Administrator with respect to which judicial review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." See, e.g., United States v. Ethyl Corp., 761 F.2d 1153 (5th Cir. 1985), cert. denied, 474 U.S. 1070, 106 S. Ct. 830, 88 L.Ed. 2d 801 (1986).

In view of the foregoing, Respondent's challenge to the validity of the regulation may not be sustained and its motion to dismiss will be denied. Northern Improvement has acknowedged demolishing the Salem Luthern Church building on June 4, 1992, and that no notice of intent to demolish was furnished to the Administrator or the State of North Dakota as required by the regulation, 40 CFR § 61.145 (b). Accordingly, there is no dispute of material fact that Respondent violated the Act and regulation as alleged in the complaint and Complainant's motion for an accelerated decision as to liability will be granted.

O R D E R

1. Respondent's motion for dismissal is denied.
2. Complainant's motion for an accelerated decision as to liability is granted.
3. The amount of the penalty remains at issue and will be determined, after further proceedings, including a hearing, if necessary.

Dated this 13th day of October 1995.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER DENYING RESPONDENT'S MOTION TO DISMISS AND GRANTING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION**, dated October 13, 1995, in re: Northern Improvement Co., Dkt. No. CAA-VIII-(113)-93-10, was mailed to the Regional Hearing Clerk, Reg. VIII, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: October 13, 1995

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