

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of

DMC, Inc.

Docket No. CAA-96-004

and

Southern Environmental  
Services, Inc.

Respondents

ORDER

This case arises under Section 113(d) of the Clean Air Act, 42 U.S.C. §7413(d). The U.S. Environmental Protection Agency ("EPA") seeks civil penalties against DMC, Inc. ("DMC") and Southern Environmental Services, Inc. ("SESI"), totalling \$75,000, for three alleged violations of the National Emissions Standard for Asbestos, 40 CFR Part 61, Subpart M ("asbestos NESHAP"). DMC and SESI both filed answers denying the violations, setting forth defenses, and requesting a hearing.

SESI filed a motion to dismiss on March 31, 1997. The motion asserts that this action should be dismissed because the laboratory used by EPA destroyed an inspection sample that had been tested to determine asbestos content, thus preventing SESI from performing an independent analysis.<sup>1</sup> EPA filed a response to the motion on April 14, 1997 and argued that SESI has not set forth sufficient grounds for dismissal.

Respondent SESI's motion to dismiss is denied. First, SESI does not cite any legal authority to support its claim for relief. Instead, it simply asserts that the destruction of the inspection sample is so prejudicial that dismissal is warranted. Second, the facts of this case do not support such a conclusion. In that regard, SESI's employees knew that samples were taken during an Asbestos NESHAP compliance inspection. The respondent could have requested that

EPA save the samples, collected its own samples during the inspection, or requested split sampling. Moreover, SESI also indicated that at some point it had taken its own samples of the material that was being demolished, further reducing any prejudice. Finally, there is no evidence that the samples were destroyed in bad faith. The respondent will have the opportunity at hearing to cross-examine EPA's witnesses and challenge the accuracy and probative value of EPA's laboratory tests. See, U.S. v. Pilot Petroleum Assoc., Inc., 712 F. Supp. 1077, 1081 (E.D.N.Y. 1989) (denying defendant's motion to dismiss because the evidence was not destroyed in bad faith, the defendants would have the opportunity to challenge EPA documents, chain of custody, and testing, and the prejudice against the defendants was not great.) In addition, SESI will have the opportunity at hearing to submit the results of its own laboratory analysis.

Accordingly, for these reasons, SESI's Motion to Dismiss is **denied**.

Carl C. Charneski

Administrative Law Judge

Dated: June 6th, 1997

Washington, D.C.

<sup>1</sup> The EPA sample was analyzed pursuant to the Polarized Light Microscopy method. SESI argues that the destruction of the sample prevented its being analyzed pursuant to Transmission Electron Microscopy, a method which Respondent represents is more reliable. Mot. to Dismiss at 2.

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**IN THE MATTER OF DMC. INC. and SOUTHERN ENVIRONMENTAL SERVICES, INC.,**

Respondents

Docket No. CAA-96-004

**Certificate of Service**

I certify that the foregoing Order, dated June 6, 1997, was sent this day in the following manner to the

below addressees.

Original by Regular Mail to: Julia P. Mooney

Regional Hearing Clerk

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Atlanta Federal Center

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Dated: June 6, 1997

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