8/30/96

**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

| | | |
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| **In the Matter of** | ) | |
| | ) | |
| **Kelem Construction Company,** | ) | **CAA Docket No. I-92-1049** |
| **Leitkowski Construction Co.,** | ) | |
| **et al.,** | ) | |
| | ) | |
| **Respondents** | ) | |

**Clean Air Act** -- Accelerated Decision -- Complainant's Motion for Partial Accelerated Decision was granted where Respondents failed to respond either to Motion or to Order to Show Cause why Motion should not be granted; Respondent's failure to respond waived any objection to the Motion under Section 22.16(b) of the Agency's Consolidated Rules, and also the record showed that no genuine issue of material fact existed and that Complainant was entitled to judgment as a matter of law under Section 22.20(a).

**Appearances**

For Complainant:

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For Respondent
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For Respondent
Leitkowski Construction Co.:

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**Before**

Thomas W. Hoya
Administrative Law Judge

## RULING GRANTING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION

This Ruling grants a Motion for Partial Accelerated Decision filed by Complainant--the Regional Administrator, Region I, U.S. Environmental Protection Agency--against Respondent Kelem Construction Company ("Kelem") and Respondent Leitkowski Construction Co. ("Leitkowski"). This case is conducted under the Clean Air Act ("the Act), 42 U.S.C. §§ 7401-7671q, and regulations ("the Regulations"), 40 C.F.R. Part 61, promulgated pursuant to the Act. By this Ruling, Respondents are declared to have violated the Regulations as charged in the Complaint.

### Background

This case arose out of the demolition of three buildings on the University of Connecticut's Avery Point Campus, in Groton, Connecticut in October-November 1991. Authorized Agency representatives inspected this activity on several occasions in October and November 1991. Based on these inspections, Complainant issued a May 20, 1992 Complaint against six Respondents for violations of the Regulations.

These Respondents were all charged as an "owner or operator of a demolition or renovation activity," as that phrase is defined in Section 61.141 of the Regulations. Respondents so charged, in addition to Kelem and Leitkowski, were: University of Connecticut, Board of Trustees for the University of Connecticut, State of Connecticut, and Landin Corporation. Respondents Kelem, Leitkowski, and Landin Corporation are all Connecticut corporations.

Respondents were charged in seven counts with violations of Subpart M of the National Standards for Hazardous Air Pollutants for Asbestos (the "Asbestos NESHAP"). Count I charged a failure to notify the Agency of a change in the starting date for the demolition activities, a violation of Section § 61.145(b)(3)(iv) of the Regulations. Counts II and III charged a failure to remove regulated asbestos containing material ("RACM") prior to the asbestos demolition activities, a violation of Section 61.145(c)(1). Counts IV and V charged a failure to strip or contain in leak-tight wrapping a facility component covered with RACM, a violation of Section 61.145(c). Count VI charged a failure to keep RACM adequately wet until collected for disposal, a violation of Section 61.145(c)(6)(I). Lastly, Count VII charged a failure to maintain waste shipment records, a violation of Section 61.150(d). The total civil penalty proposed in the Complaint for these alleged violations was $59,900.

Respondent University of Connecticut owned the three buildings

on the University Campus at which the demolition occurred, and they contracted with Respondent Landin Corporation for the work. Respondent Landin Corporation subcontracted work to Respondent Kelem, which in turn subcontracted work to Respondent Leitkowski.

All six Respondents filed Answers generally denying the charges. Pursuant to a March 1, 1993 Order, some of the parties submitted prehearing exchanges. For Respondents University of Connecticut, Board of Trustees for the University of Connecticut, and State of Connecticut, the case was concluded by an October 21, 1994 Consent Agreement.

On July 28, 1995, Complainant filed its Motion for Partial Accelerated Decision against the remaining Respondents to declare them in violation of the Regulations as charged. None replied. On January 22, 1996, an Order was issued to the remaining Respondents to Show Cause by February 29, 1996 why an accelerated decision should not be entered against them on the issue of liability, pursuant to Complainant's Motion. Respondent Landin Corporation replied with a February 4, 1996 Consent Agreement concluding the case as to it. Neither of the two remaining Respondents--Kelem and Leitkowski--responded to the Order to Show Cause.

**Complainant's Motion**

Procedure for this case is governed by the Agency's Consolidated Rules of Practice ("Consolidated Rules"), 40 C.F.R. Part 22. Section 22.16 of these Rules, concerning motions, provides a basic response time of ten days after service of the motion, and provides further that, "If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion" (§ 22.16(b)). Since Respondents Kelem and Leitkowski responded to neither Complainant's Motion nor the Order to Show Cause, they may be deemed to have waived any objection to the granting of Complainant's Motion. This waiver of any objection by Respondents is of itself a sufficient basis for granting Complainant's Motion.

Complainant argued its Motion on the basis of Section 22.20 of the Consolidated Rules. That section provides, in pertinent part, that an accelerated decision may be granted "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding" (§ 22.20(a)). Complainant argued that "no genuine issue of material fact exists" as to any of the counts, and its Motion will be reviewed also on this basis.

The Act authorizes the Agency to promulgate standards for the handling of hazardous air pollutants. The Asbestos NESHAP was promulgated in 1973 after extensive evaluation and public comment, and is currently set forth at 40 C.F.R. Part 61, Subpart M. *United*

*States v. Hugo Key and Son, Inc.*, 731 F. Supp. 1135, 1140 (D.R.I. 1989). In order to establish liability under the Asbestos NESHAP, the EPA must show that (1) the minimal requirements of the NESHAP have been met and (2) that the defendant failed to comply with requisite requirements. *United States v. MPM Contractors, Inc.* 767 F. Supp. 231, 233 (D.Kan. 1990). The chief defense of Respondents Kelem and Leitkowski centered on the alleged absence in this case of one of these minimal requirements.

**Respondents: Definition of Facility**

This defense by Respondents Kelem and Leitkowski to all the counts turned on the definition in the Regulations of "facility." An important minimal requirement in this case is the amount of RACM present at the three University of Connecticut buildings. Under Section 61.145(a) of the Regulations, the Asbestos NESHAP work-practice standards apply when the amount of RACM involved in the "facility" being demolished is at least 260 linear feet on pipes or 160 square feet on other components.

Respondents contended that this RACM threshold was not met because the amount of RACM in each of the three University buildings was less than 260 linear feet.[1] The amount of RACM in any two of the buildings added together, however, exceeded 260 linear feet. Thus the crucial inquiry is whether each building by itself constituted the relevant "facility," or whether, as argued by Complainant, the "facility" comprised all three buildings together.

The answer is supplied by the Regulations. Section 61.141 defines "facility" as:

> ...any institutional, commercial, public, industrial, or residential structure, installation, or building (including any structure, installation, or building containing condominiums or individual dwelling units....

The same section goes on to define "installation" as:

> "...any building or structure or any group of buildings or structures at a single demolition or renovation site that are

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[1] Asbestos NESHAP notifications, dated 9/5/91, submitted by both Complainant and Respondent Kelems indicated that: building 4313 contained 120 linear feet and 3200 square feet of RACM; building 4314 contained 160 linear feet and 1,600 square feet of RACM; and building 4338 contained 150 linear feet and 250 square feet of RACM. Complainant's Prehearing Exchange (April 15, 1993), Exhibits 8, 9, 10; Respondent Kelem's Prehearing Exchange (April [illegible number], 1993), Exhibits 1, 2, 3.

under the control of the same owner or operator (or owner or operator under common control).

The three University buildings meet this definition of a "facility." They were all "under the control of the same owner": the University of Connecticut. They were also "at a single demolition ... site." Two of the buildings were about 145 feet apart, and the third building was about a quarter of a mile away. All three were demolished within a 15-day period by Respondents Landin Corporation, Kelem, and Leitkowski. Therefore the three buildings together constituted a "facility," and the requisite amount of RACM was present.

Respondents Kelem and Leitkowski argued further that the buildings should be treated separately because Respondent University of Connecticut submitted to the Agency a separate notification for each of the buildings. This argument fails, however, because such action by Respondent University of Connecticut lacks any authority to interpret the meaning of the Agency's Regulations.

Respondents Kelem and Leitkowski suggested further that they are exonerated because the Agency accepted these separate notifications and did not apprise Respondents that the buildings together constituted the relevant facility. This argument also fails, however, because no duty existed for the Agency to examine the notifications and give such information in return. Respondents, on the other hand, had the affirmative duty to know the Regulations and to comply with them. Publication of the Regulations in the Federal Register effectively provided Respondents with the notice of their content to which Respondents were entitled.

A good faith belief by Respondents Kelem and Leitkowski that their work was outside the Asbestos NESHAP Regulations because each building was a separate facility is not, on the other hand, totally devoid of legal significance. It may serve to mitigate the applicable civil penalty.

## Counts of the Complaint

Count I charged a failure to notify the Agency of a change in the starting date of the demolition activities, in violation of Section 61.145(b)(3)(iv)(A) of the Regulations. Complainant submitted documentary evidence that the actual starting date was on or about October 22, 1991.[2] The Answers of both Respondents Kelem and Leitkowski, however, stated that the notifications listed an

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[2] Complainant's Prehearing Exchange, Exhibits 1, 2, and 3 (April 15, 1993).

earlier starting date: "between August 25, 1992 and September 25, 1991."[3] The "1992" is apparently a typographical error, since copies of the notifications submitted by the University and State of Connecticut listed a starting date of August 25, 1991 and a completion date of September 25, 1991.[4] Moreover, Respondents Kelem and Leitkowski filed their Answers in July 1991.

Documentation submitted by Complainant shows that telephone notice of the new starting date was apparently not given until October 22, 1991,[5] and documentation submitted both by Complainant and by the University and State of Connecticut Respondents show that written notice was not given until October 23, 1991.[6] Both of these dates are well after Section 61.145(b)(3)(iv)(A)'s deadline for such notification, viz., the originally scheduled starting date of August 25, 1991. Consequently, no material issue of fact exists for Count I, and Complainant is entitled to judgment on liability as a matter of law.

Count II charged a failure, in violation of Section 61.145(c)(1) of the Regulations, to remove RACM prior to the demolition activity in one of the buildings, and Count III made the same charge regarding a second one of the buildings. Respondents Kelem and Leitkowski, aside from their own facility definition, replied essentially with naked denials.

Complainant's charges, however, are supported by inspection reports, photographs, and analyses of samples taken.[7] This documentation is sufficient to eliminate any genuine issues of material fact, and to entitle Complainant to a judgment on Counts II and III.

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[3] Answer of Respondent Kelem, ¶ 25 (July 14, 1992); Answer of Respondent Leitkowski, ¶ 25 (July 15, 1992).

[4] Prehearing Exchange of the Respondents University of Connecticut, Board of Trustees for the University of Connecticut and State of Connecticut (April 18, 1993), Exhibits A, B, C. The same documents appear in Complainant's Prehearing Exchange (April 15, 1993), Exhibits 8, 9, 10.

[5] Complainant's Prehearing Exchange (April 15, 1993), Exhibit 34.

[6] Prehearing Exchange of the Respondents University of Connecticut, et al., supra note 4, Exhibits C, D; Complainant's Prehearing Exchange (April 15, 1993), Exhibit 11.

[7] Complainant's Prehearing Exchange (April 15, 1993), Exhibits 1-5.

Counts IV and V charge a failure to strip or contain in leak-tight wrapping two pipes covered with RACM prior to their removal from one of the buildings demolished, a violation of Section 61.145(c)(4).[8] Respondents Kelem's and Leitkowski's defense, in addition to the facility definition and a general denial, was a suggestion that the situation resulted from a stop work order issued by an Agency inspector. No evidence is offered to support the claim of such an order. Nonetheless, the significant point is that such an order would not excuse the already completed removal of an improperly prepared pipe. Accordingly, for Counts IV and V also, no genuine issue of material fact exists, and Complainant is entitled to judgment as a matter of law.

Count VI charged a failure to keep RACM adequately wet until collected for disposal, a violation of Section 61.145(c)(6)(I). Complainant supported this charge with inspection reports and analyses of samples taken[9]. Respondents Kelem and Leitkowski did not really deny this charge, other than with their facility definition. Hence again any genuine issue of material fact is absent, and Complainant's entitlement to judgment as a matter is law is established.

Count VII charged a failure to maintain proper waste shipment records, in violation of Section 61.150(d) of the Regulations, and supplied supporting documentation.[10] Respondents Kelem and Leitkowski essentially admitted the charge, but advanced in defense a State of Connecticut permit they had obtained for depositing materials containing asbestos in a certain landfill. Such a state permit, however, could not override the recordkeeping requirements of EPA's Regulations. Thus no genuine issue of material fact exists, and Complainant is entitled to judgment as a matter of law on Count VII.

In sum, for all seven Counts of the Complaint, the record shows no existence of any issue of material fact, and shows Complainant's entitlement to judgment as a matter of law. This conclusion provides a basis for granting Complainant's Motion in addition to Respondents' having waived any objection through their failure to respond.

**Remaining Issue in Case**

The issue that remains in this case is to determine the appropriate civil sanction for the violations that Respondents

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[8] Id. Exhibits 1,2,4, 5.

[9] Id. Exhibits 1-6.

[10] Id. Exhibit 42.

Kelem and Leitkowski have been found to have committed. Complainant will be directed to propose a method for making this determination.

## Order

Complainant's Motion for Partial Accelerated Decision is granted. Accordingly, Respondents Kelem and Leitkowski are declared to have violated the Regulations as charged in the Complaint.

Complainant is directed to report by September 30, 1996 the method it suggests for determining the appropriate civil sanction for Respondents Kelem and Leitkowski.

Dated: August 30, 1996

Thomas W. Hoya
Administrative Law Judge

**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

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|---|---|---|
| **In the Matter of** | ) | |
| | ) | |
| **Kelem Construction Company, Leitkowski Construction Co., et al.,** | ) | **CAA Docket No. I-92-1049** |
| | ) | |
| | ) | |
| **Respondents** | ) | |

**ORDER GRANTING WITHDRAWAL OF APPEARANCE**

Mr. Karl-Erik Sternlof's Motion to Withdraw Appearance as counsel for Respondent Kelem Construction Company is granted. The Motion included a letter from the president of Respondent directing the withdrawal, and no other party made any objection. In this situation, adequate justification exists for granting the Motion.

Dated: August 30, 1994

Thomas W. Hoya
Administrative Law Judge

In the Matter of Kelem Construction Company & Leitkowski Construction Co.,et al., Respondent
Docket No. CAA-I-92-1049

Certificate of Service

I certify that the foregoing **Ruling Granting Complainant's Motion For Partial Accelerated Decision and Order Granting Withdrawal of Appearance**, dated August 30, 1996, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

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Dated: August 30, 1996