UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Lu Vern G. Kienast	)	Docket No. CAA-5-2001-007
L.G. Kienast Utility Construction	)	
Oshkosh, Wisconsin	)	
	)	
Respondents	)	
	)	

Initial Decision

Clean Air Act. This proceeding is commenced by the U.S. Environmental Protection Agency, pursuant to Section 113(d) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7413(d), for alleged violations by Respondents of the Asbestos National Emission Standards for Hazardous Air Pollutants regulations for 1) demolition and renovation; and 2) waste disposal for manufacturing, fabricating, demolition, renovation, and spraying operations, 40 C.F.R. §§ 61.145 and 61.150, and Section 112 of the Act, 42 U.S.C. § 7412. **HELD**: Respondents L.G. Kienast Utility Construction and Lu Vern G. Kienast are found liable for violating the Asbestos NESHAP regulations and Section 112 of the Act. Respondents are assessed a penalty in the total amount of **$35,000.**

Before: Stephen J. McGuire[1]
United States Administrative Law Judge

Date: August 7, 2003

APPEARANCES:

For Complainant:

Deidre Flannery Tanaka
James J. Cha
Associate Regional Counsel
U.S. EPA
77 West Jackson Boulevard, C-14J
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[1] The undersigned Administrative Law Judge, after appointment as Chief Administrative Law Judge with the Federal Trade Commission ("FTC"), is authorized to continue adjudicating this case pursuant to an Interagency Agreement between the FTC and the Environmental Protection Agency, effective July 2003.

For Respondent: **George E. Bullwinkel**
Bullwinkel Partners, Ltd.
19 S. LaSalle Street
Chicago, Illinois 60603-1493

I. INTRODUCTION

This civil administrative penalty proceeding arises under the authority of Section 113(d) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7413(d). The applicable rules of procedure governing the instant matter are 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.

The Director of the Air and Radiation Division, United States Environmental Protection Agency, Chicago, Illinois ("Complainant" or "EPA") filed the Complaint in this matter against L.G. Kienast Utility Construction and Lu Vern G. Kienast ("Respondents") on May 18, 2001 alleging violations of the Clean Air Act, 42 U.S.C. §§ 7401 et seq., by Respondents in their demolition of the H.D. Hudson Manufacturing plant ("Hudson facility" or "facility") at 106 East Tennessee Avenue, Oshkosh, Wisconsin. The Complaint charges Respondents with eleven violations of Section 112 of the Clean Air Act, 42 U.S.C. § 7412, for allegedly failing to comply with the National Emission Standards for Hazardous Air Pollutants for Asbestos ("NESHAP" or "asbestos NESHAP") regulations 40 C.F.R. Part 61, Subpart M. Complainant claims that Respondents violated the asbestos NESHAP regulations for 1) demolition and renovation; and 2) waste disposal for manufacturing, fabricating, demolition, renovation, and spraying operations, 40 C.F.R. §§ 61.145 and 61.150. The EPA seeks a civil administrative penalty of $113,600 for the alleged violations.

Specifically, the Complaint alleges eleven violations of the asbestos NESHAP regulations by Respondents: 1) Respondents violated 40 C.F.R. § 61.145(a) by failing to inspect the facility for the presence of asbestos prior to commencing demolition or renovation; 2) Respondents violated 40 C.F.R. § 61.145(b) by failing to notify the Administrator of intent to demolish the facility at least ten days prior to the Respondents commencing the demolition activity; 3) Respondents violated 40 C.F.R. § 61.145(b) by failing to provide an accurate demolition notice on September 2, 1998; 4) Respondents violated 40 C.F.R. § 61.145(b) by failing to provide an accurate demolition notice on December 15, 1998; 5) Respondents violated 40 C.F.R. § 61.145(b) by failing to remove all regulated asbestos-containing material ("RACM") prior to the commencement of demolition activity; 6) Respondents violated 40 C.F.R. § 61.145(c)(6)(i) by failing to adequately wet the RACM at the facility during asbestos removal or demolition activities and to ensure that it remained wet until collected and contained or treated in preparation for disposal according to § 61.150; 7) Respondents violated 40 C.F.R. § 61.145(c)(2) by failing to adequately wet all RACM exposed during cutting or disjoining operations and damaging or disturbing asbestos during the removal of the oven(s) from the Hudson facility; 8)

Respondents violated 40 C.F.R. § 61.150(b) by failing to properly dispose of asbestos-containing waste material obtained from the facility; 9) Respondents violated 40 C.F.R. § 61.150(b) by failing to maintain waste shipment records for all asbestos-containing waste material transported off the Hudson facility site; 10) Respondents violated 40 C.F.R. § 61.145(c)(8) by failing to have a foreman or authorized representative, trained in the provisions of the asbestos NESHAP and with the asbestos NESHAP available on-site during the stripping, removing, handling or disturbing of RACM, or to have the training information posted at the demolition and /or renovation site; 11) Respondents violated Section 114 of the Act, 42 U.S.C. § 7414, by failing to provide accurate information about the demolition activities at the site, in response to the Section 114 request for information.

Respondents answered the Complaint and requested a hearing on June 22, 2001. As part of their Answer, Respondents requested that the Complaint be dismissed with prejudice. By Order issued August 15, 2001, Respondents' request for dismissal with prejudice was denied.

An evidentiary hearing was held in Oshkosh, Wisconsin on November 5 and 6, 2002, on the issues of Respondents' liability and the proposed penalty assessment. EPA offered into evidence forty-two exhibits, Complainant's Ex. 1 through 42, and called five fact witnesses. Respondent introduced thirty-three exhibits, Respondent's Ex. A through AG, and called one fact witness.

II. FINDINGS OF FACT

1. Complainant is the Director of the Air and Radiation Division, United States Environmental Protection Agency ("EPA"), Region 5, Chicago, Illinois. (November 5, Tr. 248).[2]

2. Respondents are L.G. Kienast Utility Construction ("Kienast Construction"), a corporation doing business at 765 North Washburn Street, Oshkosh, Wisconsin, and Lu Vern G. Kienast ("Kienast") (Complaint at 1, ¶ 3; Answer at 1-2; ¶ 3).[3]

3. Respondents own and operate a company that demolished commercial buildings. (Complaint at 6, ¶ 24; Answer at 6, ¶ 24).

4. Respondents owned a structure formerly used as a commercial building at 106 East Tennessee Avenue, Oshkosh, Wisconsin, at all times relevant to the Complaint. This

[2] The transcripts from the two-day evidentiary hearing are compiled in two individually numbered volumes. To avoid any confusion, all citations to the transcript will contain the date of the hearing testimony followed by the page number.

[3] Unless otherwise specified, all citations to Respondents' Answer refer to Respondents' First Amended Answer to Administrative Complaint, dated September 20, 2001.

facility was known as the H.D. Hudson Manufacturing plant ("Hudson facility" or "facility"). (Complaint at 7, ¶ 29; Answer at 7, ¶ 29; Complainant's Ex. 30).

5. Kienast signed a Notification of Demolition and/or Renovation and Application for a Permit ("Notification") dated August 28, 1998, post-marked September 2, 1998, and received by the Wisconsin Department of Natural Resources ("WDNR") on September 3, 1998. In the Notification, Kienast made the following representations concerning the demolition at the Hudson facility as stated on the form:

a) Section 6 indicated the project was an ordered demolition;
b) Section 9, Dates of Asbestos Abatement, was blank;
c) Section 10, Dates of Renovation/Demolition, stated that the start date was September 10, 1998, no ending date was listed;
d) Section 11, Abatement Contractor, was blank;
e) Section 12, Demolition contractor, listed L.G. Kienast Utility Const. and the contact person as Vern Kienast (920) 231-0898;
f) Section 13 did not include any information concerning the facility address, prior use, present use, age and size of the building;
g) Section 14, Facility Owner, listed L.G. Kienast, and the facility contact person as Vern Kienast;
h) Section 15, Waste Disposal Site, listed Glacier Ridge Landfill, N7296 V Horicon, WI 53032;
i) Section 16, Amount of Asbestos, was blank;
j) Section 17, Asbestos Abatement Fee Schedule, was checked for an amount of $50 for a demolition project that had less than 160 square and 260 linear feet of friable or nonfriable ACM;
k) Section 18, Indicate the Inspection Procedure, including Analytical Methods used to Detect the Presence or Absence of Asbestos, was blank;
l) Section 19, Description of Asbestos Material Involved and it its Location in the Facility, stated "Bld is located at 17 E. Tennesee [sic] St Oshkosh Wis Bld is condemned for removal Asbestos was in a small heat oven";
m) Sections 20, 21, 22 and 23 were blank. These sections requested information about the work including specific abatement/demolition methods, abatement work practice/engineering controls and waste procedures, and emergency abatement provisions;
n) Section 25 contains Lu Vern Kienast's signature certifying that an individual trained in the provisions of the asbestos NESHAP will be on site during the demolition, and that evidence that the required training has been accomplished by this person will be available for inspection during normal business hours;
o) Section 26 contains Lu Vern Kienast's signature certifying that the information submitted in this notice is correct to the best of this knowledge.

(Complaint at 7-8, ¶ 30; Answer at 7-8, ¶ 30; Complainant's Ex. 6; Respondents' Ex. X).

6. Respondents demolished and removed what remained of the Hudson facility, including all load-supporting members, beginning on or after August 24, 1998 and ending October 9, 1998. (Answer at 10, ¶ 38; accord Order Granting Motion to File Further Amendment to First Amended Answer, January 14, 2002).

7. The first truckload of demolition waste was removed to the Winnebago County Landfill on or after August 24, 1998. (Answer at 10, ¶ 39; accord Order Granting Motion to File Further Amendment to First Amended Answer, January 14, 2002).

8. On or about September 3, 1998, Respondents dismantled and removed an oven/kiln[4] containing friable asbestos-containing material from the Hudson facility. (Answer at 11, ¶ 41).

9. Respondents did not remove all the asbestos-containing material from the oven before removing the oven, and/or portions of the oven, from the Hudson facility.

10. Respondents did not adequately wet the oven during its removal.

11. Respondents disturbed and/or damaged the asbestos-containing material on the oven pieces during the removal and transport of the oven to the dump site.

12. Respondents did not adequately wet the asbestos-containing waste material at all times after the oven's removal from the Hudson facility and did not keep it wet prior to December 16, 1998.

13. Respondents did not dispose of the asbestos-containing material in or from the oven as soon as practical at a waste disposal site operated in accordance with the provisions of 40 C.F.R. §§ 61.154 or 61.155.

14. Respondents did not maintain waste shipment records for all asbestos-containing waste material transported off the Hudson facility site, which included the information specified at 40 C.F.R. §§ 61.150(c) and (d).

15. During the period of time when the Respondents removed portions of the oven from the Hudson facility, from about September 3, 1998, until December 17, 1998, the oven was not kept in a leak-type container, but instead was either kept under a tarp or open to the air while it was at Respondents' Jackson Street dump site.

16. Sometime during the period from August 24, 1998 to September 23, 1998, Respondents began demolition of the roof and roof structures of the Hudson facility. The roof area covered approximately 18,750 square feet.

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[4] The terms "oven" and "kiln" will be used interchangeably in this Initial Decision.

17. The roof and roof structures were coated with friable asbestos-containing material or contained asbestos containing material that was made friable.

18. Respondents did not have access to water at the Hudson facility site from the period of August 24, 1998 through October 1, 1998. (Respondents' Exs. P and Z). Water was only available at the Hudson facility site from October 1, 1998 to October 12, 1998. (Id.)

19. Respondents did not adequately wet asbestos-containing material from the Hudson facility during the period of August 24, 1998 through October 1, 1998.

20. Respondents did not dispose of asbestos-containing material from the Hudson facility as soon as practical at a waste disposal site operated in accordance with the provisions of 40 C.F.R. § 61.154, or an EPA-approved site that converts RACM and asbestos-containing waste material into nonasbestos material according to the provisions of 40 C.F.R. § 61.155.

21. Beginning on September 23, 1998, and continuing through December 17, 1998, Larry Weix, Air Management Specialist, WDNR, conducted inspections and inspection activities concerning Respondents' activities at the Hudson facility. The inspection included but was not limited to, reviewing the notification submitted by Respondents, visiting the Hudson facility, interviewing asbestos abatement contractors, Gary Rupert, and Mike Davis, interviewing Kienast, viewing disposal sites, visiting Kienast's construction company office at 227 Linwood, Oshkosh, WI and two of the Respondents' disposal sites on Jackson Avenue, and sampling materials found at the Hudson facility and at Respondents' disposal sites at Jackson Avenue.

22. WDNR inspector Larry Weix visited the Hudson facility on September 23, 1998, and found, among other things, that:

    a) the facility address was 106 Tennessee Avenue;
    b) approximately 15% of the structure was demolished;
    c) a backhoe and bobcat were on the site;
    d) the building size was approximately 25,000 square feet;
    e) there were no ovens or material resembling ovens on the site;
    f) the roof was composed of multiple layers of felt paper and asphalt;
    g) the demolition debris included wood and built-up roofing materials;
    h) the roofing materials in the demolition debris could be crushed using hand pressure.

23. The Wisconsin Occupational Health Laboratory analyzed the samples collected by Inspector Weix on September 23, 1998 at the Hudson facility, and reported on September 29, 1998, that the three samples each contained chrysotile asbestos in the amount of 10%.

24. On October 1, 1998, Inspector Weix, returned to the Hudson facility, and found that the facility was approximately 30 to 40% demolished, and two workers and Kienast were on site.

25. On October 1, 1998, Respondent Kienast told Inspector Weix the following:

a) He (Kienast) did not have anyone do an asbestos inspection at the facility;
b) He did not know that built-up roofs contained asbestos;
c) He was not adding water to control the dust;
d) The only equipment he had removed from the building was a gas space heater;
e) Demolition waste was being hauled to Winnebago County Landfill on his trucks; and,
f) He would go to the city water department as soon as possible to get a water meter to attach to a fire hydrant located on the property.

26. On October 5, 1998, Inspector Weix met with Kienast at 227 Linwood. Kienast told Inspector Weix that ovens were removed from the building before he purchased the building, and he had purchased the building approximately two years previously.

27. On October 19, 1998, Inspector Weix and Dave Misterek, Solid Waste Specialist, Oshkosh Service Center, visited various Kienast owned sites to try to find the oven(s). At Kienast's waste disposal dump located off Jackson Street, Inspector Weix found rusted metal panels filled with a white insulation material under a canvas tarp. Inspector Weix collected five samples of the insulation material. Inspector Weix also observed the roofing material and other building materials debris that were similar to debris he observed at the Hudson facility. He collected four bulk samples of this material.

28. On October 19, 1998, Inspector Weix visited a second Jackson Street property owned by Kienast. He took one sample of roofing material debris.

29. On October 26, 1998, the Wisconsin Occupational Health Laboratory reported that the ten samples collected by Inspector Weix on October 19, 1998 contained chrysotile asbestos in amounts ranging from 10 to 15%.

30. On or about December 4, 1998, Superior Glacier Ridge Landfill, Horicon, Wisconsin, faxed Inspector Weix, a statement that Lu Vern Kienast had deposited 8 cubic yards of asbestos containing waste from the Hudson Building at the landfill on September 3, 1998.

31. On December 15, 1998, Inspector Weix received notification from Mike Davis, an asbestos abatement contractor advising that Davis would be cleaning up the oven on the Kienast property at Highway 45. The start date was December 16, 1998, and the end date was December 17, 1998. On December 17, 1998, Inspector Weix visited the Kienast site and observed the workers conducting the final clean up of the property.

32. The notification submitted by Michael Davis, dated December 15, 1998, stated in pertinent part, that a previous notification had been submitted by Lu Vern Kienast for a demolition project by the owner at the owner's facility and the amount of asbestos to be removed was 108 cubic feet from an industrial kiln located at Highway 45, Oshkosh, WI.

33. On August 17, 2000, Mike Davis submitted a response to a Section 114 Request for Information, stating that he had removed 4 to 6 cubic yards of metal clad oven pieces from a field in Oshkosh, WI. He identified Respondent Kienast as the owner.

34. On September 29, 1999, EPA issued a Section 114 Request for Information to Respondents requesting specific information about the Respondents' activities at the Hudson facility, including inspection, work practices and disposal. The response was due on or before November 26, 1999.

35. By letter dated December 1, 1999, Respondents provided some documents and information concerning the demolition at the Hudson facility but did not provide most of the information required by Section 114 requests 2, 5, 6, 8, 9, 11, 12, 13, 14, 15, and 16. Kienast stated that: "We sent in a copy of our recipts [sic] in Oct of 99 We hired a asbestos contractor to remove it from site invoices paid I called the office at Green Bay & they said we could haul the asbestos to a licened [sic] land fill at Glacer Ridge, it was wett [sic] down as we were instructe [sic] In closed are a copy of our records. The building was condemed [sic] in 1995." (Complainant's Ex. 8).

36. On January 31, 2000, EPA issued a follow-up letter advising Respondents of the deficiencies in the December 1, 1999 response, and reiterating the Section 114 Request for Information. (Complainant's Ex. 9).

37. By letter dated February 11, 2000, Respondents provided additional information requested by the Section 114 request. Respondents stated in pertinent part:

a) There was no machinery in the Hudson facility;
b) The ovens were 5 feet by 6 feet;
c) The dates the demolition began and ended were 6/28/98 to 12/7/98;
d) They wet down the asbestos; The asbestos was taken out and put in barrels and the oven doors were saved for reuse;
e) All material was wet down prior to removal;
f) The material was transported by L.G. Kienast Utility Co., Inc., in sealed barrels marked "ASBESTOS";
g) Some were transported by Fidelity Environmental;
h) The only persons identified as transporting the material were Mike Davis and Fidelity Environmental;
i) The dates of shipment were 12/16/98 and 9/3/98;
j) They did not have copies of shipment records;

k) The plumbing permit application was dated July 16, 1998, for the abandoning of sewer and water for the raze permit;
l) On August 27, 1998, Respondents paid $20 for a wrecking fee; and
m) For the period of October 1, 1998, through October 12, 1998, Respondents paid for 290cf of water.

(Complainant's Ex. 10).

38. Respondents did not wet asbestos containing materials at the Hudson facility during the periods of June 28, 2001 to October 1, 2001 and October 13, 2001 to December 16, 2001.

39. According the Consolidated Rules, the Administrative Law Judge "shall determine the amount of the recommended civil penalty based on the evidence in the record, and in accordance with any penalty criteria set forth in the Act" and "shall consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b).

40. Pursuant to Section 113(d) of the Act, 42 U.S.C. § 7413(d), the Administrator may assess a penalty not to exceed $25,000 per day against Respondents for violations of Section 113 of the Clean Air Act.

41. A gravity based penalty of $35,000 for Respondents' violations of Section 113 of the Clean Air Act and 40 C.F.R. Part 61, Subpart M is authorized, and the amount of the penalty is in accordance with the statutory penalty criteria in Section 113(e)(1) of the Act. 42 U.S.C. § 7413(e)(1). The total penalty of $35,000 ($3,000 for Count I, $2,000 for Count III, $6,000 for Count V, $6,000 for Count VI, $6,000 for Count VII, $4,000 for Count VIII, $1,000 for Count IX, $6,000 for Count X, and $1,000 for Count XI) is appropriate under the particular facts and circumstances of this case. See CAA § 113(e)(1); 42 U.S.C. § 7413(e)(1).

42. Pursuant to "other factors as justice may require" under Section 113(e) of the Clean Air Act, the EPA's suggested civil administrative penalty of $113,600 is reduced to $35,000 to account for the size of Respondents' business, the perceived economic impact of the penalty on the business and Respondents' good faith efforts to comply with the requirements of the asbestos NESHAP.

III. DISCUSSION

A. Constitutional Issues

As a threshold matter, the undersigned must address Respondents' claim that WDNR's inspection of the Hudson facility did not comport with constitutional standards prior to determining liability for alleged violations of the asbestos NESHAP. Respondents contend that Inspector Weix's failure to obtain a warrant prior to inspecting the Hudson facility on September

23, 1998 and October 1, 1998 violated Respondents' Fourth Amendment rights against unreasonable search and seizure and was therefore unconstitutional. During the hearing, Respondents orally requested suppression of all evidence relating to the asbestos results obtained by the WDNR prior to October 19, 1998. (November 6, Tr. 10-11). Respondents' constitutional challenge to the WDNR's inspection is rejected.

The undersigned finds it unnecessary to examine whether Weix's inspection of Respondent's facility was in fact constitutional. Even if the WDNR had violated Respondents' Fourth Amendment rights against unreasonable search and seizure, suppressing evidence resulting from Weix's inspection of the Hudson facility would not be an appropriate remedy in the instant case. See Litton Industrial Automation Sys., Inc., TSCA Appeal No. 93-4, 5 E.A.D. 671, 676 n.9 (EAB, January 27, 1995) (citing Boliden-Metech, Inc., TSCA Appeal No. 89-3, 3 E.A.D. 439, 444 n.5 (EPA CJO, November 21, 1990)). As the Chief Judicial Officer noted in the Boliden-Metech case:

> The exclusionary rule was initially created by the federal courts to deter Fourth Amendment violations in criminal cases and has not necessarily been extended to all administrative proceedings. See United States v. Leon, 468 U.S. 897 (1984); In re Establishment Inspection of Hern Iron Works, Inc., 881 F.2d 722, 729 (9th Cir. 1989). The courts have a applied a balancing test in each case, weighing the deterrent effect of suppressing unlawfully obtained evidence against the social cost of depriving the government of the use of such evidence. United States v. Janis, 428 U.S. 433 (1976). Applying the exclusionary rule here would appear to have no deterrent effect since EPA, the Agency which introduced the evidence was not responsible for the allegedly unconstitutional search and seizure. Moreover, the Supreme Court has stated, in dictum, that the social cost of applying the exclusionary rule is unacceptably high in situations involving continuing environmental violations. It states, for example, that "[p]resumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order has been improperly obtained * * *." Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032, 1046 (1984).

Boliden-Metech, Inc., 3 E.A.D. at 444 n.5. The Chief Judicial Officer's reasoning in Boliden-Metech is equally applicable to the case at bar. As in Boliden-Metech, applying the exclusionary rule in this case would have absolutely no deterrent effect since the allegedly unconstitutional search and seizure was carried out by an agent of WDNR, not EPA. Furthermore, it does not appear that Supreme Court precedent favors applying the exclusionary rule in administrative proceedings or in environmental cases involving hazardous substances. See, e.g., United States v. Leon, 468 U.S. 897 (1984); Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032 (1984). Based on the foregoing discussion, Respondents' motion to suppress all evidence relating to the asbestos results obtained from Inspector Weix prior to October 19, 1998 is denied.

B. The Statute of Limitations

Respondents claim that EPA's complaint is barred by the Clean Air Act's one-year statute of limitations. On the second day of the hearing, Respondents moved to dismiss the case, arguing that Respondents were unfairly prejudiced when the Complaint was filed nearly three years after the initial violations. (November 6, Tr. 5-6). While most complaints under the Clean Air Act must be brought within 12 months of the initial date of violation, the Act does provide for an exception. The Clean Air Act's statute of limitations is as follows:

> The Administrator's authority under this paragraph shall be limited to matters where the total penalty sought does not exceed $200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiations of the administrative action, *except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review.*

42 U.S.C. § 7413(d)(1) (emphasis added).

In responding to Respondents' motion to dismiss, EPA noted that the statute of limitations issue was previously raised by Respondents and ruled on by the undersigned. (November 6, Tr. 7; Order of November 30, 2001). In the November 30, 2001 Order, the undersigned denied Respondents' motion to dismiss and found that EPA had obtained the appropriate waivers to comply with the exception to the Clean Air Act's statute of limitations. Id. Respondents' Post-Hearing Brief does not cite to any new facts or legal precedent which justify overturning the Order of November 30, 2001. Respondents' motion to dismiss based on the statute of limitations is denied.

C. Liability

1. Count I

Count I of the Complaint charges that Respondents violated 40 C.F.R. § 61.145(a) by failing to inspect the facility for the presence of asbestos prior to commencing demolition or renovation.

The asbestos NESHAP regulations at 40 C.F.R. § 61.145(a) require an owner or operator of a demolition or renovation activity to "thoroughly inspect the affected facility or part of the

facility where the demolition or renovation operation will occur for the presence of asbestos, including Category I and Category II nonfriable ACM," prior to the commencement of demolition or renovation. A pre-demolition inspection is required in order to determine how the notice and work practice standards of 40 C.F.R. § 61.145 apply to the demolition or renovation activity.

As support for the allegation that Respondents failed to inspect the facility for the presence of asbestos prior to commencing demolition or renovation, Complainant primarily relies on Respondents' responses to a Section 114 request for information[5] and selected portions of Kienast's hearing testimony. Complainant notes that paragraph 5 of the Section 114 information request specifically asked the Respondents to:

> State whether, prior to demolition, Kienast conducted an inspection to determine if the facility contained asbestos. If Kienast conducted such an inspection, provide a detailed description of the inspection, and if asbestos was detected in the facility, describe where and how such asbestos was detected.

(Section 114 Request, Complainant's Ex. 7). Respondents submitted two responses to the Section 114 request. In their initial November 26, 1999 response, Respondents did not specifically respond to paragraph 5. (Complainant's Ex. 8). In the second response, dated February 11, 2000, Respondents responded to the paragraph 5 request with the statement, "The only asbestos was at the ovens." (Complainant's Ex. 10). In its post hearing brief, Complainant alleges that Respondents "have offered *no evidence or documents* that demonstrate or suggest that Respondents conducted a thorough inspection for the purposes of determining how the notice and work practice standards applied to the demolition activity as required by Section 61.145(a)." (Complainant's Post Hearing Brief at 55, emphasis added).

While Respondents' responses to the Section 114 requests were admittedly skimpy, Complainant seems to ignore supporting documentation in both the November 26, 1999 response and the February 11, 2000 response which show that Respondents conducted at least a cursory inspection of the facilities for asbestos prior to commencing demolition. Both responses contain a copy of Respondents' completed Form-4500-113, the WDNR Notification of Demolition and/or Renovation and Application for Permit Exemption. (See November 26, 1999 response, Complainant's Ex. 8; February 11, 2000 response, Complainant's Ex. 10). This form was dated August 28, 1998 and received by the WDNR on September 3, 1998, prior to the scheduled demolition start date of September 10, 1998. (Respondents Ex. Y; Complainant's Exs. 5 and 6). Under Section 17 of the form, Asbestos Abatement Fee Schedule, Respondents checked the box for a $50.00 fee, corresponding to a demolition of less than 160 square and 260 linear feet of friable or nonfriable ACM. (Respondents Ex. Y; Complainant's Exs. 8 and 10). Under Section 19 of the form, which requests a description of the asbestos material involved and its location in the facility to be demolished/renovated, Respondents provided "Bld is located at 17 E Tennesee

[5] The Section 114 request for information was sent on September 30, 1999, pursuant to Section 114(a) of the Clean Air Act, 42 U.S.C. § 7414(a). See Complainant's Ex. 7.

[sic] St Oshkosh Wis Bld is condemed [sic] for removal Asbestos was in a small heat oven." (See id.)[6] Respondents had to have the facilities inspected for asbestos in order to complete the form.

Kienast's testimony also indicates that Respondents completed at least a preliminary investigation prior to the facility's demolition. Kienast testified that he "tentatively" went through the facility before it was torn down (November 6, Tr. 23). During this pre-demolition inspection, Kienast noted a kiln that was "rusted through on the sides" and containing what he believed to be asbestos inside. (November 6, Tr. 25). This testimony is consistent with Respondents' responses on the WDNR form, Notification of Demolition and/or Renovation and Application for Permit Exemption.

The record indicates that Respondents were aware that the facility contained asbestos and did engage in some inspection of the facility prior to its demolition. However, the extent of Respondents' inspection does not comport with the requirement that an owner or operator *thoroughly* inspect an affected facility prior to demolition. Respondents' incomplete responses to the Section 114 requests for information and testimony regarding the extent of the pre-demolition inspection of the facility indicate a failure to fully comply with the requirements of 40 C.F.R. § 61.145(a). While Respondents' partial compliance will be taken into account in determining an appropriate penalty, Respondents are found to have violated the asbestos NESHAP at 40 C.F.R. § 61.145(a).

2. Count II

Count II of the Complaint charges that Respondents violated 40 C.F.R. § 61.145(b), and Section 112 of the Act, 42 U.S.C. § 7412, by failing to notify the Administrator of intent to demolish the facility at least ten days prior to Respondents' commencement of demolition activity. EPA argues that Respondents' notice, postmarked September 2, 1998, with a demolition start date of September 10, 1998 is on its face late. (Complainant's Post-Hearing Brief at 56, citing WDNR inspection report, Complainant's Exs. 5 and 6).

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[6] Section 19 and the date/signature line appears on the second page of Respondents' completed Form-4500-113, the WDNR Notification of Demolition and/or Renovation and Application for Permit Exemption. For some reason, this second page is not included in Complainant's Exs. 8 and 10. It is unclear whether this oversight is due to Complainant's failure to compose a complete exhibit or Respondents' failure to include both pages of the notification form in their responses to the Section 114 request. However, because page 2 of the form appears elsewhere in Complainant's exhibits, see, e.g., Complainant's Ex. 6, Complainant is deemed to have knowledge of this document in its entirety.

However, the ten day notification requirement of 40 C.F.R. § 61.145(b)(3)(i) is inapplicable to this case. Under 40 C.F.R. § 61.145(a)(3):

> If the facility is being demolished under an order of a State or local government agency, issued because the facility is structurally unsound and in danger of imminent collapse, only the requirements of paragraphs (b)(1), (b)(2), (b)(3)(iii), (b)(4) (except (b)(4)(viii)), (b)(5), and (c)(4) through (c)(9) of this section apply.

The record clearly indicates that the Hudson Building had been condemned by the City of Oshkosh in 1995. (See, e.g., Respondents' Section 114 response, Respondents' Ex. X; Complainant's Ex. 10; Complainant's Post-Hearing Brief at 5; November 6, Tr. 22-23). While the copy of the City of Oshkosh letter which Kienast submitted to the EPA pursuant to Respondents' Section 114 Response appears to be incomplete, it is still clear that the city ordered the building to be "razed or repaired" due to "structural failure." (See Complainant's Ex. 10). Nor do the parties dispute this characterization as both Complainant and Respondents refer to the building as "condemned". (See, e.g., Complainant's Post-Hearing Brief at 5; Respondents' Section 114 Response, Complainant's Ex. 10).

Because the City of Oshkosh condemned the Hudson building, Respondents were not required to satisfy the ten day notice requirement of 40 C.F.R. § 61.145(b)(3)(i). Under the applicable section, Respondents were only required to postmark or deliver the notice "[a]s early as possible before, but not later than, the following working day if the operation is a demolition ordered according to paragraph (a)(3) of this section." 40 C.F.R. § 61.145(b)(3)(iii). Respondents delivered the notice of demolition at least seven days before demolition was set to begin. (See, e.g., Complainant's Exs. 5 and 6, WDNR Asbestos Abatement Inspection Report listing the notification date as September 3, 1998).

Admittedly, there is some confusion in the record as to the exact date that Respondents commenced demolition of the Hudson facility. In an amended Answer to the Complaint, Respondents admitted that they "demolished and removed what remained of the Hudson facility, including all load-supporting members, beginning on or after August 24 and ending October 9, 1998." (Answer at 10, ¶ 38; accord Order Granting Motion to File Further Amendment to First Amended Answer, January 14, 2002 (emphasis in original)). Respondents further admitted that "[t]he first truckload of demolition waste was removed to the Winnebago County Landfill[7] on or after August 24, 1998." (Id. at ¶ 39.) Also, Respondents provided a waste shipment record from the Glacier Ridge Landfill, dated September 3, 1998, certifying that eight cubic yards of asbestos waste had been removed from the Hudson facility and a check for the $200 disposal fee, dated September 3, 1998. (See Respondents' Exs. U and V).

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[7] The landfill is referred to by various names in the record, including: Winnebago County, Glacier Ridge, Superior, Horicon and Lakeshore. These various names all appear to refer to one landfill.

While it is possible that this small amount of asbestos waste may have been removed from the Hudson facility prior to Respondents' September 2, 1998 notice of demolition, Respondents were still in compliance with all applicable notice requirements. Respondents claim that the eight cubic yards of asbestos came from a kiln at the facility, thus the removal of this asbestos would not have signified the structural demolition of the Hudson facility. (See, e.g., Respondents' Post-Hearing Brief at 11). The asbestos NESHAP defines "demolition" as follows:

> *Demolition* means the wrecking or taking out of any load-supporting structural member of a facility together with any related handling operations or the intentional burning of any facility.

40 C.F.R. § 61.141 (emphasis added). There is no evidence in the record that any structural demolition of the Hudson facility began before September 2, 1998. Furthermore, there is evidence that the structural demolition occurred much later. The record contains a copy of a front page article from the September 24, 1998 Oshkosh Northwestern newspaper, headlined "Demolition starts at Hudson site." (Respondents' Ex. N).

For the foregoing reasons, the ten day notice requirement of 40 C.F.R. § 61.145(b)(3)(i) does not apply to the demolition of the Hudson building and Respondents are deemed to have complied with the modified notice requirement of 40 C.F.R. § 61.145(b)(3)(iii). Thus, Count II of the Complaint is dismissed.

3. Count III

Count III of the Complaint charges that Respondents violated 40 C.F.R. § 61.145(b) by failing to provide an accurate demolition notice. In order to comply with the notification requirements of § 61.145(b), there are seventeen elements which must be included in the notification of demolition and renovation. See 40 C.F.R. § 61.145(b)(4). EPA alleges that the demolition notice submitted by Respondents did not include the following required elements: the correct address of the facility; a description of the facility, including the size, age, and present and prior use of the facility; the procedure used to detect the presence of RACM and nonfriable ACM; an estimate of the amount of RACM to be removed, and an estimate of the amount of nonfriable asbestos which is not to be removed; scheduled starting and completion dates for asbestos removal; the final date of demolition; a description of the planned demolition work to be performed; a description of the work practices and engineering controls to be used to comply with the asbestos NESHAP; a complete description of the demolition order, and; procedures to follow if RACM is encountered during the activity. (Complaint at 20, ¶ 92). Respondents denied EPA's allegations (Answer at 24, ¶ 92-93).

While Respondents deny violating the notice requirements of 40 C.F.R. § 61.145(b)(4), Respondents admit in ¶ 30 of their Answer that "Mr. Kienast signed a Notification of Demolition and/or Renovation and Application for a Permit dated August 28, 1998, [and postmarked September 2, 1998] for the purpose of notifying all responsible authorities of his intent to begin

the demolition of the 'Hudson Building.'" (Answer at 8, ¶ 30). Respondents further assert that this document "speaks for itself." (Id.)

As previously noted in Finding of Fact 5, the Notification of Demolition and/or Renovation and Application for a Permit dated August 28, 1998, and post-marked September 2, 1998, makes the following representations concerning the demolition at the Hudson facility as stated on the form:

a) Section 6 indicated the project was an ordered demolition;
b) Section 9, Dates of Asbestos Abatement, was blank;
c) Section 10, Dates of Renovation/Demolition, stated that the start date was September 10, 1998, no ending date was listed;
d) Section 11, Abatement Contractor, was blank;
e) Section 12, Demolition contractor, listed L.G. Kienast Utility Const. and the contact person as Vern Kienast (920) 231-0898;
f) Section 13 did not include any information concerning the facility address, prior use, present use, age and size of the building;
g) Section 14, Facility Owner, listed L.G. Kienast, and the facility contact person as Vern Kienast;
h) Section 15, Waste Disposal Site, listed Glacier Ridge Landfill, N7296 V Horicon, WI 53032;
i) Section 16, Amount of Asbestos, was blank;
j) Section 17, Asbestos Abatement Fee Schedule, was checked for an amount of $50 for a demolition project that had less than 160 square and 260 linear feet of friable or nonfriable ACM;
k) Section 18, Indicate the Inspection Procedure, including Analytical Methods used to Detect the Presence or Absence of Asbestos, was blank;
l) Section 19, Description of Asbestos Material Involved and it its Location in the Facility, stated "Bld is located at 17 E. Tennesee [sic] St Oshkosh Wis Bld is condemned for removal Asbestos was in a small heat oven";
m) Sections 20, 21, 22 and 23 were blank. These sections requested information about the work including specific abatement/demolition methods, abatement work practice/engineering controls and waste procedures, and emergency abatement provisions;
n) Section 25 contains Lu Vern Kienast's signature certifying that an individual trained in the provisions of the asbestos NESHAP will be on site during the demolition, and that evidence that the required training has been accomplished by this person will be available for inspection during normal business hours;
o) Section 26 contains Lu Vern Kienast's signature certifying that the information submitted in this notice is correct to the best of this knowledge.

(Complaint at 7-8, ¶ 30; Answer at 7-8, ¶ 30; Complainant's Ex. 6; Respondents' Ex. X; Finding of Fact 5).

This document does in fact speak for itself. The numerous blank sections clearly indicate that Respondents failed to fill out this form to the extent required by 40 C.F.R. § 61.145(b)(4). By their own admission, Respondents are found to have violated the asbestos NESHAP at 40 C.F.R. § 61.145(b).

4. Count IV

Count IV of the Complaint charges that Respondents violated 40 C.F.R. § 61.145(b) by failing to provide complete and accurate information in a demolition notice submitted by Michael R. Davis, and dated December 15, 1998. On November 4, 2002, Complainant submitted a request to withdraw Count IV of the Complaint with prejudice. Complainant's request is granted and Count IV is hereby dismissed.

5. Count V

Count V of the Complaint charges that Respondents violated 40 C.F.R. § 61.145(c) by failing to remove all RACM prior to the commencement of demolition activity.[8] Respondents deny this allegation. (Answer at 25, ¶ 98). Under 40 C.F.R. § 61.145(c)(1), Respondents were required to remove all regulated asbestos-containing material from the Hudson facility before beginning any activity that would breakup, dislodge or similarly disturb the material. Although Respondents denied violating 40 C.F.R. § 61.145(c)(1), as the facts are alleged in the Complaint, elsewhere, Respondents admitted facts which demonstrate violation of this provision.

Respondents admit that on or about September 3, 1998, Respondents dismantled and removed or otherwise disposed of a single, metal encased kiln having hinged doors from the Hudson facility. (Answer at 11, ¶ 41). Respondents admit that the kiln that was dismantled and removed on or about September 3, 1998, contained asbestos insulation. (Answer at 11, ¶ 42). Respondents assert that all insulation was properly wet down and placed in sealed containers prior to shipment to Superior Glacier Ridge Landfill in Horicon, WI, an authorized disposal site. (Answer at 11, ¶ 42). Respondents further admit that they removed the doors of the kiln and

[8] In Complainant's Post-Hearing Brief, EPA notes that "Paragraph 93 of the Complaint contains a typographical error and cites to 40 C.F.R. § 61.145(b) instead of 61.145(c)." (Complainant's Post-Hearing Brief at 60 n.36). It appears that Complainant's correction contains yet another typographical error as the relevant paragraph is ¶ 98 and not ¶ 93. (See Complaint at 21, ¶ 98). In trying to minimize the significance of this error, EPA asserts that "Complainant has alleged and proven violations of Section 61.145(c), and has consistently represented to the Respondents in its other filings and its penalty calculation explanations that Complainant was alleging that Respondent had violated Sections 61.145(a),(b) and (c)." (Complainant's Post-Hearing Brief at 60 n.36). Neither Complainant, nor Respondents appeared to have noticed this error until the correction in Complainant's Post-Hearing Brief. Since Respondents have consistently responded to Count V as if they were responding to an allegation under 40 C.F.R. § 61.145(c), they are not held to be prejudiced by Complainant's error.

transported them to another location. (Answer at 11, ¶ 43). Respondents admit that the kiln doors were damaged on being unloaded at the location where they were to be stored pending resale. (Answer at 11, ¶ 45). Respondents admit that after removal, the kiln doors were kept under a tarp or similar cover at Respondent's site near Highway 45 in Oshkosh, Wisconsin, from about September 3, 1998, until on or about December 17, 1998. (Answer at 12, ¶ 49).

On December 15, 1998, Inspector Weix received notification from Mike Davis, an asbestos abatement contractor, advising that Davis would be cleaning up the oven on the Kienast property at Highway 45. The start date was December 16, 1998, and the end date was December 17, 1998. On December 17, 1998, Inspector Weix visited the Kienast site and observed the workers conducting the final clean up of the property. (Finding of Fact 31). The notification submitted by Michael Davis, dated December 15, 1998, stated in pertinent part, that a previous notification had been submitted by Lu Vern Kienast for a demolition project by the owner at the owner's facility and the amount of asbestos to be removed was 108 cubic feet from an industrial kiln located at Highway 45, Oshkosh, WI. (Finding of Fact 32). On August 17, 2000, Mike Davis submitted a response to a Section 114 Request for Information, stating that he had removed 4 to 6 cubic yards of metal clad oven pieces from a field in Oshkosh, WI. He identified Respondent Kienast as the owner. (Finding of Fact 33).

The need for an asbestos abatement contractor at the Kienast property at Highway 45 in December of 1998 indicates that Respondents did not fully comply with the requirements of 40 C.F.R. § 61.145(c)(1). While Respondent did partially comply with this provision by removing asbestos insulation from the body of the kiln on September 3, 1998 and properly disposing of it, Respondents are still found to have violated the asbestos NESHAP at 40 C.F.R. § 61.145(c). Respondents' partial compliance will be considered in addressing the appropriate penalty for Count V.

6. Count VI

Count VI of the Complaint charges that Respondents violated 40 C.F.R. § 61.145(c)(6)(i) by failing to adequately wet the RACM at the facility during asbestos removal or demolition activities and to ensure that it remained wet until collected and contained or treated in preparation for disposal according to 40 C.F.R. § 61.150. Respondents deny this allegation. (Answer at 25, ¶ 101). However, Respondents' own statements and documents evidence a violation of this provision.

According to Respondents, they "demolished and removed what remained of the Hudson facility, including all load-supporting members, beginning on or after August 24 and ending October 9, 1998." (Answer at 10, ¶ 38; accord Order Granting Motion to File Further Amendment to First Amended Answer, January 14, 2002). But, Respondents' own exhibits show that there was no water at the Hudson facility site from the period of August 24, 1998 through October 1, 1998 when the bulk of this demolition took place. (See Respondents' Exs. P and Z; see also Complainant's Ex. 10 containing Respondents' supplemental response to the Section 114 request for information and including a deposit/rental form for water utility

equipment from October 1, 1998 to October 12, 1998). Aside from twelve days in October when Respondents rented a meter to hook up to a city fire hydrant, there was no water available at the Hudson facility that Respondents could have used to comply with the asbestos NESHAP.

During the hearing, Respondent Kienast offered inconsistent testimony regarding other possible sources of water at the facility. At the beginning of his testimony, Kienast stated that "the whole sprinkler system was full of some antifreeze or something. Because the building wasn't heated. *It couldn't have water in it*." (November 6, Tr. 28) (emphasis added). Later on, Kienast claimed that the sprinkler system was overflowing with water. "We hooked up a hose for the city, but we had water in the building. There was old – it leaked all the time, stack pipes for a sprinkler system. They had been froze up and broke. There was water all over the place." (November 6, Tr. 177). Respondent also claimed that the facility was always wet during demolition, because "[t]he only time we worked on the demolition is when we had rainy spells and we couldn't work on another project, so we went over on – to keep my men busy, to work over there on the Hudson building." (November 6, Tr. 35).

Notwithstanding Respondents' claims of rainy days and the existence of water in the facility's sprinkler system, the only time water was demonstratively available at the Hudson facility site was from October 1, 1998 to October 12, 1998. Thus, Respondents are found to have violated 40 C.F.R. § 61.145(c)(6)(i) by failing to adequately wet the RACM at the facility during asbestos removal or demolition activities and to ensure that it remained wet until collected and contained or treated in preparation for disposal according to 40 C.F.R. § 61.150.

7. Count VII

Count VII of the Complaint charges that Respondents violated 40 C.F.R. § 61.145(c)(2) by failing to adequately wet all RACM exposed during cutting or disjoining operations and damaging or disturbing asbestos during the removal of the oven(s) from the Hudson facility. Respondents deny this allegation as well. (Answer at 25, ¶ 103). As previously discussed in Count VI, there is overwhelming evidence that except from the period from October 1, 1998 to October 12, 1998, there was no source of water available at the Hudson facility for cutting and disjoining operations, nor was water available at the dump site where the oven doors were dumped. Thus, Respondents are found to have violated the asbestos NESHAP at 40 C.F.R. § 61.145(c)(2).

8. Count VIII

Count VIII of the Complaint charges that Respondents violated 40 C.F.R. § 61.150(b) by failing to properly dispose of asbestos-containing waste material obtained from the facility as soon as practical. As previously discussed in Count V, Respondents admit to partially dismantling a kiln, containing asbestos-containing material, from the Hudson facility on or about September 3, 1998, and to transporting the kiln doors to another location. (Answer at 11, ¶ 41 - 43). Respondents further admit that the kiln doors were damaged on being unloaded and that after removal, the kiln doors were kept under a tarp or similar cover at Respondent's site near

Highway 45 in Oshkosh, Wisconsin, from about September 3, 1998, until on or about December 17, 1998. (Answer at 11 - 12, ¶ 45, 49). Respondents did not complete the abatement and disposal of the asbestos-containing kiln doors until on or about December 17, 1998, which is more than 90 days after removing and damaging the kiln doors. During the hearing, Respondent Kienast testified that the asbestos-containing kiln doors from the Hudson facility were on the dump site for a month and a half. (November 6, Tr. 49).

Respondents' own testimony establishes that asbestos-containing material was left in an open dump site for a substantial period of time. The asbestos NESHAP requires that all asbestos-containing waste material shall be deposited as soon as practical by the waste generator at: 1) a waste disposal site operated in accordance with the provisions of § 61.154, or 2) an EPA-approved site that converts RACM and asbestos-containing waste material into nonasbestos (asbestos-free) material according to the provisions of § 61.155. See 40 C.F.R. § 61.150(b). Since Respondents managed to properly dispose of the body of the kiln on September 3, 1998, (see Answer at 11, ¶ 42), the extra 45 to 90 days that it took to dispose of the asbestos-containing kiln doors can hardly be deemed reasonable. Thus, Respondents are found to have violated 40 C.F.R. § 61.150(b) by failing to properly dispose of asbestos-containing waste material obtained from the facility as soon as practical.

9. Count IX

Count IX of the Complaint charges that Respondents violated 40 C.F.R. § 61.150(d) by failing to maintain waste shipment records for all asbestos-containing waste material transported off the Hudson facility site. Section 61.150(d) requires that owners and operators maintain specific information concerning the off-site transport of all asbestos-containing wastes. The required information includes the following: 1) the name, address, and telephone number of the waste generator; 2) the name and address of the local, State, or EPA Regional office responsible for administering the asbestos NESHAP program; 3) the approximate quantity in cubic meters (cubic yards); 4) the name and telephone number of the disposal site operator; 5) the name and physical location of the disposal site; 6) the date transported; 7) the name, address, and telephone number of the transporter[s]; 8) a certification that the contents of the consignment are fully and accurately described by proper shipping name and are classified, packed, marked, and labeled, and are in all respects in proper condition for transport by highway according to applicable international and government regulations. 40 C.F.R. § 61.150(d)(1). Furthermore, a copy of all waste shipment records is required to be kept at the site for at least 2 years and is required to be made available for inspection. 40 C.F.R. § 61.150(d)(5). Respondents denied that they failed to comply with these provisions. (Answer at 26, ¶ 105 - 106).

Although Respondents denied that they failed to maintain adequate waste shipment records, Respondents did not provide any information to demonstrate that the required waste transport information was maintained for the kiln doors transported from the Hudson facility to Respondents' property on Highway 45. This information does not appear in Respondents' responses to the Section 114 request for information (dated September 30, 1999, well within the two year period mandated by the regulation), in their prehearing exchange, or during the hearing.

Respondents did provide copies of a manifest dated September 3, 1998, for the transport of some wastes to Glacier Ridge (Respondents' Ex. U), and provided copies of the manifests prepared by Mike Davis of Fidelity Environmental for the abatement and transport of wastes from the Highway 45 site on December 17, 1998 (Respondents' Ex. AF); however, there are no waste shipment records for material transported to the Highway 45 site. Furthermore, in response to ¶ 14 of the Section 114 information request, Respondents stated that they did not know the method used to transport and dispose of asbestos wastes. (See Complainant's Ex. 10).

For the aforementioned reasons, Respondents are found to have violated 40 C.F.R. § 61.150(d) by failing to maintain waste shipment records for all asbestos-containing waste material transported off the Hudson facility site. Respondents' partial compliance in maintaining some waste shipment records will be considered in addressing the appropriate penalty for Count IX.

10. Count X

Count X of the Complaint charges that Respondents violated 40 C.F.R. § 61.145(c)(8) by failing to have a foreman or authorized representative, trained in the provisions of the asbestos NESHAP and with means of complying with the asbestos NESHAP available on-site during the stripping, removing, handling or disturbing of RACM, or to have the training information posted at the demolition and/or renovation site. In the Post-Hearing Brief, Respondents admit that "EPA is correct" and that "Mr. Kienast should have called in someone trained and certified in asbestos removal." (Respondents' Post Hearing Brief at 26). By their own admission, Respondents are found to have violated the asbestos NESHAP at 40 C.F.R. § 61.145(c)(8).

11. Count XI

Count XI of the Complaint charges that Respondents violated Section 114 of the Clean Air Act, 42 U.S.C. § 7414, by failing to provide accurate information about the demolition activities at the site, in response to the Section 114 request for information. Section 114 of the Act, 42 U.S.C. § 7414(a) provides the Administrator, or authorized representative, with authority to require members of the regulated community to allow their facilities to be inspected, and to compel the production of information and documents relevant to determining if violations of Section 112 of the Act, 42 U.S.C. § 7412(a), have occurred.

On September 29, 1999, EPA issued a Section 114 Request for Information to Respondents requesting specific information about the Respondents' activities at the Hudson facility, including inspection, work practices and disposal. The response was due on or before November 26, 1999. (Complainant's Ex. 7; Finding of Fact 34). By letter dated December 1, 1999, Respondents provided some documents and information concerning the demolition at the Hudson facility but did not provide most of the information required by Section 114 requests 2,

5, 6, 8, 9, 11, 12, 13, 14, 15, and 16. In lieu of a paragraph by paragraph response to the numbered requests for information, Kienast's cover letter contained the following one paragraph response: "We sent in a copy of our recipts [sic] in Oct of 99 We hired a asbestos contractor to remove it from site invoices paid I called the office at Green Bay & they said we could haul the asbestos to a licened [sic] land fill at Glacer Ridge, it was wett [sic] down as we were instructe [sic] In closed are a copy of our records. The building was condemed [sic] in 1995." Copies of Respondents' records followed this brief cover letter. (Complainant's Ex. 8; Finding of Fact 35).

On January 31, 2000, EPA issued a follow-up letter advising Respondents of the deficiencies in the December 1, 1999 response and reiterating the Section 114 Request for Information. (Complainant's Ex. 9; Finding of Fact 36). By letter dated February 11, 2000, Respondents provided additional information requested by the Section 114 request. (Complainant's Ex. 10). Respondents' supplemental response did contain a paragraph by paragraph response to the numbered requests for information; however, these responses were skimpy and still incomplete. (Id.) Respondents' second response to the Section 114 request failed to provide complete and accurate information about Respondents' activities at the Hudson facility, including, but not limited to, the start and end dates of the demolition activities, the amount of and types of asbestos on the site, demolition techniques, the dates of removal of the oven and the disposition of the oven and asbestos-containing material, the dates of removal of the roofing material, the transportation of wastes, the disposition of the wastes relating to the roofing materials, and the names and identifying information concerning those involved in asbestos removal, demolition disposal and transport activities. During the hearing, Jeffrey Gahris, Air Management Specialist, EPA, Region V, confirmed the issuance of a Section 114 request for information, and Respondents failure to provide the requested information. (See November 5, Tr. 252-258).

While Respondents did provide partial responses to the Section 114 request for information, both the December 1, 1999 response and the February 11, 2000 response fall short of full compliance. Thus, Respondents are found to have violated Section 114 of the Clean Air Act, 42 U.S.C. § 7414, by failing to provide accurate information about the demolition activities at the site, in response to the Section 114 request for information. Respondents' partial compliance will be considered in addressing the appropriate penalty for Count XI.

D. Civil Penalty

The assessment of a civil administrative penalty for violations of the asbestos NESHAP regulations at 40 C.F.R. Part 61, Subpart M and Section 112 of the Clean Air Act ("CAA" or "Act") is governed by Section 113(d)(1) of the Act. Section 113(d)(1) of the Clean Air Act authorizes the assessment of civil administrative penalties of up to $25,000 per day of violation. 42 U.S.C. § 7413(d)(1). Section 113(e) of the Act sets forth various criteria that the EPA and the ALJ must consider in determining the appropriate amount of the civil administrative penalty for violations of the Act. Section 113(e), in pertinent part, provides that:

> [T]he Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) 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 (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C. § 7413(e)(1).

In addition to considering the statutory penalty criteria, the ALJ must also consider any applicable EPA penalty policy. Section 22.27(b) of the Rules of Practice, 40 C.F.R. § 22.27(b) provides as follows:

> If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

40 C.F.R. § 22.27(b).

The EPA has developed guidelines that provide a method whereby an appropriate penalty can be calculated in accordance with the provisions of the Clean Air Act. These guidelines collectively are entitled the Clean Air Act Stationary Source Civil Penalty Policy and Appendices ("Penalty Policy"). (Complainant's Ex. 26). The Penalty Policy can be characterized as being composed of two major parts: 1) the general penalty policy contained in the Clean Air Act Stationary Source Civil Penalty Policy (October 25, 1991) ("General Penalty Policy"), which is applicable to civil administrative penalties assessed under Section 113(d) of the Act, and 2) the appendices which consist of guidelines applicable to specific hazardous air pollutants regulated by the CAA.

The General Penalty Policy states that it seeks to promote two primary goals, 1) deterrence, and 2) fair and equitable penalties. (General Penalty Policy at 3). The goal of deterrence is sought through a penalty that removes the economic benefit of noncompliance and reflects the gravity of the violation. The goal of fair and equitable penalties is sought through the application of adjustment factors. (Id.)

According to the General Penalty Policy, a penalty should be calculated by first determining a "preliminary deterrence amount" by assessing the "economic benefit of noncompliance component" and the "gravity component." (Id. at 4). The factors indicating the seriousness of the violation set forth in section 113(e) of the Act are reflected in the gravity component. (Id. at 8). Under limited circumstances, adjustments to either component may be justified. (Id. at 4). Mitigation of the economic benefit component can be made when the economic benefit component involves an insignificant amount, there are compelling public concerns, or there is concurrent administrative action under Section 120 of the Act, 42 U.S.C. § 7420. (Id. at 3). The adjustment factors applicable to the gravity component are: the degree of willfulness or negligence, the degree of cooperation, history of noncompliance, and environmental damage. (Id. at 15-19). As a result, the gravity component can be increased or decreased. After the economic benefit and gravity components are combined to yield the preliminary deterrence amount, additional adjustments may be made based on factors such as the violator's ability to pay and the payment of penalties previously assessed for the same violation. (Id. at 19-24).

Certain types of violations are more appropriately addressed in separate guidance, which are included as appendices to the General Penalty Policy. Appendix III of the Penalty Policy, the asbestos Demolition and Renovation Civil Penalty Policy (May 5, 1992) ("Asbestos Penalty Policy") specifies how the gravity component and/or economic benefit components are calculated for asbestos NESHAP standard demolition and renovation violations. (Complainant's Ex. 26). The General Policy governs the adjustment, aggravation, or mitigation of penalties calculated under any of the appendices. (General Penalty Policy at 3).

At this point, it is emphasized that under the Administrative Procedure Act, 5 U.S.C. §§ 551 to 559, which governs these proceedings, a penalty policy, such as the general Penalty Policy or Asbestos Penalty Policy, is not unquestioningly applied as if the policy were a rule with "binding effect." Employers Insurance of Wausau and Group Eight Technology, Inc., TSCA Appeal No. 95-6, 6 E.A.D. 735, 755-762 (EAB, February 11, 1997). However, pursuant to Section 22.27(b), which also govern these proceedings, the ALJ is required to consider civil penalty guidelines issued under the Act, such as the Penalty Policy, and to state specific reasons for deviating from the amount of the penalty recommended to be assessed in the Complaint. The ALJ "has the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant." In re DIC Americas, Inc., TSCA Appeal No. 94-2, 6 E.A.D. 184, 189 (EAB, September 27, 1995).

After considering the penalty assessment criteria in Section 113(e) of the Clean Air Act and EPA's Asbestos Penalty Policy, the undersigned will assess a civil administrative penalty of $35,000. The total penalty of $35,000 is determined as follows: ($3,000 for Count I; $2,000 for Count III; $6,000 for Count V; $6,000 for Count VI; $6,000 for Count VII; $4,000 for Count VIII; $1,000 for Count IX; $6,000 for Count X; and $1,000 for Count XI). These penalties are appropriate under the particular facts and circumstances of this case. Pursuant to "other factors as justice may require" under Section 113(e) of the Clean Air Act, the EPA's suggested civil administrative penalty of $113,600 has been reduced to $35,000 to account for the size of

Respondents' business, the perceived economic impact of the penalty on the business and Respondents' good faith efforts to comply with the requirements of the asbestos NESHAP. See CAA § 113(e)(1); 42 U.S.C. § 7413(e)(1).

IV. CONCLUSIONS OF LAW

1. Respondents, L.G. Kienast Utility Construction and Lu Vern G. Kienast, are each a "person" as that term is defined by § 302(e) of the Act, 42 U.S.C. § 7602(e).

2. Respondents are each an "owner or operator of a demolition or renovation activity" as defined at 40 C.F.R. § 61.141.

3. The Hudson facility is a "facility" as defined at 40 C.F.R. § 61.141.

4. At all times relevant to the complaint, the Hudson facility contained regulated asbestos containing material ("RACM") of at least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components, or at least 1 cubic meter (35 cubic feet) off facility components as described in 40 C.F.R. § 61.145(a)(1)(i) and (ii).

5. The Hudson facility contained Category I nonfriable asbestos-containing material ("ACM") as defined at 40 C.F.R. § 61.141.

6. The Hudson facility contained Category I nonfriable ACM that became friable as defined at 40 C.F.R. § 61.141.

7. Respondents were subject to the notification and work practice requirements of the asbestos NESHAP renovation and demolition standards set forth at 40 C.F.R. § 61.145(b) and (c).

8. Respondents were required to thoroughly inspect the Hudson facility prior to the commencement of the demolition or renovation, to determine which requirements of 40 C.F.R. § 61.145(a), (b) and (c) were applicable, and to determine whether asbestos was present.

9. Respondents "demolished" the Hudson facility, as defined at 40 C.F.R. § 61.141.

10. Respondents failed to thoroughly inspect the Hudson facility for the presence of asbestos prior to commencing demolition or renovation as required by 40 C.F.R. § 61.145(a).

11. The demolition notice submitted by Respondents (postmarked on September 2, 1998) did not include, among other things: the correct address of the facility; a description of the facility, including the size, age, and present and prior use of the facility; the procedure

used to detect the presence of RACM and nonfriable ACM; an estimate of the amount of RACM to be removed, and an estimate of the amount of nonfriable asbestos which is not to be removed; scheduled starting and completion dates for asbestos removal; the final date of demolition; a description of the planned demolition work to be performed; a description of the work practices an engineering controls to be used to comply with the asbestos NESHAP; a complete description of the demolition order; and, procedures to follow if RACM is encountered during the activity. Respondents' failure to provide a notice which accurately provided the information constitutes a violation of 40 C.F.R. § 61.145(b) and Section 112 of the Act, 42 U.S.C. § 7412.

12. Respondents failed to remove all RACM prior to the commencement of demolition activity as required by 40 C.F.R. § 61.145(b) and Section 112 of the Act, 42 U.S.C. § 7412.

13. Prior to October 1, 1998, and after October 12, 1998, Respondents did not wet the RACM while removing asbestos-containing materials or demolishing the facility. Respondents' failure to adequately wet the RACM at the facility during asbestos removal or demolition activities and to ensure that it remains wet until collected and contained or treated in preparation for disposal according to § 61.150 constitutes a violation of 40 C.F.R. § 61.145(c)(6)(i) and Section 112 of the Act, 42 U.S.C. § 7412.

14. Respondents failed to adequately wet all RACM exposed during cutting or disjoining operations and damaging or disturbing asbestos during the removal of the oven(s) from the Hudson facility as required by 40 C.F.R. § 61.145(c)(2) and Section 112 of the Act, 42 U.S.C. § 7412.

15. Respondents failed to properly dispose of asbestos-containing waste material obtained from the facility as required by 40 C.F.R. § 61.150(b) and Section 112 of the Act, 42 U.S.C. § 7412.

16. Respondents failed to maintain specified waste shipment records for all asbestos-containing waste material transported off the Hudson facility site as required by 40 C.F.R. § 61.150(d) and Section 112 of the Act, 42 U.S.C. § 7412.

17. Respondents failed to have a foreman or authorized representative, trained in the provisions of the asbestos NESHAP and with means of complying with the asbestos NESHAP available on-site during the stripping, removing, handling or disturbing of RACM, or to have the training information posted at the demolition and/or renovation site as required by 40 C.F.R. § 61.145(c)(8) and Section 112 of the Act, 42 U.S.C. § 7412.

18. Respondents failed to provide accurate information about the demolition activities at the site, including, but not limited to, the start and end dates of the demolition activities, the amount of asbestos on the site, demolition techniques, the dates of removal of the oven[s]

and the disposition of the oven[s], the dates of removal of the roofing material, and the transportation of wastes, the disposition of the wastes relating to the roofing materials, the names and identifying information concerning those involved in asbestos removal and demolition activities, in response to the Section 114 Request for Information, as required by Section 114 of the Act, 42 U.S.C. § 7414, and Section 112 of the Act, 42 U.S.C. § 7412.

19. The gravity based penalty of $35,000 for Respondents' violations of Section 113 of the Clean Air Act and 40 C.F.R. Part 61, Subpart M is authorized, and the amount of the penalty is in accordance with the statutory penalty criteria in Section 113(e)(1) of the Act. 42 U.S.C. § 7413(e)(1). The total penalty of $35,000 ($3,000 for Count I, $2,000 for Count III, $6,000 for Count V, $6,000 for Count VI, $6,000 for Count VII, $4,000 for Count VIII, $1,000 for Count IX, $6,000 for Count X, and $1,000 for Count XI) is appropriate under the particular facts and circumstances of this case. See CAA § 113(e)(1); 42 U.S.C. § 7413(e)(1).

20. The total penalty of $35,000 will deter Respondents, as well as other persons, from future violations of Section 113 of the Clean Air Act and 40 C.F.R. Part 61, Subpart M.

ORDER

As discussed above, Respondent is found liable for counts I, III, and V - XI of the Complaint. Based on the foregoing discussion, the undersigned assesses a total penalty of $35,000.

_____
Stephen J. McGuire
United States Administrative Law Judge

So Ordered.

August 7, 2003
Washington, D.C.

Pursuant to 40 C.F.R. § 22.27(c), this **Initial Decision** shall become a final order 45 days after its service upon the parties, unless a party moves to **reopen the hearing** under 40 C.F.R. § 22.28, an **appeal** is taken to the Environmental Appeals Board within 30 days of service of this **Initial Decision** pursuant to 40 C.F.R. § 22.30(a), or the Board elects to review this **Initial Decision**, *sua sponte*, as provided by 40 C.F.R. § 22.30(b).

Unless this hearing is reopened and timely appeal of this **Initial Decision** is taken, or the Board chooses to review this **Initial Decision** on its own initiative, **payment** of the full amount of this civil penalty shall be made **within 30 days** after the effective date of the final order. Payment shall be made by sending a cashier's check or certified check in the amount of **$35,000**, payable to the Treasurer, United States of America, and mailed to:

Sonja Brooks-Woodard
Regional Hearing Clerk
U.S. EPA
77 West Jackson Boulevard, E-19J
Chicago, Illinois 60604-3590

A transmittal letter identifying the subject case and docket number (CAA-5-2001-007), as well as Respondent's name and address, must accompany the check. Respondent shall serve copies of the check on the Regional Hearing Clerk and on Complainant. Respondent may be assessed interest on the civil penalty if it fails to pay the penalty within the prescribed period.