UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
HOUSING AUTHORITY OF THE	)	**DOCKET No. CAA-03-2003-0211**
CITY OF MOUNDSVILLE, *ET AL.*	)	
	)	
Respondent.	)	

ORDER

This case was initiated by the filing of an Administrative Complaint on June 5, 2003. Three Respondents are named in the Complaint: the Housing Authority of the City of Moundsville (MHA), Earl P. Huffner (Huffner), and Carpeting Unlimited, Inc. (CU). The Complaint alleges violations of section 112 of the Clean Air Act, as amended (42 U.S.C. § 7412), and of Federal regulations promulgated thereunder, specifically the National Emission Standard for Asbestos (Asbestos NESHAP), 40 C.F.R. Subpart M, arising out of the Respondents' removal of floor tiles containing asbestos in residential buildings in Moundsville, West Virginia. The buildings are known as the Dorsey Street/Burly Court apartment complex. Respondent MHA is alleged as the owner of the complex, Huffner is alleged to be the general contractor on the tile removal project, and CU, is alleged to be the subcontractor.

On June 16, 2003, CU filed its Answer to the Complaint. Subsequently, on August 4, 2003, MHA filed its Answer. To date, Huffner has not filed an Answer, but there is an informal indication in the record that the Complainant has settled its claim against Huffner.[1]

Along with its Answer, on August 4, 2003, Respondent MHA also filed a Motion wherein it seeks to implead The Browne Group, Inc. (Browne) as a party respondent to the Complaint filed in this matter. In support thereof, MHA states that by contract dated October 6, 2000, it hired Browne to provide architectural services in connection with, *inter alia*, the floor tile replacement project at the Dorsey Street/Burly Court apartment complex. Further, MHA alleges that as part of that contract Browne was obliged to inspect the site for the presence of asbestos prior to the commencement of the renovation to determine which requirements of the Asbestos NESHAP apply, and advise MHA and Huffner as to the applicable requirements of the

[1] **Within 10 days of this Order, Complainant shall submit a definitive statement as to whether it is currently pursuing any claims in this matter against Respondent Huffner.**

Asbestos NESHAP. MHA asserts that Browne failed to inspect, notify, or advise it in regard to the Federal asbestos regulations, in violation of its contract and, therefore, Browne should be required to contribute to any penalty assessed in this action against MHA for violating such regulations.

The Certificate of Service attached to the Motion indicates that MHA served a copy of the Motion on Brown as well as Respondents Huffner and CU. The record reflects that, to date, no response to the Motion has been received from anyone.[2]

The Consolidated Rules of Practice which govern this proceeding do not address the subject of impleading. In the absence of administrative rules on a subject, the Environmental Appeals Board ("EAB") has suggested looking for guidance by consulting the Federal Rules of Civil Procedure ("FRCP") as they apply in analogous situations. *Carroll Oil Co.*, RCRA (9006) Appeal No. 01-02, slip op. at 19, 10 E.A.D. ___ (EAB, July 31, 2002); *Asbestos Specialists, Inc.*, , 4 E.A.D. 819, 827 n. 20 (EAB 1993); *Wego Chemical & Mineral Corp.*, 4 E.A.D. 513, 524 n.10 (EAB 1993).

FRCP 14(a) provides as follows, in pertinent part:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff.

"The primary purpose of any procedure authorizing the impleader of third parties is to promote judicial efficiency by eliminating 'circuity of action.' The objective of Rule 14 is to avoid the situation that arises when a defendant has been held liable to plaintiff and then finds it necessary to bring a separate action against a third individual who may be liable to defendant for all or part of plaintiff's original claim. When the rights of all three parties center upon a common factual setting, economies of time and expense can be achieved by combining the suits into one action. Doing so eliminates duplication in the presentation of evidence and increases the likelihood that consistent results will be reached when multiple claims turn upon identical or similar proof. Additionally, the third party practice procedure is advantageous in that a potentially damaging time lag between a judgment against a defendant in one action and a judgment in his favor against the party ultimately liable in a subsequent action will be avoided. . . . Because Rule 14 is designed to reduce multiplicity of litigation and therefore is remedial in character, it should be liberally construed." 6 Charles A. Wright, Arthur R. Miller, and Mary K. Kane, <u>Federal Practice & Procedure: Civil 2d</u> § 1442 (2d ed. 1990)(footnotes omitted).

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[2] Although no response was received to the Motion, ruling on the Motion was stayed while some of the parties named initially in this action participated in alternative dispute resolution.

However, "the rule does not create any new right of action or authorize the use of impleader for practices that violate the limits of federal jurisdiction or infringe upon rights recognized under the governing substantive law." *Id.*; *In re Townley*, No. CS-01-0211-JLQ, 2002 U.S. Dist LEXIS 26497 (E.D. Wash. 2002).

The right of action at issue, *i.e.*, the authority for filing the Complaint, is provided by Section 113(a)(3) and (d) of the CAA, which state as follows, in pertinent part:

> (a)
> * * *
> (3) . . . whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of this subchapter . . . including . . . a requirement or prohibition of any rule . . . promulgated . . . under those provisions or subchapters, . . . the Administrator may –
> (A) issue an administrative penalty order in accordance with section (d) of this section . . .
> * * *
> (d)
> * * *
> (1) The Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to $25,000, per day of violation, whenever, on the basis of any available information, the Administrator finds that such person –
> * * *
> (B) has violated or is violating any other requirement or prohibition of this subchapter . . . including . . . a requirement or prohibition of any rule . . . promulgated . . . under this chapter
> * * * *
> (2)(A) An administrative penalty assessed under paragraph (1) shall be assessed by the Administrator by an order made after opportunity for a hearing in the record . . . . Before issuing such an order, the Administrator shall give written notice to the person to be assessed an administrative penalty of the Administrator's proposal to issue such an order and provide such person an opportunity to request such a hearing on the order . . . .

The statute thus authorizes the Administrator of EPA to assess a penalty order against a person only after the Administrator gives written notice to the person of the proposal to issue the order -- that is, after the Administrator issues a complaint. The Administrator has delegated the duty to issue such complaints under the CAA to, *inter alia,* the Complainant, Division Director of the Waste and Chemicals Management Division of EPA Region 3. Neither the Presiding Judge nor Respondent MHA has authority to issue a complaint under the CAA.

In its Motion, Respondent MHA requests that Browne be required to answer the Complaint and to contribute to any civil penalty assessed, *on the basis of the contract* between MHA and Browne. "Service of process is important in impleader cases because impleader joins

a new party to the case, and that erstwhile nonparty must be brought before the jurisdiction of the court. . . . The court exercises personal jurisdiction over the third-party defendant through service of process." *In re Townley, supra* (citing 3 Moore's Federal Practice § 14.22 (3d ed. 2000)). No complaint has been filed by the Administrator, or his delegate, against Browne. Without such a complaint, there is no authority in the CAA to issue an order assessing a penalty against a person on the basis of a contract with another person who has been found by the Administrator to have violated a regulatory requirement. There is also no authority in the CAA to order a person to contribute to any civil penalty assessed against another person, unless a complaint was issued under the CAA against both persons.

There is also no authority for this proceeding to encompass the filing by Respondent MHA, as a third-party plaintiff, of any summons and complaint against Browne. The Presiding Judge is authorized to conduct administrative hearings under certain statutes and rules, including the CAA and Consolidated Rules of Practice, under which this proceeding was initiated. *See*, 40 C.F.R. § 22.4(c)(1). Neither the authority in the CAA § 113(a)(3) and (d), nor the Consolidated Rules, encompass a cause of action based on a contract. Moreover, such a cause of action, impleading Browne, would infringe upon rights recognized under the governing statute (the CAA), which, as noted above, FRCP 14(a) cannot do.

It is concluded that the undersigned has no authority to require Browne to answer the Complaint or to contribute to any civil penalty assessed. Accordingly, Respondent MHA's Motion to implead The Browne Group, Inc., is hereby **DENIED**.

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Susan L. Biro
Chief Administrative Law Judge

Date: January 5, 2004
Washington, D.C.