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2 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY 2011 SEP 29 PM 2:0
3 REGION IX
4 75 HAWTHORNE STREET
5 SAN FRANCISCO, CA 94105 REGIONAL TRAINING CENTER

6 IN THE MATTER OF:) Docket No. CAA-09-2011-0005
7)
8 J.A. SUTHERLAND, INC. and) COMPLAINT AND NOTICE OF
9 WALBERG, INC.,) OPPORTUNITY FOR HEARING
10 Respondents.)

11 PRELIMINARY STATEMENT

12 Complainant, the Director of the Air Division, United
13 States Environmental Protection Agency ("EPA"), Region 9,
14 issues this Complaint and Notice of Opportunity for Hearing
15 ("Complaint") against Respondents, J.A. Sutherland Inc.
16 ("Sutherland") and Walberg, Inc. ("Walberg") pursuant to
17 Section 113(d) of the Clean Air Act ("CAA" or the "Act"), as
18 amended, 42 U.S.C. § 7413(d).

19 The Administrator of EPA ("Administrator") delegated the
20 authority to issue civil administrative complaints such as this
21 one in California to the Regional Administrator of Region 9 and
22 the Regional Administrator, in turn, re-delegated the authority
23 to issue such complaints to Complainant, the Director of the
24 Air Division.

25 Pursuant to Sections 112 and 114 of the Act, 42 U.S.C. §§
26 7412 and 7414, the Administrator promulgated regulations that
27 govern the emission, handling, and disposal of asbestos and
28 associated record-keeping and notification requirements. These

1 regulations are known as the National Emission Standards for
2 Hazardous Air Pollutants ("NESHAP") for asbestos. The NESHAP
3 regulations for asbestos are found at 40 C.F.R. Part 61,
4 Subpart M. Complainant will show that Respondents violated the
5 CAA by violating the asbestos NESHAP at 40 C.F.R. Part 61,
6 Subpart M, a copy of which is enclosed with this Complaint.

7 GENERAL ALLEGATIONS

8 1. Respondents are each a "person" doing business in the
9 State of California, as that term is defined in Section 302(e)
10 of the Act, 42 U.S.C. § 7602(e).

11 2. At all times relevant to this Complaint, Respondent
12 Sutherland was the owner of a structure located at 1301 West
13 Wood Street in Willows, California, in which it operated a Taco
14 Bell fast-food restaurant (the "Building").

15 3. The Building constitutes a "facility," as defined at
16 40 C.F.R. §61.141.

17 4. Respondent Sutherland hired Respondent Walberg to
18 demolish the Building.

19 5. In or around June 9-10, 2011, Respondent Walberg
20 began and completed "demolition" of the Building, as that term
21 is defined at 40 C.F.R. § 61.141.

22 6. On or about June 10, 2011, an inspector from the
23 California Air Resources Board conducted an inspection at 1301
24 West Wood Street in Willows, California and found that the
25 Building had been demolished.

26 7. Respondents are each "an owner or operator of a
27
28

1 "demolition activity" as defined at 40 C.F.R. §61.141.

2
3 COUNT I: FAILURE TO PROVIDE EPA WITH WRITTEN NOTICE OF
4 INTENTION TO DEMOLISH, 40 C.F.R. § 61.145(b)(1).

5 8. Paragraphs 1 through 7 are realleged and incorporated
6 herein by reference.

7 9. An owner or operator of a demolition activity must
8 provide EPA with a written notice of intention to demolish at
9 least ten working days before demolition begins. 40 C.F.R. §
10 61.145(b)(1).

11 10. Respondents did not submit a written notice of their
12 intention to demolish the Building to EPA before demolition
13 began.

14 11. Respondents' failure to provide written notice of
15 intention to demolish the Building to EPA before demolition
16 began constitutes a violation of 40 C.F.R. § 61.145(b)(1).

17 PROPOSED CIVIL PENALTY

18 Section 113(d) of the Act, 42 U.S.C. § 7413(d), authorizes
19 a civil administrative penalty of up to Twenty-Five Thousand
20 Dollars (\$25,000) per day for each violation of the Act,
21 provided that the total amount of penalty assessed does not
22 exceed Two Hundred Thousand Dollars (\$200,000). These maximum
23 penalty amounts have been adjusted to \$37,500 per day not to
24 exceed a total penalty of \$295,000 for violations occurring
25 after January 12, 2009 pursuant to the Civil Monetary Penalty
26 Inflation Adjustment Rule at 40 C.F.R. Part 19, which

1 implements the Federal Civil Penalties Inflation Adjustment Act
2 of 1990, 28 U.S.C. § 2461. In this case, EPA proposes the
3 assessment of a civil penalty in the amount of FOURTEEN
4 THOUSAND, TWO HUNDRED DOLLARS (\$14,200) against Respondents.

5 This civil penalty is proposed after consideration of the
6 statutory assessment factors set forth at Section 113(e) of the
7 Act, 42 U.S.C. § 7413(e), and in accordance with EPA's "Clean
8 Air Act Stationary Source Civil Penalty Policy" ("Penalty
9 Policy") dated October 25, 1991 and Appendix III of the Penalty
10 Policy ("Appendix III"), the "Asbestos Demolition and
11 Renovation Civil Penalty Policy" dated May 5, 1992. Copies of
12 the Penalty Policy and Appendix III are enclosed with this
13 Complaint. This section explains the rationale behind the
14 penalty assessed for Count I and the various penalty factors
15 and adjustments that were used in the calculation of the total
16 penalty amount.

17 The civil penalty has two components: economic benefit and
18 gravity. The economic benefit is based on the value that the
19 alleged violator realized from delaying or failing to comply
20 with the law. In this action, the economic benefit is \$0, as
21 calculated under Appendix III of the Penalty Policy. The
22 second component of the civil penalty is valuing the gravity of
23 the alleged violation. The gravity component of the civil
24 penalty addresses the gravity of each violation and assesses a
25 penalty based on the size of the violator. Count I alleges
26 that Respondents violated 40 C.F.R. § 61.145(b)(1) by failing
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28

1 to provide EPA written notice of intention to demolish before
2 demolition began. The penalty assessed for this violation, as
3 calculated under Appendix III of the Penalty Policy, is \$5,000.
4 In addition, in accordance with Section 113(e) of the Act, the
5 Penalty Policy requires the assessment of an additional penalty
6 based on the "size of the violator" as a deterrent to future
7 violations. The Penalty Policy assigns a penalty amount based
8 on the net worth of the Respondents. However, if "size of
9 violator" penalty provided in the Penalty Policy exceeds the
10 sum of the economic benefit and gravity components, as in this
11 case, assessment for the "size of violator" penalty will equal
12 the sum of the economic benefit and gravity components.
13 Consequently, the "size of violator" penalty in this case is
14 \$5,000. Combining the penalty assessed for Count I and the
15 penalty assessed for the size of violator results in a penalty
16 of \$10,000 assessed for gravity. In accordance with the Civil
17 Monetary Penalty Inflation Adjustment Rule at 40 C.F.R. Part
18 19, this gravity penalty amount is adjusted by 41.63%,
19 resulting in a penalty of \$14,163. Since there is no economic
20 benefit calculated in this case, the total civil penalty
21 against Respondents is \$14,163, which is rounded to the nearest
22 hundred for a total penalty of \$14,200.

23 **NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

24 As provided in Section 113(d) of the Act, 42 U.S.C. §
25 7213(d), you have the right to request a formal hearing to
26 contest any material fact set forth in this Complaint or to
27

1 contest the appropriateness of the proposed penalty. Any
2 hearing requested will be conducted in accordance with the
3 Administrative Procedure Act, 5 U.S.C. § 551 et seq., and the
4 Consolidated Rules of Practice Governing the Administrative
5 Assessment of Civil Penalties and the Revocation/Termination or
6 Suspension of Permits ("Consolidated Rules of Practice"), 40
7 C.F.R. Part 22. A copy of the Consolidated Rules of Practice
8 is enclosed with this Complaint.

9 You must file a written Answer within thirty (30) days of
10 receiving this Complaint to avoid being found in default, which
11 constitutes an admission of all facts alleged in the Complaint
12 and a waiver of the right to a hearing, and to avoid having the
13 above penalty assessed without further proceedings. If you
14 choose to file an Answer, you are required by the Consolidated
15 Rules of Practice to clearly and directly admit, deny, or
16 explain each of the factual allegations contained in this
17 Complaint to which you have any knowledge. If you have no
18 knowledge of a particular fact and so state, the allegation is
19 considered denied. Failure to deny any of the allegations in
20 this Complaint will constitute an admission of the undenied
21 allegation.

22 The Answer shall also state the circumstances and
23 arguments, if any, which are alleged to constitute the grounds
24 of defense, and shall specifically request an administrative
25 hearing, if desired. If you deny any material fact or raise
26 any affirmative defense, you will be considered to have

1 requested a hearing.

2 The Answer must be filed with:

3 Regional Hearing Clerk
4 USEPA, Region IX
5 75 Hawthorne Street
6 San Francisco, CA 94105

7 In addition, please send a copy of the Answer and all other
8 documents that you file in this action to:

9 Carol Bussey
10 Assistant Regional Counsel
11 Office of Regional Counsel (ORC-2)
12 USEPA, Region IX
13 75 Hawthorne Street
14 San Francisco, CA 94105

15 Ms. Bussey is the attorney assigned to represent EPA in this
16 matter. Her telephone number is (415)972-3950.

17 You are further informed that the Consolidated Rules of
18 Practice prohibit any ex parte (unilateral) discussion of the
19 merits of any action with the Regional Administrator, Regional
20 Judicial Officer, Administrative Law Judge, or any person
21 likely to advise these officials in the decision of the case,
22 after the Complaint is issued.

23 **INFORMAL SETTLEMENT CONFERENCE**

24 EPA encourages all parties against whom a civil penalty is
25 proposed to pursue the possibility of settlement through
26 informal conferences. Therefore, whether or not you request a
27 hearing, you may confer informally with EPA through Carol
28 Bussey, the EPA attorney assigned to this case, regarding the
29 facts of this case, the amount of the proposed penalty, and the
30 possibility of settlement. **An informal settlement conference**

1 does not, however, affect your obligation to file an Answer to
2 this Complaint.

3 ALTERNATIVE DISPUTE RESOLUTION

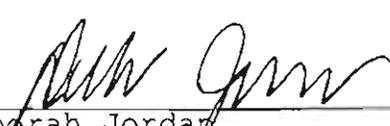
4 The parties also may engage in any process within the
5 scope of the Alternative Dispute Resolution Act, 5 U.S.C. § 581
6 et seq., which may facilitate voluntary settlement efforts.

7 Dispute resolution using alternative means of dispute
8 resolution does not divest the Presiding Officer of
9 jurisdiction nor does it automatically stay the proceeding.

10 CONSENT AGREEMENT AND FINAL ORDER

11 EPA has the authority, where appropriate, to modify the
12 amount of the proposed penalty to reflect any settlement
13 reached with you in an informal conference or through
14 alternative dispute resolution. The terms of such an agreement
15 would be embodied in a Consent Agreement and Final Order. A
16 Consent Agreement signed by both parties would be binding as to
17 all terms and conditions specified therein when the Regional
18 Judicial Officer signs the Final Order.

19
20 DATE: 9/28/11



Deborah Jordan
Director, Air Division
U.S. EPA, Region 9

CERTIFICATE OF SERVICE

I certify that the original and a copy of the foregoing Complaint and Opportunity for Hearing was hand delivered to:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

and that a true and correct copy of the Complaint; the asbestos NESHAP, 40 C.F.R. Part 61, Subpart M; the Consolidated Rules of Practice, 40 C.F.R. Part 22; and the Clean Air Act Stationary Source Civil Penalty Policy (including Appendix III) were placed in the United States Mail, certified mail, return receipt requested, addressed to the following:

Raymond B. Walberg
President
Walberg, Inc.
2791 Highway 99 W.
Corning, CA 96021
Certified Mail No. 7010 3090 0001 2472 7685

Steve O'Donnell
Principal
J. A. Sutherland, Inc.
1201 B. State Street
Ukiah, CA 95482
Certified Mail No. 7007 1490 0000 4710 0372

Steven B. McCarthy, Esq.
McCarthy & Rubright, LLP
100 Rio Street
P. O. Box 190
Red Bluff, CA 96080-0190
Certified Mail No. 7001 2510 0003 5943 6882

Dated: SEP 28 2011

By: 
Robert Trotter
Air Enforcement Office
USEPA Region 9.