

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of

Coleman Trucking, Inc.,

Docket No. 5-CAA-96-005

Respondent

ORDER DENYING MOTION TO STAY
ADMINISTRATIVE PENALTY PROCEEDING

This is a civil administrative action instituted by the U.S. Environmental Protection Agency ("EPA") against Coleman Trucking, Inc. ("Coleman"), pursuant to Section 113(d)(1) of the Clean Air Act, 42 U.S.C. § 7413(d)(1). EPA seeks a total civil penalty of \$50,000 against Coleman for two alleged violations of the asbestos NESHAP work practice requirements. Count I of EPA's complaint charges a violation of 40 C.F.R. § 61.145(c)(3) for failure by Coleman, on or before June 1, 1995, "to adequately wet, dry RACM [regulated asbestos-containing material] when it was being stripped from the facility components." Count II of the administrative complaint charges a violation of 40 C.F.R. § 61.145(c)(6)(i) for failure by Coleman, on or before June 1, 1995, "to adequately wet friable, dry RACM that had been removed to insure that it remained wet until collected for disposal."

Coleman timely filed an answer to the EPA complaint, followed by an amended answer. In the amended answer, Coleman renewed several affirmative defenses resting upon a Consent Decree entered on July 28, 1995, by the United States District Court for the Northern District of Ohio.¹ By way of the affirmative defenses Coleman essentially argued that the Consent Decree resolves the present administrative matter involving the two alleged NESHAP violations occurring on or before June 1, 1995, by placing those alleged violations within the exclusive jurisdiction of the District Court.

Thereafter, the parties exchanged proposed exhibits and identified expected witnesses pursuant to an order of this court, and in anticipation of the

administrative hearing scheduled for February 12, 1997. ² On February 3, 1997, Coleman filed with this court a Motion to Stay Administrative Penalty Proceeding. Attached to Coleman's motion to stay was a "Motion To Compel Enforcement of Consent Decree To Enjoin Prosecution Of Proposed Order Assessing Penalties And To Determine Controversy Over Alleged Violations" which the respondent had filed with the United States District Court for the Northern District of Ohio on February 4, 1997. EPA vigorously opposes Coleman's motion to stay this administrative proceeding.

The battleground between EPA and Coleman is the Consent Decree. On the one hand, Coleman argues that the Consent Decree was intended to cover the events of June 1, 1995, as well as place exclusive jurisdiction for NESHAP violations in the District Court where the Decree was entered. On the other hand, EPA argues that the events of June 1 are not covered by the Consent Decree because they occurred prior to the District Court's entry of the Decree. EPA further argues that, in any event, the plain language of the Consent Decree shows that the Agency expressly retained its statutory authority to prosecute Coleman's NESHAP violations in a forum other than the United States District Court for the Northern District of Ohio.

A plain reading of the Consent Agreement supports EPA's authority to bring this action. Paragraph 17 of the Consent Decree reads:

Coleman shall pay stipulated penalties of \$2,500 per day per violation of any requirement of this Decree. *Nothing in this Paragraph shall preclude the United States from seeking any additional legal or equitable relief for violation of this Consent Decree, including but not limited to, injunctive relief, and civil and criminal contempt sanctions.*

Emphasis added.

Accordingly, even if the alleged violations of June 1, 1995, are covered by the Consent Decree as Coleman asserts, the plain language of the Decree makes clear that EPA retained its statutory enforcement authority to pursue the present administrative action. If, however, Coleman is wrong and the events of June 1 do not fall within the coverage of the Decree, then EPA may proceed against respondent administratively pursuant to authority provided by the Clean Air Act. 42 U.S. C. § 7401 *et seq.* Either way, EPA may proceed in this administrative action.

The parties are advised that this order is not intended as an instructional guide as to what falls in, or out, of the Consent Decree coverage. This order stands only for the proposition that given the express language of Paragraph 17 of the Consent Agreement, EPA is not precluded from bringing the present administrative action for the alleged violations occurring on or before June 1, 1995, and set forth in Counts I and II of its complaint.

ORDER

For the reasons mentioned above, Coleman Trucking, Inc.'s, Motion to Stay Administrative Penalty Proceeding is *Denied*.

Carl C. Charneski
Administrative Law Judge

Issued: February 7, 1997
Washington, D.C.

IN THE MATTER OF COLEMAN TRUCKING, INC., Respondent

Docket No. 5-CAA-96-005

Certificate of Service

I certify that the foregoing Order Denying Motion to Stay Administrative Penalty Proceeding,, dated February 7, 1997, was sent this day in the following manner to the below addressees.

Original by Regular Mail to:

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Marion Walzel
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Dated: February 7, 1997

¹ This Consent Decree was signed by the parties prior to June 1, 1995, the date of the two alleged NESHAP violations at issue in this case. The Consent Decree was lodged with the District Court, pending solicitation of public comment by the U.S. Department of Justice, on April 3, 1995. As noted above, the Consent Decree was entered by the District Court after the events of June 1, 1995.

² By separate order issued this date, the hearing in this case has been rescheduled for April 22-24, 1997.