

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF: Balkema Excavating, Inc. Kalamazoo, Michigan Respondent.) Docket No. CAA-05- '01-0016)) Proceeding to Assess a) Civil Penalty under) Section 113(d) of the) Clean Air Act,) 42 U.S.C. § 7413(d))
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Administrative Complaint

1. This is an administrative proceeding to assess a civil penalty under Section 113(d) of the Clean Air Act (the Act), 42 U.S.C. § 7413(d).

2. The Complainant is, by lawful delegation, the Director of the Air and Radiation Division, United States Environmental Protection Agency (U.S. EPA), Region 5, Chicago, Illinois.

3. The Respondent is Balkema Excavating, Inc. (Balkema), a corporation doing business in the State of Michigan.

Statutory and Regulatory Background

4. On May 6, 1980, U.S. EPA approved Michigan Air Pollution Control Commission Rule R336.1201 (Rule 201) as part of the federally enforceable state implementation plan (SIP) for Michigan. 45 Fed. Reg. 29790.

5. Michigan Rule 201 states that a person shall not install, construct, reconstruct, relocate or alter any process, which may be a source of an air contaminant, until a permit is issued by the commission. The permit shall be known as a permit to install and shall cover construction, reconstruction,

relocation, and alteration of equipment. A person planning to install, construct, reconstruct, relocate or alter any process shall apply to the commission for a permit to install and supply the required information.

6. Under Section 111 of the Act, 42 U.S.C. § 7411, the Administrator of U.S. EPA (the Administrator) promulgated the New Source Performance Standards (NSPS) for Nonmetallic Mineral Processing Plants at 40 C.F.R. Part 60, Subpart 000 (§§ 60.670 through 60.676), in addition to General Provisions at 40 C.F.R. §§ 60.1 through 60.19.

7. The NSPS for Nonmetallic Mineral Processing Plants applies to the following affected facilities, which commenced construction, reconstruction, or modification after August 31, 1983, in fixed or portable nonmetallic mineral processing plants: each crusher, grinding mill, screening operation, bucket elevator, belt conveyor, bagging operation, storage bin, enclosed truck or railcar loading station.

8. "Affected facility" under the NSPS means, with reference to a stationary source, any apparatus to which a standard is applicable. 40 C.F.R. § 60.2. An affected facility that commences construction, reconstruction or modification after August 31, 1983 is subject to the requirements of the NSPS for Nonmetallic Mineral Processing Plants. 40 C.F.R. § 60.670(e).

9. The NSPS at 40 C.F.R. § 60.7(a)(1) requires owners or operators subject to the NSPS to furnish to the Administrator written notification of the date construction of an affected facility is commenced postmarked no later than 30 days after such

date.

10. The NSPS at 40 C.F.R. § 60.7(a)(2) requires owners or operators subject to the NSPS furnish to the Administrator a written notification of the anticipated date of initial startup of an affected facility postmarked not more than 30 days prior to such date.

11. The NSPS at 40 C.F.R. § 60.7(a)(3) requires owners or operators subject to the NSPS to furnish to the Administrator a written notification of the actual date of initial startup of an affected facility postmarked within 15 days after such date.

12. The NSPS at 40 C.F.R. § 60.8(a) requires that within 60 days after achieving the maximum production rate at which the affected facility will be operated, but not more than 180 days after initial startup of the facility, the owner or operator of the facility shall conduct performance test(s) and furnish the Administrator a written report of the results of the performance test(s).

13. The Administrator may assess a civil penalty of up to \$25,000 per day of violation up to a total of \$200,000 for SIP and NSPS violations that occurred prior to January 31, 1997, under Section 113(d)(1) of the Act, 42 U.S.C. § 7413(d)(1). The Debt Collections Improvements Act of 1996 increased the statutory maximum penalty to \$27,500 per day of violation up to a total of \$220,000 for SIP and NSPS violations that occurred on or after January 31, 1997. 31 U.S.C. § 3701 and 40 C.F.R. Part 19.

14. Section 113(d)(1) limits the Administrator's authority to matters where the first alleged date of violation occurred no

more than 12 months prior to initiation of the administrative action, except where the Administrator and Attorney General of the United States jointly determine that a matter involving a longer period of violation is appropriate for an administrative penalty action.

15. The Administrator and the Attorney General of the United States, each through their respective delegates, have determined jointly that an administrative penalty action is appropriate for the period of violations alleged in this complaint.

General Allegations

16. Respondent owns and operates a nonmetallic mineral processing plant designated as the Midway Aggregates Plant, at 15600 E. Michigan Avenue, Climax, Michigan, which was constructed and began operation on approximately April 1, 1998.

17. Respondent owns and operates a nonmetallic mineral processing plant, designated as the Climax Portable Plant, at 15600 E. Michigan, Climax, Michigan, which was constructed and began operation on approximately April 1, 1998.

18. Respondent's two plants, described in paragraphs 16 and 17, above, are subject to the General Provisions of the NSPS at 40 C.F.R. § 60.1 through 19 and to the NSPS for Nonmetallic Mineral Processing Plants at 40 C.F.R. §§ 60.670 through 60.676, because each of the plants commenced construction, reconstruction or modification after August 31, 1983.

19. Respondent's two plants, described in paragraphs 16 and 17, above, are sources of air contaminants and are, therefore,

subject to the Michigan SIP permitting requirements, including Rule 201, described above.

20. Respondent is a "person" as defined at Section 302(e) of the Act, 42 U.S.C. § 7602(e) and Michigan Rule R336.1116(g).

21. Respondent is the "owner and/or operator", as defined at Section 111(a)(5) of the Act, 42 U.S.C. § 7411(a)(5).

22. On January 5, 2001, U.S. EPA sent Respondent Findings of Violation for violations of 40 C.F.R. §§ 60.7(a)(1), 60.7(a)(2), 60.7(a)(3) and 60.8(a) at Respondent's Midway Aggregates Plant and Climax Portable Plant.

23. On January 5, 2001, U.S. EPA sent Respondent Notices of Violation for violations of Michigan Rules 201 at Respondent's Midway Aggregates Plant and Climax Portable Plant.

24. On February 12, 2001, U.S. EPA met with Respondent to discuss the January 5, 2001, Findings and Notices of Violation.

Count I

25. Complainant incorporates paragraphs 1 through 24 of this complaint, as if set forth in this paragraph.

26. Respondent violated 40 C.F.R. § 60.7(a)(1) at its Midway Aggregates Plant, because it failed to provide to the Administrator written notification of the date construction was commenced no later than 30 days after such date, or by May 1, 1998. Respondent did not provide such notification until July 27, 1999.

Count II

27. Complainant incorporates paragraphs 1 through 24 of this

complaint, as if set forth in this paragraph.

28. Respondent violated 40 C.F.R. § 60.7(a)(2) at its Midway Aggregates Plant, because it failed to provide to the Administrator written notification of the anticipated date of initial date of startup of that facility no later than 30 days prior to such date, or by March 2, 1998. Respondent did not provide such notification until July 27, 1999.

Count III

29. Complainant incorporates paragraphs 1 through 24 of this complaint, as if set forth in this paragraph.

30. Respondent violated 40 C.F.R. § 60.7(a)(3) at its Midway Aggregates Plant, because it failed to provide to the Administrator written notification of the actual date of the initial startup of the facility within 15 days after such date, or by April 15, 1998. Respondent did not provide such notification until July 27, 1999.

Count IV

31. Complainant incorporates paragraphs 1 through 24 of this complaint, as if set forth in this paragraph.

32. Respondent violated 40 C.F.R. § 60.8(a) at its Midway Aggregates Plant, because it failed to conduct performance test(s) and furnish to the Administrator a written report of the results of the performance test(s) within 60 days after achieving the maximum production rate at which the facility would be operated, but not more than 180 days after initial startup of the facility, or by October 1, 1998. Respondent did not conduct the required performance tests until July 13, 14, and 21, 1999, and

did not submit the test results until July 27, 1999.

Count V

33. Complainant incorporates paragraphs 1 through 24 of this complaint, as if set forth in this paragraph.

34. Respondent violated Michigan Rule 201 at its Midway Aggregates Plant, because it failed to obtain a permit to install prior to commencing construction, or by April 1, 1998. Respondent did not obtain a permit to install for its Midway Aggregates plant until September 21, 1999.

Count VI

35. Complainant incorporates paragraphs 1 through 24 of this complaint, as if set forth in this paragraph.

36. Respondent violated 40 C.F.R. § 60.7(a)(1) at its Climax Portable Plant, because it failed to provide to the Administrator written notification of the date construction was commenced no later than 30 days after such date, or by May 1, 1998. Respondent did not provide such notification until July 27, 1999.

Count VII

37. Complainant incorporates paragraphs 1 through 24 of this complaint, as if set forth in this paragraph.

38. Respondent violated 40 C.F.R. § 60.7(a)(3) at its Climax Portable Plant, because it failed to provide to the Administrator written notification of the actual date of the initial startup of the facility within 15 days after such date, or by April 15, 1998. Respondent did not provide such notification until July 27, 1999.

Count VIII

39. Complainant incorporates paragraphs 1 through 24 of this complaint, as if set forth in this paragraph.

40. Respondent violated 40 C.F.R. § 60.8(a) at its Climax Portable Plant, because it failed to conduct performance test(s) and furnish to the Administrator a written report of the results of the performance test(s) within 60 days after achieving the maximum production rate at which the facility would be operated, but not more than 180 days after initial startup of the facility, or by October 1, 1998. Respondent did not conduct a performance test on the Climax Portable Plant until July 14, 1999, and did not submit the results of that test until July 27, 1999.

Count IX

41. Complainant incorporates paragraphs 1 through 24 of this complaint, as if set forth in this paragraph.

42. Respondent violated Michigan Rule 201 at its Climax Portable Plant, because it failed to obtain a permit to install prior to commencing construction, or by April 1, 1998. Respondent did not obtain a permit to install for its Climax Portable Plant until September 9, 1999.

Proposed Civil Penalty

43. The Administrator must consider the factors specified in Section 113(e) of the Act when assessing an administrative penalty under Section 113(d). 42 U.S.C. § 7413(e).

44. Based upon an evaluation of the facts alleged in this complaint and the factors in Section 113(e) of the Act, Complainant proposes that the Administrator assess a civil

penalty against Respondent of \$110,000. Complainant evaluated the facts and circumstances of this case with specific reference to U.S. EPA's Clean Air Act Stationary Source Penalty Policy dated October 25, 1991 (penalty policy). Enclosed with this complaint is a copy of the penalty policy.

45. Complainant developed the proposed penalty based on the best information available to Complainant at this time. Complainant may adjust the proposed penalty if the Respondent establishes bona fide issues of ability to pay or other defenses relevant to the penalty's appropriateness.

Rules Governing This Proceeding

46. The "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" (the Consolidated Rules) at 40 C.F.R. Part 22 govern this proceeding to assess a civil penalty. Enclosed with the complaint served on Respondent is a copy of the Consolidated Rules.

Filing and Service of Documents

47. Respondent must file with the Regional Hearing Clerk the original and one copy of each document Respondent intends as part of the record in this proceeding. The Regional Hearing Clerk's address is:

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

48. Respondent must serve a copy of each document filed in this proceeding on each party pursuant to Section 22.5 of the

Consolidated Rules. Complainant has authorized Susan Tennenbaum to receive any answer and subsequent legal documents that Respondent serves in this proceeding. You may telephone Susan Tennenbaum at (312) 886-0273. Ms. Tennenbaum's address is:

Susan Tennenbaum (C-14J)
Associate Regional Counsel
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Penalty Payment

49. Respondent may resolve this proceeding at any time by paying the proposed penalty by certified or cashier's check payable to "Treasurer, the United States of America", and by delivering the check to:

U.S. Environmental Protection Agency
Region 5
P.O. Box 70753
Chicago, Illinois 60673

Respondent must include the case name and docket number on the check and in the letter transmitting the check. Respondent simultaneously must send copies of the check and transmittal letter to Susan Tennenbaum and to:

Attn: Compliance Tracker, (AE-17J)
Air Enforcement and Compliance Assurance Branch
Air and Radiation Division
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Opportunity to Request a Hearing

50. The Administrator must provide an opportunity to request a hearing to any person against whom the Administrator proposes to assess a penalty under Section 113(d)(2) of the Act, 42 U.S.C. § 7413(d)(2). Respondent has the right to request a

hearing on any material fact alleged in the complaint, or on the appropriateness of the proposed penalty, or both. To request a hearing, Respondent must specifically make the request in its answer, as discussed in paragraphs 51 through 56, below.

Answer

51. Respondent must file a written answer to this complaint if Respondent contests any material fact of the complaint; contends that the proposed penalty is inappropriate; or contends that it is entitled to judgment as a matter of law. To file an answer, Respondent must file the original written answer and one copy with the Regional Hearing Clerk at the address specified in paragraph 47, above, and must serve copies of the written answer on the other parties.

52. If Respondent chooses to file a written answer to the complaint, it must do so within 30 calendar days after receiving the complaint. In counting the 30-day time period, the date of receipt is not counted, but Saturdays, Sundays, and Federal legal holidays are counted. If the 30-day time period expires on a Saturday, Sunday, or Federal legal holiday, the time period extends to the next business day.

53. Respondent's written answer must clearly and directly admit, deny, or explain each of the factual allegations in the complaint; or must state clearly that Respondent has no knowledge of a particular factual allegation. Where Respondent states that it has no knowledge of a particular factual allegation, the allegation is deemed denied.

54. Respondent's failure to admit, deny, or explain any

material factual allegation in the complaint constitutes an admission of the allegation.

55. Respondent's answer must also state:

- a. the circumstances or arguments which Respondent alleges constitute grounds of defense;
- b. the facts that Respondent disputes;
- c. the basis for opposing the proposed penalty; and
- d. whether Respondent requests a hearing as discussed in paragraph 50, above.

56. If Respondent does not file a written answer within 30 calendar days after receiving this complaint the Presiding Officer may issue a default order, after motion, under Section 22.17 of the Consolidated Rules. Default by Respondent constitutes an admission of all factual allegations in the complaint and a waiver of the right to contest the factual allegations. Respondent must pay any penalty assessed in a default order without further proceedings 30 days after the order becomes the final order of the Administrator of U.S. EPA under Section 22.27(c) of the Consolidated Rules.

Settlement Conference

57. Whether or not Respondent requests a hearing, Respondent may request an informal settlement conference to discuss the facts of this proceeding and to arrive at a settlement. To request an informal settlement conference, Respondent may contact Susan Tennenbaum at the address or phone number specified in paragraph 48, above.

58. Respondent's request for an informal settlement conference does not extend the 30 calendar day period for filing

a written answer to this complaint. Respondent may pursue simultaneously the informal settlement conference and the adjudicatory hearing process. U.S. EPA encourages all parties facing civil penalties to pursue settlement through an informal conference. U.S. EPA, however, will not reduce the penalty simply because the parties hold an informal settlement conference.

Continuing Obligation to Comply

59. Neither the assessment nor payment of a civil penalty will affect Respondent's continuing obligation to comply with the Act and any other applicable federal, state, or local law.

7/20/01
Date

 FOR

Cheryl Newton, Acting Director
Air and Radiation Division
U.S. Environmental Protection
Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

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Docket No.

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CERTIFICATE OF SERVICE

I, Shanee Rucker, certify that I hand delivered the original and one copy of the Administrative Complaint, docket number [] to the Regional Hearing Clerk, Region 5, United States Environmental Protection Agency, and that I mailed correct copies of the Administrative Complaint, copies of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits" at 40 C.F.R. Part 22, and copies of the penalty policy described in the Administrative Complaint by first-class, postage prepaid, certified mail, return receipt requested, to the Respondent and Respondent's Counsel by placing them in the custody of the United States Postal Service addressed as follows:

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Dan Balkema, President
Balkema Excavating, Inc.
1500 River Street
Kalamazoo, Michigan 49048

Ronald E. Baylor, Attorney
Miller, Canfield, Paddock and Stone, P.L.C.
444 West Michigan Avenue
Kalamazoo, Michigan 49007-3751

on the 23 day of July, 2001.

Shanee Rucker
Shanee Rucker
AECAS (MI/WI)

CERTIFIED MAIL RECEIPT NUMBER: 7099 3400 0000 9581 2885