

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

RECEIVED
MAR 25 1999

_____)
In the Matter of:)
)
James R. Hernandez)
Construction Co., Inc.)
)
Respondent.)
_____)

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Docket No. CAA-5-99-008
Proceeding to Assess Administrative Penalty
Under Section 113(d) of the
Clean Air Act
42 U.S.C. § 7413(d)

ADMINISTRATIVE COMPLAINT

This is an action for the assessment of a civil administrative penalty brought, pursuant to Section 113(d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7413(d), and the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits" (Consolidated Rules), 40 C.F.R. Part 22, against Respondent James R. Hernandez Construction Co., Inc. for violations of the asbestos National Emission Standard for Hazardous Air Pollutants.

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.

STATUTORY AND REGULATORY BACKGROUND

1. Section 112(b) of the Act, 42 U.S.C. § 7412(b), prior to its amendment on November 15, 1990, required the Administrator of U.S. EPA ("Administrator") to publish a list of air pollutants which he determined to be hazardous and to prescribe an emission

standard for each listed pollutant. Section 112(e) of the Act, 42 U.S.C. § 7412(e), provided that where the establishment of such an emission standard was not feasible, the Administrator could instead promulgate a work practice standard or other appropriate standard for such pollutants and that any such work practice standard be treated as an "emission standard." After its amendment on November 15, 1990, the Act continued to provide for the promulgation of work practice standards for hazardous air pollutants and to require that any such work practice standard be treated as an "emission standard." 42 U.S.C. § 7412(h). Emission standards promulgated pursuant to Section 112 constitute the National Emission Standards for Hazardous Air Pollutants ("NESHAP").

2. Pursuant to Section 112(b) of the Act, 42 U.S.C. § 7412(b), the Administrator identified asbestos as a hazardous air pollutant. When the Act was amended on November 15, 1990, asbestos was specifically listed, in Section 112(b)(1) of the Act, 42 U.S.C. § 7412(b)(1), as a hazardous air pollutant.

3. On November 20, 1990, the Administrator promulgated the final revised asbestos NESHAP, subsequently codified at 40 C.F.R. Part 61, Subpart M, which includes regulations governing the emission, handling, and disposal of asbestos.

4. Section 112(f)(4) of the Act, 42 U.S.C. § 7412(f)(4), prohibits the emission of any air pollutant to which a NESHAP applies, in violation of that NESHAP. Section 112(i)(3)(A) of the Act, 42 U.S.C. § 7412(i)(3)(A), prohibits any person from operating a source in violation of any emissions standard, limitation, or regulation promulgated under Section 112. The asbestos NESHAP is an emission standard, limitation or regulation promulgated under Section 112. Thus, a violation of the asbestos NESHAP is a violation of Section 112 of the Act.

5. Pursuant to 40 C.F.R. § 61.145(a), the asbestos NESHAP applies to each "owner or operator" of a "demolition or renovation activity" at a "facility", as those terms are defined at 40 C.F.R. § 61.141. Specifically, if the combined amount of regulated asbestos-containing material (RACM) in a facility being demolished is at least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components, at least 1 cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously, the notification requirements set forth at 40 C.F.R. § 61.145(b), the procedures for emission control set forth at 40 C.F.R. § 61.145(c), and the waste disposal standard set forth at 40 C.F.R. § 61.150 apply. If the combined amount of RACM in a facility being demolished is less than 80 linear meters (260 linear feet) on pipes and less than 15 square meters (160

square feet) on other facility components, and less than 1 cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously, then only the notification requirements of paragraphs (b)(1), (2), (3)(i) and (iv), and (4)(i) through (vii) and (4)(ix) and (xvi) of 40 C.F.R. 61.145(b) apply.

6. The "owner or operator of a demolition or renovation activity" means any person who "owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation operation, or both." 40 C.F.R. § 61.141.

7. 40 C.F.R. § 61.145(a) requires that each owner or operator of a demolition or renovation activity, prior to the commencement of the demolition or renovation and to determine which requirements of the asbestos NESHAP apply, thoroughly inspect the affected facility or part of the facility where the demolition or renovation will occur for the presence of asbestos.

8. 40 C.F.R. § 61.145(b)(1) requires each owner or operator of a subject demolition or renovation activity to provide the Administrator with written notice of intent to renovate or demolish.

9. 40 C.F.R. § 61.145(b)(4) requires that each owner or operator of a subject renovation or demolition operation include certain information in the written notices. Specifically,

40 C.F.R. § 61.145(b)(4)(iv), (v), (ix), and (xvi) require the following information be contained in notices: a complete description of the facility being demolished including size in square meters or square feet; the procedure, including analytical method, employed to detect the presence of RACM; the starting date of demolition; and the procedures to be followed in the event that unexpected RACM is found.

10. 40 C.F.R. § 61.145(c)(1) requires each owner or operator of a subject demolition or renovation activity to remove all RACM from a facility being demolished or renovated before any activity begins that would break up dislodge, or similarly disturb the material or preclude access to the material for subsequent removal.

11. 40 C.F.R. § 61.145(c)(6)(i) requires each owner or operator of a subject demolition or renovation activity to adequately wet and keep wet all RACM, including material that has been removed or stripped, until collected and contained or treated in preparation for disposal in accordance with 40 C.F.R. § 61.150.

12. 40 C.F.R. § 61.145(c)(6)(ii) requires each owner or operator of a subject demolition or renovation activity to carefully lower RACM to the ground and floor, not dropping, throwing, sliding or otherwise damaging or disturbing the material.

13. The Alton Federal Yard Office facility contained at least 260 linear feet of RACM on pipes, or at least 160 square feet of RACM on other facility components, or at least 35 cubic feet of RACM on other facility components where the length or area could not be measured previously. Thus, the Alton Federal Yard Office demolition operation was subject to the notification requirements set forth at 40 C.F.R. § 61.145(b), the procedures for emission control set forth at 40 C.F.R. § 61.145(c), and the waste disposal standard set forth at 40 C.F.R. § 61.150.

14. The James R. Hernandez Construction Co., Inc. (Hernandez or Respondent) was the demolition contractor for the Alton Federal Yard Office demolition. Thus, Hernandez was subject to the requirements of the asbestos NESHAP.

15. On or about November 25, 1996, and November 26, 1996, Hernandez demolished the Alton Federal Yard Office facility prior to any RACM being removed from the facility.

16. On or about November 25, 1996, and November 26, 1996, Hernandez demolished the Alton Federal Yard Office facility prior to any written notice being provided to U.S. EPA or to the Illinois Environmental Protection Agency (IEPA).

17. On November 28, 1996, December 10, 1996, and April 24, 1997, Norfolk and Western Railway (Norfolk) submitted information to U.S. EPA concerning the demolition of the Alton Federal Yard Office facility. At the time of the Alton Federal Yard Office

demolition, Norfolk was subject to a Federal Consent Decree for previous asbestos violations.

18. The information submitted by Norfolk on November 28, 1996, December 10, 1996, and April 24, 1997, contained factual information and admissions by Norfolk relative to the violations which occurred during the Alton Federal Yard Office demolition. On April 24, 1997, Norfolk made a stipulated penalty payment to the U.S. Treasury in the amount of \$26,690 for the alleged violations at the Alton Federal Yard Office.

19. On or about December 18, 1996, Hernandez submitted a written notice to the IEPA for a demolition operation to be conducted at a residential installation (group of buildings), located in Alton, Illinois (Alton residential installation demolition).

20. Hernandez was the demolition contractor for the Alton residential installation demolition operation and was therefore, subject to the requirements of the asbestos NESHAP.

21. The December 18, 1996, written notice for the Alton residential installation demolition did not contain the following information: a complete description of the facility being demolished, including size in square meters or square feet; the procedure, including analytical method, employed to detect the presence of RACM; the starting date of demolition; and the procedures to be employed in the event that unsuspected RACM is

discovered during the demolition.

22. No survey to determine the presence of RACM was conducted for the Alton residential installation facility.

23. On September 1, 1998, U.S. EPA issued a Finding of Violation (FOV) to Hernandez for violations of the asbestos NESHAP at the Norfolk Federal Yard Office demolition and at the Alton residential installation demolition.

24. On October 15, 1998, U.S. EPA and Mr. James Hernandez, of the Hernandez company, held a conference, pursuant to Section 113(a)(4) of the CAA, 42 U.S.C. § 7413(a)(4), to discuss the violations.

25. The Attorney General of the United States has concurred with the determination of the Administrator of U.S. EPA, each through their respective delegates, that an administrative assessment of civil penalties is appropriate for the period of violations alleged in this Complaint.

COUNT I--Failure to Notify

26. Paragraphs 1 through 25 of this Administrative Complaint are hereby incorporated by reference as if fully set forth in this paragraph.

27. Hernandez failed to provide U.S. EPA or the IEPA with a written notice of intention to demolish the Norfolk and Western Railway's Alton Federal Yard Office facility in Alton, Illinois, in violation of 40 C.F.R. § 61.145(b)(1) and Section 112(i)(3)(A)

of the Act, 42 U.S.C. § 7412(i)(3)(A).

Count II--Failure to Remove RACM Before Demolition

28. Paragraphs 1 through 25 of this Administrative Complaint are hereby incorporated by reference as if fully set forth in this paragraph.

29. The information submitted by Norfolk on November 28, 1996, December 10, 1996, and April 24, 1997, indicates that Hernandez demolished the Alton Federal Yard Office facility with a trackhoe and Bobcat prior to any of the RACM being removed from the facility.

30. Hernandez's failure to remove all RACM from the Alton Federal Yard Office building in Alton, Illinois, prior to demolishing the building is in violation of 40 C.F.R. § 61.145(c)(1) and Section 112(i)(3)(A) of the Act, 42 U.S.C. § 7412(i)(3)(A).

Count III--Failure to Wet RACM

31. Paragraphs 1 through 25 of this Administrative Complaint are hereby incorporated by reference as if fully set forth in this paragraph.

32. The information submitted by Norfolk on November 28, 1996, December 10, 1996, and April 24, 1997, indicates that the RACM in the facility was not adequately wetted during demolition and kept wet until it was collected or contained for disposal.

33. Hernandez's failure to adequately wet all RACM and

ensure that it remained wet until collected and contained or treated in preparation for disposal, during the Alton Federal Yard Office building demolition, is in violation of 40 C.F.R. § 61.145(c)(6)(i) and Section 112(i)(3)(A) of the Act, 42 U.S.C. § 7412(i)(3)(A).

Count IV--Failure to Carefully Lower RACM

34. Paragraphs 1 through 25 of this Administrative Complaint are hereby incorporated by reference as if fully set forth in this paragraph.

35. The information submitted by Norfolk on November 28, 1996, December 10, 1996, and April 24, 1997, indicates that the demolition of the facility with a trackhoe and Bobcat caused RACM to fall to the ground.

36. Hernandez's failure to carefully lower RACM to the ground during the Alton Federal Yard Office demolition, is in violation of 40 C.F.R. § 61.145(c)(6)(ii) and Section 112(i)(3)(A) of the Act, 42 U.S.C. § 7412(i)(3)(A).

Count V-Failure to Survey

37. Paragraphs 1 through 25 of this Administrative Complaint are hereby incorporated by reference as if fully set forth in this paragraph.

38. Prior to the commencement of the Alton residential installation demolition, and to determine which requirements of the asbestos NESHAP would apply, a thorough inspection was not

conducted of the facility for the presence of RACM.

39. Hernandez's failure to thoroughly inspect the Alton residential installation facility prior to the commencement of the demolition for the presence of RACM constitutes a violation of 40 C.F.R. § 61.145(a) and of Section 112(i)(3)(A) of the Act, 42 U.S.C. § 7412(i)(3)(A).

Count VI-Failure to Submit Complete Notice

40. Paragraphs 1 through 25 of this Administrative Complaint are hereby incorporated by reference as if fully set forth in this paragraph.

41. For the demolition of a residential installation owned by the City of Alton, Illinois, in December of 1996, Hernandez failed to provide a complete written notice of intention to demolish. Specifically, the notice failed to contain: a complete description of the facility being demolished, including size in square meters or square feet; the procedure, including analytical method, employed to detect the presence of RACM; the starting date of demolition; and the procedures to be followed in the event that unexpected RACM was found.

42. The above described failures constitute violations of 40 C.F.R. § 61.145(b)(4)(iv), 40 C.F.R. § 61.145(b)(4)(v), 40 C.F.R. § 61.145(b)(4)(ix), 40 C.F.R. § 61.145(b)(4)(xvi) and Section 112(i)(3)(A) of the Act, 42 U.S.C. § 7412(i)(3)(A).

NOTICE OF PROPOSED ORDER ASSESSING A CIVIL PENALTY

43. Pursuant to Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1), and 40 C.F.R. Part 19, the Administrator of U.S. EPA may assess a civil penalty not to exceed \$25,000 per day up to a total of \$200,000 for each violation of the asbestos NESHA that occurred prior to January 31, 1997, and not to exceed \$27,500 per day up to a total of \$220,000 for each such violation which occurred on or after January 31, 1997.

44. Section 113(e)(1) of the CAA, 42 U.S.C. § 7413(e)(1), requires the Administrator to take the following factors into consideration when determining the amount of any penalty to be assessed under Section 113: the size of Respondent's business; the economic impact of the proposed penalty on Respondent's business; Respondent's full compliance history and good faith efforts to comply; the duration of the violations alleged in the Complaint as established by any credible evidence; payment by Respondent of penalties previously actions; and such other factors as justice may require.

45. Based upon the facts alleged in this Complaint and after consideration of the factors discussed above as they relate to Respondent and to the facts and circumstances of Respondent's violations, U.S. EPA hereby proposes to issue to Respondent a Final Order Assessing Administrative Civil Penalties in the amount of \$ 3,000. This proposed penalty has been calculated in

accordance with Section 113(e)(1) of the CAA. In developing the penalty proposed in this Complaint, Complainant has taken into account the particular facts and circumstances of this case with specific reference to U.S. EPA's Clean Air Act Stationary Source Civil Penalty Policy and Appendix III to the Stationary Source Policy, which is the Asbestos Demolition and Renovation Policy ("Penalty Policy"), a copy of which is enclosed with this Complaint.

46. The CAA requires that, when determining an appropriate penalty, U.S. EPA must consider the economic benefit a violator derives from the alleged violations. The penalty must be sufficient to preclude the violator from deriving monetary benefit due to its having avoided or delayed expenditures that would have insured compliance with the CAA, both for deterrence purposes and because other regulated entities have incurred similar expenses in maintaining compliance with the CAA. In this case, there may have been an economic benefit for Respondent's avoidance in removing RACM from the Alton Federal Yard Office facility prior to demolition. However, according to information currently available to U.S. EPA, the asbestos-containing material which was not removed from the facility prior to demolition and was later contained and disposed of properly. Furthermore, according to Mr. Hernandez, the Hernandez company was not paid for its work at the Alton Federal Yard Office demolition.

Accordingly, based on the information currently available, the penalty proposed in this Administrative Complaint does not include an economic benefit factor.

47. In accordance with the CAA, U.S. EPA has considered the seriousness of Respondent's violations. One factor reflecting the seriousness of the violations is the amount and toxicity of the pollutant that was potentially emitted as a result of the violation. Because asbestos is a hazardous air pollutant that is known to cause death and serious irreversible illness, an appropriately high factor has been taken into consideration. Accordingly, the proposed penalty includes a component corresponding to the actual or potential environmental harm from the violations.

48. In considering the seriousness of the violation, U.S. EPA also considered the importance of the notification and survey requirements to achieving the goals of the Clean Air Act and its implementing regulations. U.S. EPA relies on timely and complete notices to be able to inspect renovation and demolition projects. A complete and accurate survey is necessary to determine which requirements of the asbestos NESHAP apply to the operation in question. Accordingly, the proposed penalty includes a component corresponding to the importance of the notification and survey violations to the regulatory scheme.

49. In accordance with the CAA, U.S. EPA has considered the duration of the violations in assessing the actual or possible harm resulting from such violations. The Alton Federal Yard Office demolition violations commenced on November 25, 1996, and continued through at least November 26, 1996. Thus, the penalty has been based on a two-day duration of violations.

50. In accordance with the CAA, U.S. EPA has considered the size of Respondent's business in determining the appropriate penalty. Respondent's net worth is not listed on the report prepared by the Dun & Bradstreet financial information service. Therefore, U.S. EPA assumed that the net worth of Respondent's business was less than \$100,000. Accordingly, based on the information currently available the proposed penalty includes a component which is based on the size of Respondent's business.

51. In determining an appropriate civil penalty in accordance with the CAA, U.S. EPA has considered Respondent's compliance history and its good faith efforts to comply. Because U.S. EPA is aware of no prior citations for violations of environmental statutes by Respondent, the proposed penalty has not been enhanced based on this factor.

52. In determining an appropriate civil penalty in accordance with the CAA, U.S. EPA has considered the fact that Norfolk and Western Railway has paid a penalty of \$26,690 for these same violations.

53. In accordance with the CAA, U.S. EPA has considered the economic impact of the penalty on Respondent's business, including financial information submitted by Hernandez in February of 1999. Based on the best information available to U.S. EPA at this time, the proposed penalty of \$ 3,000 reflects a current presumption of Respondent's ability to pay the penalty and to continue in business.

54. The penalty proposed in this Complaint has been developed based on the best information available to U.S. EPA at this time, and may be adjusted if the Respondent establishes bonafide issues of ability to pay or other defenses relevant to the appropriateness of the penalty.

55. Respondent shall pay the proposed penalty by certified or cashier's check payable to "Treasurer, the United States of America", and shall deliver it, with a transmittal letter identifying the name of the case and docket number of this Complaint to:

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

Respondent shall also include on the check the name of the case and the docket number. Respondent simultaneously shall send copies of the check and transmittal letter to:

Linda L. Hamsing (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

and

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

OPPORTUNITY TO REQUEST A HEARING

56. Section 113(d)(2) of the CAA, 42 U.S.C. § 7413(d)(2), requires the Administrator of U.S. EPA to provide to any person against whom the Administrator proposes to assess a penalty an opportunity to request a hearing on the proposed penalty. Accordingly, you have the right to request a hearing to contest any material fact alleged in the Complaint or to contest the appropriateness of the amount of the proposed penalty. In order to request a hearing, you must specifically make such request in your Answer, as discussed in Paragraphs 57 through 61, below. Any hearing which you request regarding the Complaint will be held and conducted in accordance with the provisions of the Consolidated Rules.

ANSWER

57. To avoid being found in default, you must file a written Answer to this Complaint with the Regional Hearing Clerk,

(R-19J), U.S. EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590, within thirty (30) calendar days of your receipt of this Complaint. In computing any period of time allowed under this Complaint, the day of the event from which the designated period begins to run shall not be included.

Saturdays, Sundays and Federal holidays shall be included, except when a time period expires on such, in which case the deadline shall be extended to the next business day.

58. Your Answer must clearly and directly admit, deny or explain each of the factual allegations contained in the Complaint, or must state clearly that you have no knowledge regarding a particular factual allegation which you cannot admit, deny or explain, in which case the allegation will be deemed denied.

Your Answer shall also state with specificity:

- a. The circumstances or arguments which you allege constitute grounds for defense;
- b. The facts that you intend to place at issue; and
- c. Whether you request a hearing as discussed in paragraph 56, above.

59. Failure to respond to any factual allegation in this Complaint shall constitute admission of the alleged fact.

60. You must send a copy of your Answer and of any documents subsequently filed in this action to William Clune, Assistant Regional Counsel (C-14J), U.S. EPA, 77 West Jackson

Boulevard, Chicago, Illinois 60604-3590. You may telephone Mr. Clune at (312) 353-7448.

61. If you fail to file a written Answer within thirty (30) calendar days of your receipt of this Complaint, the Administrator of U.S. EPA may issue a Default Order pursuant to 40 C.F.R. § 22.17(a). Issuance of a Default Order will constitute a binding admission of all allegations made in the Complaint and a waiver of your right to a hearing. The civil penalty proposed herein shall become due and payable without further proceedings sixty (60) days after the Default Order becomes the Final Order of the Administrator pursuant to 40 C.F.R. § 22.27 or § 22.31.

SETTLEMENT CONFERENCE

62. Whether or not you request a hearing, you may request an informal conference to discuss the facts of this action and to arrive at a settlement. To request a settlement conference, write to Linda L. Hamsing, Air Enforcement and Compliance Assurance Branch (E-17J), Air and Radiation Division, U.S. EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590, or telephone Ms. Hamsing at (312) 886-6810.

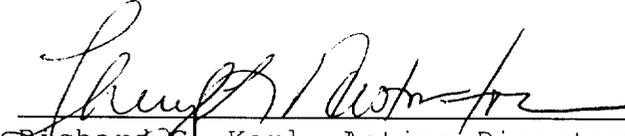
63. Your request for an informal settlement conference does not extend the thirty calendar day period during which you must submit a written Answer to this Complaint. You may pursue simultaneously the informal settlement conference and

adjudicatory hearing processes. U.S. EPA encourages all parties facing civil penalties to pursue settlement through an informal conference. However, U.S. EPA will not reduce the penalty simply because such a conference is held. Any settlement that may be reached as a result of such a conference shall be embodied in a Consent Order. Your agreement to a Consent Order issued pursuant to 40 C.F.R. § 22.27 shall constitute a waiver of your right to request a hearing on any matter stipulated to therein.

CONTINUING OBLIGATION TO COMPLY

64. Neither assessment nor payment of an administrative civil penalty shall affect your continuing obligation to comply with the CAA or any other Federal, State or local law or regulation.

3/23/99
Date


Richard C. Karl, 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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CERTIFICATE OF SERVICE

I, Betty Williams, do hereby certify that the original of the foregoing Administrative Complaint was hand delivered to the Regional Hearing Clerk, Region 5, United States Environmental Protection Agency, and that correct copies, along with a copy of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits," 40 C.F.R. Part 22, and a copy of the Penalty Policy (described in the Complaint) was mailed first-class, postage prepaid, certified mail, return receipt requested, to the Respondent and Respondent's Counsel by placing it in the custody of the United States Postal Service addressed as follows:

James R. Hernandez, President and
Registered Agent for
James R. Hernandez Construction Co., Inc.
531 Shelly Street
Alton, Illinois 62002

on the 25th day of March, 1999.


Betty Williams, Secretary
AECAS (IL/IN)

CERTIFIED MAIL RECEIPT NUMBER: P140778978