

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

Kensington
Heights
To: Larry
J.

In the Matter of:

Buffalo Municipal Housing Authority,
Buffalo, New York

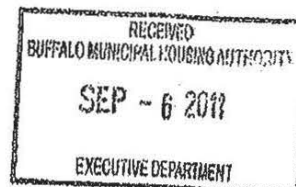
Respondent

COMPLIANCE ORDER

Index No. CAA-02-2011-1021

PRELIMINARY STATEMENT

The United States Environmental Protection Agency (EPA) Region 2 Director of the Division of Enforcement and Compliance Assistance (DECA) issues this COMPLIANCE ORDER, pursuant to Sections 113(a) and 114 of the Clean Air Act (CAA or the Act), 42 U.S.C. §§ 7413(a) and 7414, to Buffalo Municipal Housing Authority (Respondent) located in Buffalo, New York, for violations of Section 112 of the CAA and the National Emission Standard for Asbestos, 40 C.F.R. Part 61, Subpart M (Asbestos NESHA), which was promulgated pursuant to Sections 112 and 114 of the Act. The authority to find a violation and issue this Compliance Order has been delegated to the Director of DECA from the Administrator through the Regional Administrator.



STATUTORY AND REGULATORY BACKGROUND

The Clean Air Act

1. Section 112 of the Act requires the Administrator to publish a list of hazardous air pollutants (HAPs), a list of categories and subcategories of major and area sources of listed HAPs, and to promulgate regulations establishing emission standards, referred to as National Emissions Standards for Hazardous Air Pollutants (NESHAPs) for each category or subcategory of major and area sources of HAP.
2. Section 112(b)(1) of the Act provides the initial list of HAPs and Section 112(b)(2) requires the Administrator to periodically review the list and, where appropriate, revise it.
3. Section 112(c) of the Act requires the Administrator to publish a list of categories or subcategories of major and area sources of listed HAPs.
4. Section 112(d) of the Act requires the Administrator to promulgate regulations establishing NESHAPs for each category or subcategory of major and area sources of HAPs. NESHAPs promulgated under the CAA as it existed prior to the 1990 CAA amendments are set forth in 40 C.F.R. Part 61.
5. Section 112(h) of the Act authorizes EPA to promulgate "design, equipment, work practice, or operational" standards, or combinations thereof, which are consistent with Section 112(d) or (f) of the Act, to the extent that it is not feasible to prescribe or enforce an emission standard for control of a HAP. Pursuant to Section 112(d)(2)(D) and (E) of the Act, design, equipment, work practice, or operational standards, or combinations thereof, promulgated under Section 112(h) of the Act, are treated as emission standards.

6. Section 112(l)(3)(A) prohibits the operation of a source in violation of any emissions standard, limitation or regulation issued pursuant to Section 112, and directs the Administrator to set a compliance deadline for existing sources that is no more than 3 years after the effective date of the standard.

7. Section 114 of the CAA authorizes the EPA Administrator to require testing, monitoring, record-keeping, and reporting of information, to enable him or her to carry out any provision of the Act (except certain provisions in subchapter II) and to assess compliance with, among other requirements, any regulations promulgated under Sections 112 of the Act.

8. Section 113(a)(3) of the CAA authorizes EPA to, among other actions, issue compliance orders to any person whenever, on the basis of any information available to EPA, EPA finds that such person has violated or is in violation of any requirement or prohibition of Title I of the Act, or any regulation promulgated pursuant to Sections 112 and 114 of the Act.

9. Section 302(e) of the CAA provides that whenever the term "person" is used in the Act, the term includes an individual, corporation, partnership, association, state, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

The Asbestos NESHAP, 40 C.F.R. Part 61, Subpart M

10. The Asbestos NESHAP specifies a set of work practice standards, set forth at 40 C.F.R. §§ 61.145 and 61.150, which are applicable to the owners and operators of renovation or demolition activities in which the amount of RACM that is stripped, removed, dislodged, cut, drilled or similarly disturbed is at least 80 linear

meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components or at least 1 cubic meter (35 cubic feet) when the length or area could not be measured prior to the asbestos removal/demolition activity.

11. The term "owner or operator of a renovation or demolition activity" is defined by 40 C.F.R. § 61.141 to mean "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."

12. The term "renovation" is defined by 40 C.F.R. § 61.141 to mean "altering of a facility or one or more facility components in any way, including the stripping or removal of RACM from a facility component. Operations in which load-supporting structural members are wrecked or taken out are demolitions."

13. The term "demolition" is defined by 40 C.F.R. § 61.141 to mean "the wrecking or taking out of any load-supporting structural member of a facility together with any related handling operations or the intentional burning of any facility."

14. The term "facility" is defined by 40 C.F.R. § 61.141 to include, among other things, "any institutional, commercial, public, industrial, or residential structure, installation, or building (including any structure, installation or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having four or fewer dwelling units)."

15. The term "facility component" is defined by 40 C.F.R. § 61.141 to mean "any part of a facility including equipment."

16. The term "regulated asbestos-containing material" (RACM) is defined by 40 C.F.R. § 61.141 to include friable asbestos containing material.

17. The term "friable asbestos material" is defined by 40 C.F.R. § 61.141 to mean any material containing more than 1 percent asbestos that when dry can be crumbled, pulverized or reduced to powder by hand pressure.

18. 40 C.F.R. § 61.145(a) provides that the affected facility, or part of a facility, where a demolition or renovation is to take place must be thoroughly inspected for the presence of asbestos prior to the commencement of the demolition or renovation activity.

19. 40 C.F.R. § 61.145(b) provides that each owner or operator of a demolition or renovation activity to which this Section applies shall: (1) provide the Administrator with written notice of the intention to demolish or renovate; (2) update the notice as necessary; and (3) postmark or deliver the notice as follows: at least ten (10) working days before demolition or renovation activity begins.

20. 40 C.F.R. § 61.145(c)(1) provides that each owner or operator of a demolition or renovation activity must remove all RACM from the facility being renovated or demolished before any activity begins that may break up, dislodge, or disturb the material.

21. 40 C.F.R. § 61.145(c)(3) provides that when RACM is stripped from a facility component while it remains in place in the facility, the owner and/or operator must adequately wet the RACM during the stripping operation.

22. 40 C.F.R. § 61.145(c)(6)(i) provides that the owner or operator of a demolition or renovation activity subject to the Asbestos NESHAP must adequately wet all RACM including the material that has been removed or stripped and ensure that it remains wet until collected and contained or treated in preparation for disposal.

23. 40 C.F.R. § 61.145(c)(8) provides that no RACM may be stripped, removed, or otherwise handled or disturbed at a facility regulated under the Asbestos NESHAP unless at least one on site representative, trained in the Asbestos NESHAP is present. In addition, this section provides that every two years the trained on-site individual shall receive refresher training.

24. 40 C.F.R. § 61.150(a)(1)(iii) provides that each owner or operator of a demolition or renovation activity subject to the Asbestos NESHAP must seal all RACM in leak-tight containers while wet.

FINDINGS OF FACT

25. Respondent Buffalo Municipal Housing Authority owns the Kensington Heights Towers located at 1827 North Fillmore Avenue, Buffalo, New York.

26. In September, October, and November 2009, Johnson Contracting of Western New York, a contractor for the owner, submitted various notifications to EPA of its intention to remove approximately 65,000 square feet of asbestos containing material from Kensington Heights Towers.

27. In March 2010, CJ Drew Contracting Inc., a contractor for the owner, submitted a notification to EPA of its intention to remove approximately 10,000 square feet of asbestos containing material from Kensington Heights Towers.

28. On August 16, 2011, two EPA inspectors accompanied by an inspector from the New York State Department of Labor (NYSDOL) conducted a compliance inspection at the Kensington Heights Towers. During the inspection, the inspectors observed small amounts of suspect friable asbestos containing material in building 5. The inspector observed that these materials were friable and not adequately wet. These materials were located at the boiler room, first floor and main entrance to Building #5. The inspectors took nine samples of the suspect material. After the inspection, the nine samples were tested and eight of the nine samples were found to contain more than 1% asbestos (50%-67% chrysotile).

29. On August 16 and 17, 2011, two EPA inspectors, accompanied by two NYSDOL compliance officers, conducted a subsequent inspection of the area outside of building 5 and observed two open-topped roll-off containers filled with mixed size pieces of suspect vinyl asbestos containing floor tiles (identified as asbestos containing through BMHA's asbestos surveys of Kensington Towers), many of which were at least as small as ½ by ½ inch, that were not bagged or otherwise enclosed. The inspectors also observed that material of this type had spilled out of the roll-off containers onto the ground around the containers.

30. On August 17, 2011, an EPA inspector accompanied by an inspector from the NYSDOL, observed a large amount of suspect RACM on the ground between buildings 1 and 6, and took, as a sample, an approximately 1 inch by 1 inch piece of this material. The EPA inspector observed that the suspect RACM was friable and not adequately wet. After the inspection, the sample was tested and found to contain more than 1% asbestos (15% chrysotile).

CONCLUSIONS OF LAW

Based on the Findings of Fact cited above, EPA finds that:

31. Respondent is an owner or operator of a demolition or renovation activity within the meaning of 40 C.F.R. § 61.141.

32. Respondent has violated 40 C.F.R. §§ 61.145(c)(6)(i) and 61.150(a)(1)(iii) of the Asbestos NESHAP.

33. Respondent's violations of the Asbestos NESHAPs are violations of Section 112 of the CAA.

ORDER

Based on the Findings of Fact and Conclusions of Law above, pursuant to Sections 113(a)(4) and 114 of the Act, IT IS DETERMINED AND ORDERED that:

I.

The provisions of this Order shall apply to Respondent and its officers, agents, servants, employees, successors and to all persons, firms and corporations acting under, through or for Respondent.

II.

Respondent shall perform all renovation/demolition operations at the Kensington Heights Towers and any and all other facilities in which friable asbestos is present in compliance with all applicable provisions of the Asbestos NESHAP.

III.

Respondent shall immediately adequately wet and cover with polyethylene sheeting the two roll-off containers and associated spillage, and shall ensure that the containers and associated spillage remain adequately wet and covered until the RACM is properly collected for disposal. Respondent shall notify EPA that it has wet and covered the roll-off containers and associated spillage within 24 hours of completion.

IV.

Respondent shall immediately cover all windows and openings in buildings 1 through 6 at Kensington Heights Towers. Respondent shall notify EPA that it has covered all windows and openings in buildings 1 through 6 at Kensington Heights Towers within 24 hours of completion.

V.

Upon the effective date of this Order (which is specified below in the section entitled "Effective Date and Opportunity for a Conference") Respondent shall submit a comprehensive asbestos abatement plan for the entire site for EPA's approval. This plan shall be prepared by an AHERA accredited project designer. The plan shall include identification and delineation of the extent of asbestos soil contamination outside of buildings 1 through 6, and shall also include plans for taking a soil lift of adequate depth of these areas. The plan shall also include plans for daily perimeter air monitoring at the fence line during abatement. In addition, a site diagram with the expected sampling locations shall be submitted along with the abatement plan for EPA approval.

VI.

The notifications required by Paragraphs III and IV above, as well as the asbestos abatement plan and site diagram required by Paragraph V above, shall be sent via overnight service to:

Mr. Ken Eng, Chief
Air Compliance Branch
Division of Enforcement and Compliance Assistance
290 Broadway, 21st Floor
New York, NY 10007

BUSINESS CONFIDENTIALITY

Respondent may assert a business confidentiality claim covering part or all of the information this Order requires only to the extent and in the manner described in 40 C.F.R. § 2.203. EPA will disclose information submitted under a confidentiality claim only as provided in 40 C.F.R. Part 2, Subpart B and 41 Fed. Reg. 36,902 (1976). If Respondent does not assert a confidentiality claim, EPA may make the information available to the public without further notice to Respondent.

ENFORCEMENT

Section 113(a)(3) of the Act authorizes EPA to take any of the following actions in response to Respondent's violation of the Act:

- Issue an administrative penalty order, for penalties up to \$25,000 per day pursuant to Section 113(d) of the Act and adjust the maximum penalty provided by the Act up to \$27,500 per day for each violation that occurs from January 30, 1997 through March 14, 2004, \$32,500 per day for each violation that occurs on or after March 15, 2004, and \$37,500 per day for each violation that occurs after January 12, 2009, in accordance with the Debt

- Collection Improvement Act, 31 U.S.C. 3701 *et seq.* (DCIA), and 40 C.F.R. Part 19, promulgated pursuant to DCIA; and
- bring a civil action pursuant to Section 113(b) of the Act for injunctive relief and/or civil penalties and adjust these penalties for inflation in accordance with the DCIA and 40 C.F.R. Part 19.

Failure to comply with this Order may result in an administrative or civil action for appropriate relief as provided in Section 113 of the Act. EPA retains full authority to enforce the requirements of the Act and nothing in this Order shall be construed to limit that authority. Furthermore, the United States may seek fines and/or imprisonment of any party who knowingly violates the Act or an Order issued pursuant to Section 113 of the Act. Upon conviction, any facility owned by such party may be declared ineligible for federal contracts, grants, and loans. (42 U.S.C. § 7606, 40 C.F.R. Part 15, and Executive Order 11738).

PENALTY ASSESSMENT CRITERIA

Section 113 (e)(1) of the Act states that if a penalty is assessed pursuant to Section 113 or Section 304(a) of the Act, the Administrator or the court, as appropriate, shall, in determining the amount of a penalty to be assessed, take into consideration the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence, the payment by the violator of penalties previously assessed for the same violation, the economic benefit of non-compliance, the seriousness of the violation, and such other factors as justice may require.

Section 113(e)(2) of the Act allows the Administrator or the court, as appropriate, to assess a penalty for each day of the violation. For purposes of determining the number of the days of the violation, the days of violation shall be presumed to include

the day the violation began and every day thereafter until Respondent establishes that continuous compliance has been achieved. If Respondent can prove, by the preponderance of the evidence, that there were intervening days during which no violation occurred or that the violation was not continuous in nature, then the EPA will reduce the penalty accordingly.

EFFECTIVE DATE and OPPORTUNITY FOR A CONFERENCE

Pursuant to Section 113(a)(4) of the Act, Respondent may request a conference with EPA concerning the violation(s) alleged in this Order. This conference will enable Respondent to present evidence bearing on the finding of violations, on the nature of the violations, and on any efforts it may have taken or it proposes to take to achieve compliance. Respondent may arrange to have legal counsel.

Respondent's request for a conference, to be held no later than thirty (30) days from receipt of this Order, must be confirmed in writing within five (5) days of receipt of this Order. If the requested conference is held, the Order shall become effective ten (10) days after the conference is held.

If the Respondent does not request a meeting within five (5) days of receipt of this Order, the above Order shall become effective five (5) days from its receipt. The request for a conference, or other inquiries concerning this Order, should be made in writing to:

John F. Dollnar, Esq.
U.S. Environmental Protection Agency-Region 2
Office of Regional Counsel, Air Branch
290 Broadway - 16th Floor
New York, NY 10007-1866
(212) 637-3204

Notwithstanding the effective date of this Order and opportunity for conference discussed above, the Respondent must comply with all applicable requirements of the Act and regulations promulgated pursuant to the Act.

Dated: 9/11, 2011

D. LaPosta
Dore LaPosta, Director
Division of Enforcement and
Compliance Assistance
U.S. Environmental Protection Agency -- Region 2

To: Modesto Candalario
Assistant Executive Director
Buffalo Municipal Housing Authority
Buffalo, NY

cc: Christopher Alonge, Associate Safety & Health Engineer
New York State Department of Labor (Building 12--Room 154)
State Office Building & Campus
Albany, NY 12240-0100

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON September 2, 2011, I MAILED A TRUE COPY OF THE ATTACHED DOCUMENT BY CERTIFIED MAIL-RETURN RECEIPT REQUESTED, ARTICLE NUMBERS 7005-3110-0000-5933-5314 POSTAGE PRE-PAID, UPON THE FOLLOWING PERSON(S):

**Modesto Candalarlo
Assistant Executive Director
Buffalo Municipal Housing Authority
Buffalo, NY**


Katherine Zuckerman