



U.S. Environmental Protection Agency Applicability Determination Index

Control Number: C100

Category: Asbestos
EPA Office:
Date: 07/19/1991
Title: Suing Owners in Asbestos Cases
Recipient: Cruden, John C.
Author: Alushin, Michael S.
Comments: "implementation strategy for revised asbestos NESHAP," 1/91
"asbestos demolition and renovation enf. strategy 3/31/88."

Subparts: Part 61, M, Asbestos

References: 61.140

Abstract:

EPA policy is to sue both the owner of the site or facility and the party performing the demolition or renovation unless there is a good reason not to do so. This is to ensure that qualified contractors are hired. OE requests that Regions justify any recommendation not to sue the owner; after reviewing the referral, OE will either concur or non-concur with the determination not to sue an owner. The decisions in four cases were reviewed where decisions were made to sue or not sue the owners of the facilities.

Letter:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Office of Enforcement

JUL 19 1991

John C. Cruden, Chief
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Benjamin Franklin Station
Washington, D.C. 20044

Re: Suing Owners in Asbestos Cases

Dear John:

Thank you for your letter of June 3, 1991, in which you raised the question of whether EPA Regional offices have been consistent in determining whether to sue owners in asbestos NESHAP demolition and renovation cases. EPA's policy is to sue both the owner of the site or facility and the party performing the demolition or renovation, unless there is a good reason not to do so. The rationale for including the owner, whether a private party or a municipality, is to ensure that qualified contractors are hired to perform these operations.

The Regions thus exercise discretion in determining whether to sue owners. For example, if the owner has hired a reputable contractor and has attempted to monitor or supervise the contractor's performance, the owner is generally not joined. Other substantial reasons exist not to sue: where the owner is a federal entity; where the owner has been very cooperative with our investigation; or where one operator has violated the NESHAP at so many different facilities that adding the owners as defendants would unnecessarily complicate the case.

EPA's policy with respect to suing owners in asbestos cases is contained in the memorandum entitled Injunctive Relief in Asbestos Demolition and Renovation Case (July 10, 1985), and in the letter from me to David T. Buente concerning the Policy on Suing Municipal Owners in Asbestos Demolition/Renovation Cases (April 30, 1990). I have attached a copy of these documents for your information.

To ensure that this policy is consistently applied, the Office of Enforcement (OE) will request that the Regions include a separate section in the referral package that justifies any recommendation not to sue the owner in asbestos cases. After reviewing the referral, my office will specifically either concur or non-concur with the Regional determination not to sue an owner.

Your letter identified four referrals from Region V that indicate the policy concerning whether or not to sue the owner. We hope that the following response resolves the Department's concerns so that further delays in filing asbestos NESHAPs cases can be avoided.

Sierra Environmental Group

In this referral, OE concurred with the Region's recommendation not to sue the owners. The facts indicate that the three owners hired the same certified abatement contractor as well as a third party monitor. As stated above, a substantial reason for exercising the discretion not to sue the owner exists where the owner has hired a reputable contractor and has attempted to monitor or supervise the contractor's performance.

Other relevant facts reinforced the conclusion that the owners should not be sued. One of the owners, the Ohio State University, requires that all contractors file work plans that delineate proper abatement methods. The University also requires that contractors inspect and certify that containment areas are clean and safe prior to their disassembly. Additionally, the three owners (two universities and one hospital) are non-profit institutions. Although this fact alone may be an insufficient basis for declining to sue, a judge might respond more sympathetically to non-profits than to private owners.

Based on these facts, we feel that this referral accurately reflects EPA policy. The Region's determination not to sue the owners in this case is a reasonable exercise of discretion.

Asbestos Abatement and Disposal

This referral has been filed by your office against the contractor. We concurred with the Region's determination not to sue the owner and to request that your office amend the complaint to include additional violations by the same contractor at two other facilities owned by two different owners. The Region has likewise recommended that the latter two owners not be joined as defendants.

A review of the facts suggests that the three owners should not be sued. Since the same contractor has violated the NESHAP at three different facilities owned by three different owners, the Region concluded that to sue all owners might unnecessarily complicate the case. This rationale is one of the factors for exercising the discretion not to sue an owner under our policy. Additionally, the owners of the additional facilities that we seek to have covered by the complaint hired independent consultants to supervise the contractor's work. As stated above, this is an additional reason for not suing those owners.

Finally, the third owner is a public high school. As mentioned above, such a non-profit institution might well enjoy the sympathy of the court, especially given the determination not to join the private owners. We conclude that this case is also consistent with our policy concerning the exercise of discretion not to sue an owner.

Certified Abatement Services

The owner in this referral is the city of Saginaw, Michigan. The city hired what it deemed to be a reputable contractor, and also hired an independent industrial hygienist to monitor the contractor's work. The industry hygienist failed to adequately review the contractor's work, resulting in the discovery by EPA inspectors of small pieces of asbestos. Our office continues to concur with the Region's exercise of discretion in this case not to sue the owner, since it falls within our policy.

Blue Earth Equipment

The Region in this referral has recommended that as to the three facilities where the contractor violated the asbestos NESHAPs, that we sue the owner where the work practice violations occurred, but not sue the owners where notice violations occurred. The Region's rationale is that a referral would not be sought on the notice violations alone. Consistent with this rationale, the Region recommended to sue only the owner of the facility where the work practice violations occurred.

After further discussions with the Region, we have determined that the notice violation involving the Hubbard Milling Company is insignificant, and should be dropped. With respect to the notice violation involving the Maynard Public School, the decision not to sue the school is inconsistent with our policy. Accordingly, we recommend that the school be joined as a defendant.

If you have any further questions concerning this issue, please call either me, at 382-2820, or Lynn Holloway of my staff, at 382-2859.

Sincerely,

Michael S. Alushin
Enforcement Counsel for Air

Attachments

cc: Gail C. Ginsberg
Regional Counsel
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John Rasnic, Director
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