



U.S. Environmental Protection Agency Applicability Determination Index

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Abstract:

Where the owner has acted responsibly, for example, by hiring a reputable contractor and monitoring contractor performance, the Agency may exercise discretion in deciding whether or not to sue the owner of a facility. Injunctions should be sought against facility owners if the demolition or renovation which was the subject of the lawsuit, or is part of an ongoing series of demolition or renovation projects.

Letter:

MEMORANDUM

SUBJECT: Injunctive Relief in Asbestos Demolition and Renovation Cases

FROM: Michael S. Alushin
Associate Enforcement Counsel
Air Enforcement Division

Edward E. Reich, Director
Stationary Source Compliance Division

TO: Addressees

This memorandum sets forth a policy regarding injunctions to enforce the National Emission Standard for Asbestos against demolition and renovation sources. This policy will apply to all pending and future civil actions for violations of these regulations.

The asbestos standards, 40 C.F.R. Section 61.140 et seq., apply to both the party performing a demolition or renovation (usually a contractor) and the owner of the subject facility. See the preamble to the repromulgation of the regulations, 49 Fed. Reg. 13658, 13659 (April 5, 1984). The asbestos strategy document issued on April 6, 1984 sets forth guidance for determining when to include the facility owner as a defendant in a civil action to enforce these standards. Facility owners should generally be included as members of the regulated community to ensure that they hire qualified contractors to remove asbestos properly. Only where the owner has acted responsibly, for example, by hiring a reputable contractor and attempting to monitor or supervise the contractor's performance, should the Agency exercise discretion not to sue the owner.

In almost all civil actions to enforce asbestos regulations against demolition and renovation sources, the action is filed after the violations have occurred.* Injunctions are therefore directed at future demolition and renovation activity. Injunctive relief should be sought against contractors, since they are likely to be handling asbestos again in the ordinary course of business. An injunction against future violations in a court order or consent decree vests the court with continuing jurisdiction until the termination date of the decree to enforce the NESHAP requirements. The prospect of a contempt action for future violations may serve as a more effective deterrent than would otherwise exist.

Facility owners are situated differently, since they are not ordinarily in the business of asbestos removal. In determining whether to seek an injunction, the Agency should consider the potential for future violations during the life of the decree. Injunctions should be sought against facility owners if the demolition or renovation which was the subject of the lawsuit, is part of an ongoing series of demolition or renovation projects, e.g., a program of asbestos removal from buildings within a school district, or if the facility owner plans further projects involving friable asbestos. If these factors are not present, an injunction is not necessary.

Injunctive relief need not be limited to merely a command to comply with the regulations. Equitable relief should be fashioned to try to prevent, at a minimum, recurrence of the violations alleged in the complaint. If, for example, a defendant gave incomplete notification of a demolition project, the Agency could seek to enjoin that party to use a specific form in submitting asbestos notifications. If the facility owner hired as the lowest bidder a contractor unqualified to do asbestos work, we may wish to enjoin the owner to address NESHAP compliance in all bid specifications for jobs involving asbestos removal. It is not possible to provide comprehensive guidance on the form of injunctive relief to be sought in all cases, but the specifics of an injunction can be worked out among the litigation team as the case develops.

Questions regarding this policy should be directed to Elliott Gilberg of the Air Enforcement Division at FTS 382-2864. _____

* If a civil action is filed for an ongoing violation, injunctive relief should be sought against all defendants, to afford the greatest chance of effectuating immediate compliance.

Addressees:

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cc: David Buente, Acting Chief

Environmental Enforcement Section
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