

# *Chapter 5*

## *Enforcement Strategy*

This chapter outlines the history and components of EPA's enforcement strategy concerning the asbestos NESHAP. Delegated agencies should check with EPA regarding current reporting requirements for regulated community notifications and violations.

### *History*

On April 5, 1984, EPA issued its first Asbestos Demolition and Renovation Enforcement Strategy. This strategy document focused on demolitions and renovations because EPA determined that the number of these sources was greater than the total number of all other sources. The compliance status for demolition/renovation sources was much worse and inspections of these sources were more difficult due to the transitory nature of the operations.

The enforcement strategy objectives were to: 1) provide effective and uniform enforcement of the asbestos NESHAP regulation by regions and the delegated states, and 2) provide emphasis and assurance to regions and states that asbestos is a high priority item and that EPA is committed to a strong enforcement posture.

From October 1, 1985 through November 17, 1987, the EPA Office of Inspector General (IG) conducted an audit of EPA's administration of the asbestos NESHAP. The audit included EPA regional, state and local programs. The audit was designed to:

- determine whether regional EPA offices, state and local agencies were giving sufficient priority to implementing an effective asbestos NESHAP program;
- determine whether inspections of demolition/renovation sites were conducted properly;
- evaluate inspection strategies;
- determine if enforcement actions were appropriate including whether they likely deter future violations;
- determine whether proper safety equipment was used and if inspectors were adequately trained prior to field activities; and
- determine the accuracy of Strategic Planning and Management System (SPMS) data for demolition/renovation sites.

Since the IG audit revealed many weaknesses in the administration of the asbestos NESHAP program, EPA reexamined its enforcement strategy and published a revised version on March 31, 1988.

In November 1990, revisions to the asbestos NESHAP were promulgated to promote better compliance and strengthen enforcement efforts. The revisions include monitoring, recordkeeping and reporting requirements for milling, manufacturing and fabricating. In addition, notification requirements for demolitions and renovations were modified and recordkeeping and reporting requirements were added for waste disposal. Also, several revisions clarified the intent of the regulation and others reflected enforcement determinations previously made.

In February 1991, EPA published its *Implementation Strategy for Revised Asbestos NESHAP* as an addendum to the enforcement strategy that was in effect. This new strategy document was designed to assist EPA regional offices and the states in implementing the revisions to the NESHAP. Because the regulation of disposal sites and the addition of requirements for waste shipment records were among the more significant changes in the NESHAP, the new implementation strategy focused primarily on requirements for waste disposal. Outreach strategies for informing building owners and contractors of the revisions were included as were strategies for informing disposal site operators of the new requirements.

In view of the new waste disposal requirements, suggestions were made on how to inspect waste shipment records (WSRs) and adjust agency inspection schemes, including targeting, to accommodate the new requirements. Suggestions were given for using construction permits and WSRs to identify non-notifiers. Finally, policy and guidance documents that are relevant to the interpretation and enforcement of the asbestos NESHAP were identified.

### ***Enforcement Strategy Components***

The following summarizes the most current strategy information issued by EPA Headquarters to the regional offices and implementing agencies.

#### ***Outreach***

Outreach programs aimed at increasing public awareness of the asbestos NESHAP requirements should be established. Agencies are encouraged to publicize the asbestos NESHAP requirements by the following mechanisms:

- National and local press releases;
- Distribution of informational pamphlets to removal contractors, state or local associations of building owners/managers, asbestos abatement groups and state and local air pollution and environmental associations;
- Distribution of information concerning waste disposal requirements to waste haulers, waste site operators and state and local solid waste associations;
- On-site educational efforts;
- Cooperative arrangements with building inspection departments;

- Informational mailings to previous asbestos NESHAP violators;
- Distribution of a list of available asbestos training courses to contractors, building owners and managers;
- Seminars and demonstration workshops for contractors and owners and managers of commercial buildings;
- Discussion forums with school district administrators, architects, lenders, real estate groups and insurance agency representatives; and
- Radio talk shows on the hazards of asbestos.

### ***Contractor Training***

Contractor training is a requirement that became effective in November 1991. It is an effective way of educating contractors as to what is required of them under the asbestos NESHAP. Most states have established training programs and/or certification for asbestos removal contractors. Also, the Asbestos Hazard Emergency Response Act (AHERA) requires states to establish accreditation programs for persons who inspect, develop management plans, or design or conduct response actions in schools. States are encouraged to extend the AHERA accreditation requirements to all demolition/ renovation contractors.

### ***Inspector Training***

To increase inspector effectiveness in finding violations and documenting evidence at demolition and renovation projects, inspectors should receive training on inspection procedures, safety, the NESHAP requirements and other pertinent regulations. Several training providers offer courses and workshops to regional, state and local agency inspectors. Providers include colleges and universities, consulting firms and individuals and multi-jurisdictional organizations formed by local and state agencies. Asbestos inspectors should periodically attend certification and accreditation courses and workshops to become aware of the information certified removal contractors are being taught about the asbestos NESHAP.

Inspectors should contact local AHERA personnel or state labor/industry departments to obtain information regarding worker, contractor/supervisor, inspector, management planner and project designer training course providers.

<http://www2.epa.gov/asbestos/state-asbestos-contacts>.

### ***Inspections***

Inspections are the foundation for finding substantive violations that may lead to enforcement actions. In order to determine compliance and to collect evidence, inspectors must enter active removal areas.

Three items – the inspectors' checklist, a camera and safety gear – are especially important and are considered standard inspection gear. Whenever possible, inspectors should collect samples and observe work practices. This includes determining “friable” material. In a recent court case, *STATE EX REL. DEWINE v. TITAN WRECKING & ENVIRONMENTAL, LLC*, 2012 Ohio 1429, the court found in favor of Titan, in part. Ohio inspectors failed to determine if the floor tile was friable. The inspectors failed to take a sample, place it in a clear “baggie” and apply hand pressure to determine if the material could be crushed/crumbled by hand pressure.

While it is preferable to inspect a site during active removal operations, a compliance determination based on evidence collected (e.g., photographs and samples of material) is possible at a removal site when no removal activity is occurring.

### ***Inspection Targeting***

Because of the tremendous increase in the number of notifications received by EPA and the delegated agencies, regions and their delegated agencies must make more efficient use of inspection resources by implementing an inspection targeting system that strategically identifies which notifications or contractors should require inspections. Inspection priority should be given to past violators, citizen complaints and demolitions and renovations for which no notification was received. Information from building permits, waste disposal site records, other contractors and agencies and various publications can assist in this effort.

### ***Program Alternatives***

When delegated agencies find it difficult to maintain a high level of inspections due to funding limitations, they should adopt cost-effective alternative mechanisms. Examples of alternatives include adoption of a statewide contractor certification program or the adoption of a system of collecting fees for each removal operation to help fund enforcement programs. When combined with a penalty policy of sufficient stringency for each violation type, the adoption of one or more such alternatives would be an acceptable asbestos NESHAP enforcement program modification.

### ***Federal Enforcement***

EPA may take administrative and/or judicial actions against a NESHAP violator. The severity and significance of the violations will determine the course of action that EPA may follow. EPA can pursue administrative actions under Clean Air Act Sections 113 and 303.

#### ***Section 113***

##### ***Federal Enforcement Options***

Section 113 of the Clean Air Act authorizes enforcement action for violations of state implementation plans, permits and other general requirements. Section 113(a)(3) authorizes EPA to take any of the following actions for general violations:

- Issue an administrative penalty order – §113(a)(3)(A);
- Issue an order to comply – §113(a)(3)(B);
- Bring a civil action against a violator – §113(a)(3)(C); or
- Request that the U.S. Attorney General commence a criminal action – §113(a)(3)(D).

### ***Requirements for Orders***

Any order issued by EPA must state with reasonable specificity the nature of the alleged violation(s) and must establish a reasonable compliance schedule, taking into consideration the seriousness of the violations and any good faith efforts to comply. Compliance must be achieved as expeditiously as practicable but in no case later than one year from the issuance of the order.

Any order from EPA must give the person to whom the order is issued an opportunity to request a conference regarding the alleged violation(s). A copy of any such order must be sent to the corresponding state agency.

### ***Civil Judicial Enforcement***

EPA may commence a civil action seeking a permanent or temporary injunction or to assess and recover a civil penalty whenever a person has violated any requirement. Any such action shall be brought in the federal District Court in the area in which the violation is alleged to have occurred, where the defendant resides, or where the principal place of business is located. The court is authorized to restrain the violation, require compliance, and assess any appropriate penalties and fees. Notice of commencement of the action is to be provided to the applicable state air pollution control agency.

### ***Criminal Penalties***

Any person who knowingly violates a requirement more than 30 days after being notified of a violation, makes a false statement or representation, fails to provide required information, or releases negligently or knowingly hazardous air pollutants that place a person in danger of imminent death or serious bodily injury is subject to a fine and imprisonment. Fines and imprisonment can vary depending on the nature of the violations. Corporate fines can be up to \$1 million for each violation. Most terms of imprisonment are one to five years except that the most severe can be up to 15 years.

### ***Administrative Assessment of Civil Penalties***

Section 113(d) describes the process for administrative penalty assessment that must be followed when administrative penalty orders (APOs) are being issued. EPA may utilize APOs to assess civil penalties up to a current maximum of \$37,500 per day per

violation. APOs may be used only in cases where the total penalty does not exceed \$320,000 and the first alleged date of violation occurred no more than 12 months prior to initiation of the administrative action. Civil penalties may be readjusted in 2012 and every four years thereafter, generally in accordance with changes in the Consumer Price Index.

### ***Penalty Assessment Criteria***

The Clean Air Act Stationary Source Civil Penalty Policy (October 25, 1991) provides guidance for determining the amount of civil penalties EPA will seek in pre-trial settlement of civil judicial actions and in APOs under Section 113 of the Clean Air Act. Due to certain unique aspects of asbestos demolition and renovation cases, an appendix entitled Asbestos Demolition and Renovation Civil Penalty Policy (May 5, 1992) provides separate guidance for determining the gravity and economic benefit components of the penalty. Adjustment factors may be applied in accordance with the penalty policy.

The general penalty assessment criteria in Section 113(e) include the following:

- Size of the business.
- Economic impact the penalty will have on the business.
- Full compliance history including good faith efforts of the violator to comply.
- Duration of violations.
- Whether the violator has been assessed and/or has paid previous penalties for similar violations.
- Economic benefit of noncompliance.
- Seriousness of the violation(s).

### ***Section 303***

Section 303 of the Clean Air Act authorizes the EPA Administrator to take specific actions during emergency situations where there are imminent and substantial threats to public health. The EPA administrator may bring suit in U.S. District Court to restrain any person from continuing to emit pollutants that are causing the threat. If it is not practical to await civil action to address the threat, the Administrator is authorized to issue a Section 303 order seeking adequate protection of public health. A Section 303 order is effective for a maximum of 60 days unless a civil action is filed in which case the order may be extended an additional 14 days.

### ***Section 306***

Another enforcement option is contractor listing under Section 306. When EPA lists a contractor, this means that the contractor cannot be awarded any contract to perform work where federal funds are involved. Listing of noncompliant contractors is mandatory when they have been convicted of criminal violations. Contractors with continuing or recurring violations of clean air standards may also be listed at the discretion of EPA. Besides restricting the involvement of recalcitrant contractors for federal projects, there is at least a moderate deterrent value in that the average contractor does not want to be on the Section 306 list due to the negative business impacts that such a listing may bring.

### ***Regional Oversight***

Joint EPA/state/local program inspections are the best method to review delegated agency inspections and establish the criteria for an acceptable compliance inspection. For regions with both delegated and undelegated state/local programs, regional inspections should be concentrated in the undelegated state/local programs. Regions should develop written inspection programs containing inspection criteria and targeting systems and should provide a written assessment of each delegated agency's compliance record.

### ***Cross-Program Coordination***

EPA NESHAP and TSCA inspections and OSHA inspection programs should be coordinated to maximize information collection and sharing, consolidate compliance assistance efforts and unify enforcement activities among all EPA and OSHA asbestos programs.

### ***Additional Enforcement Strategy Information***

The 1991 Implementation Strategy also provides a summary of new requirements and information regarding waste disposal site inspections and recordkeeping inspections at waste sites and contractors. Violations associated with waste handling and disposal recordkeeping and reporting requirements are discussed and information regarding important applicability and policy determinations is provided as well.

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