

Chapter 17

Legal Perspectives

The following information describes the authority for inspections, evidence needed to pursue an enforcement action, and various enforcement options. This material was obtained from EPA's national strategy document and from EPA attorneys. Further legal questions should be addressed to Regional Counsels or to counsels for the State or local enforcement agency.

Authority for Inspections

Statutory authority for inspection is under Section 114 of the *Clean Air Act*. Allowed activities during inspection include sampling, photography, and visual observations. The inspector need not be a certified visible emissions observer to judge whether there is an emission.

If denied access to a facility, an inspector may apply for a warrant to perform the inspection. In order to obtain a warrant, the agency should show either that the inspection is scheduled under a "neutral" inspection format, or that there is probable cause to suspect violations at the subject source. The agency must obtain the exact street address of the site and name of the owner, otherwise the warrant may be denied.

An inspector discovering obvious violations of the asbestos NESHAP during an inspection is not empowered by EPA to order a work stoppage to curtail asbestos emissions. This order must be made, when necessary, at the level of a Division Director. Other orders may be feasible under the power of local health agencies. Inspectors must couch these recommendations properly, for if the material proves NOT to be asbestos and the crew has stopped working based on the inspector's recommendation, the contractor will not be happy and potentially try to recoup lost \$ from the agency.

Evidence Required

The following facts must be proven to establish that a violation of the asbestos NESHAP occurred:

1. The defendant was an owner or operator

In 40 CFR Part 61, *National Emission Standards for Hazardous Air Pollutants*, Subpart A General Provisions, Section 61.02 (Definitions), an "**owner or operator**" is "any person who owns, leases, operates, controls, or supervises a stationary source". A "**stationary source**" is "any building, structure, facility, or installation which emits or may emit any air pollutant which has been designated as hazardous by the Administrator."

In 40 CFR Part 61, *National Emission Standards for Hazardous Air Pollutants*, Subpart M -National Emission Standard for Asbestos, Section 61.154 (Standard for active waste disposal sites) notes that "each owner or operator of an active waste disposal site that receives asbestos-containing waste material" from mills, demolition or renovation operations, or conversion operations must comply with the waste disposal provisions of the asbestos NESHAP.

In 40 CFR Part 61, *National Emission Standards for Hazardous Air Pollutants NESHAP*, Subpart M -Asbestos, Section 61.141 -Definitions, an "owner or operator" is redefined specific to demolition or renovation activities. An "**owner or operator of a demolition or renovation activity**" is "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."

Evidence needed: Find out as much as possible regarding the companies and individuals that are involved in the demolition or renovation. Get the names of the owner, any lessees, the demolition or renovation contractor, the asbestos abatement subcontractor, the asbestos surveyor, if any, and the workers at the site.

2. The site is a facility or installation

A "facility" is 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); any ship; and any active or inactive waste disposal site. For purposes of this definition, any building, structure, or installation that contains a loft used as a dwelling is not considered a residential structure, installation, or building. Any structure, installation, or building that was previously subject to this subpart is not excluded, regardless of its current use or function.

An "installation" is any building or structure or any group of buildings or structures at a single demolition or renovation site that are under the control of the same owner or operator (or owner or operator under common control).

Evidence needed: Note what type of building or buildings are being renovated or demolished. If it is an apartment building, note the number of dwelling units it contains. If more than one building is involved, speak with the owner, contractor and/or subcontractor to determine the overall purpose or scope of the demolition or renovation. It may be important to be able to group the buildings together in one project in order to meet the jurisdictional amount of asbestos if less than the regulated amount is involved in some of the buildings.

3. The activity was a demolition and/or renovation operation

"Demolition" is defined as 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.

"Renovation" is defined as altering a facility or one or more facility components in any way, including the stripping or removal of RACM from a facility component.

Evidence needed: Determine what activities are taking place at the site.

4. The activity involved asbestos

"Asbestos" is the asbestiform varieties of serpentine (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and actinolite-tremolite.

Evidence needed: Take representative samples of all suspect materials and analyze these samples at an EPA-approved laboratory.

5. The activity involved friable asbestos material (FAM)

"Friable asbestos material (FAM)" is any material containing more than 1 percent asbestos as determined using the method specified in Appendix A, Subpart F, 40 CFR Part 763, Section 1, Polarized Light Microscopy (PLM) that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure. If the asbestos content is less than 10 percent as determined by a method other than point counting by PLM, verify the asbestos content by point counting using PLM.

Evidence needed: Carefully document the condition of the material observed. Is it dry? Does it crumble easily with hand pressure? Has it been subject to any mechanical operation?

6. The activity involved a jurisdictional amount of asbestos:

In order for all of the requirements of the asbestos NESHAP to apply, there must be a demolition or renovation involving at least 260 linear feet of friable asbestos material on pipes, at least 160 square feet of friable asbestos materials on other facility components, or at least 35 cubic feet of friable asbestos off facility components where area or length could not be previously measured.

Evidence needed: Determine how much asbestos was removed. If the asbestos has already been removed, ask workers where it was removed from and measure the pipes or square footage. If such measurements are not possible, estimate the volume of asbestos materials removed.

7. The defendant acted knowingly (only applies to criminal enforcement actions)

To establish a criminal violation of the asbestos NESHAP, the government must prove that the defendant had knowledge of his or her actions.

Evidence needed: What is the defendant's history with the asbestos NESHAP? Has the owner/operator had training in the requirements of the asbestos NESHAP? Have violations occurred in the past? Did the owner/operator ignore inspection findings and proceed with a dry removal?

8. The defendant failed or caused another person or employee to fail to comply with any of the work practice standards.

Important components of the work practice standards include: proper notification, adequately wetting the ACM during removal, carefully lowering ACM, keeping materials wet pending disposal preparation, providing worker training, properly preparing materials for transportation and disposal, disposing of ACWM properly.

Evidence needed:

- a. notification - Determine if a proper notification was submitted.
- b. wet removal - Is material being wetted consistent with EPA guidelines? Is there a water source at the site? Ask workers what practices were followed during removal operations. Is dust visible in the air or on horizontal surfaces?
- c. lowering of ACM - Ask workers to describe how material was removed from areas high above the ground. Check condition of removed materials (Is it broken up from being dropped?).
- d. maintenance of wet condition - Are materials awaiting deposition properly wetted?
- e. worker training - Is the supervisor's NESHAP training certification posted? For MAP sites, are the workers' initial and current training certificates on site? For AHERA sites, does the management plan contain information re: training of school asbestos workers?
- f. preparation for transportation and disposal - Note the condition of ACM in bags or other containers. Is the material adequately wet? Are the containers properly labeled?
- g. proper disposal - What waste disposal sites are being used? Are waste shipment records available for previous shipments? Are the WSRs being retained for two years? Do the WSRs contain the appropriate information?

Enforcement Options

The three major actions EPA may pursue against violators of the asbestos NESHAP are: civil judicial enforcement, civil administrative enforcement, and criminal enforcement.

Civil Judicial Enforcement

EPA may bring a civil judicial action to enforce the asbestos NESHAP, under 42 U.S.C. Section 7413(b)(2), whenever any person violates section 112. These lawsuits may ask the court to order the defendant to come into compliance with all CAA requirements and to assess a civil penalty of no more than \$37,500 per day for each violation. These enforcement actions are brought by EPA, but represented by the Department of Justice in federal district court.

Civil Administrative Enforcement Authority

EPA may also enforce the asbestos NESHAP through an administrative action under 42 U.S.C. Section 7413(d)(1)(B) so long as the civil penalty sought does not exceed \$320,000 and the first date of alleged violation occurred no more than 12 months prior to filing the administrative complaint. These money and time period caps can be waived by concurrence of the Department of Justice and EPA Headquarters. These cases are brought by EPA attorneys and are decided by administrative law judges assigned to the EPA.

Criminal Enforcement Authority

Criminal violations of the asbestos NESHAP are charged under 42 U.S.C. Section 7413(c)(1), which provides that knowingly violating any requirement or prohibition of section 112, the air toxics program, is a felony punishable by fine or imprisonment of up to 5 years (or 10 years if it is a repeat violation), or both.

Other Potential Violations

Sources subject to the asbestos NESHAP may violate not only Section 112 of the CAA, but other regulations as well.

CERCLA Release of a Reportable Quantity

Under 42 U.S.C. Section 9603(a), the person in charge of a facility is required to report the release (other than a federally permitted release) of a reportable quantity of a hazardous substance as soon as he or she has knowledge of it to the EPA's National Response Center. Asbestos is considered a hazardous substance and the reportable quantity is one pound (of pure asbestos). Releases authorized by a CAA, Clean Water Act or RCRA permit, for example, are considered federally permitted releases and are exempt. A violation of this provision is a crime punishable by fines or imprisonment of up to three years, or both.

Note: To prove that the CERCLA regulation was violated, an agency must prove that the released material was friable and contained a pound of pure asbestos. Inspectors must carefully document the amount and condition of the released material, take adequate numbers of samples, and have them analyzed by a NVLAP laboratory.

Knowing Endangerment

42 U.S.C. Section 7413(c)(5) makes it a crime to knowingly release into the ambient air any hazardous air pollutant, including asbestos, and thereby knowingly place another person in imminent danger of death or serious bodily injury. This is the most serious crime under the CAA and is punishable by fine or imprisonment of up to 15 years, or both.

Consent Decrees

During settlement proceedings, consent decrees may be negotiated with a violator in order to enhance future compliance with the regulation. For example, depending on the types of violations seen, consent decrees may require defendants to:

- Conduct representative sampling of suspect ACM to be disturbed and have samples analyzed at a National Voluntary Laboratory Accreditation Program (NVLAP) laboratory.
- Develop an asbestos control program which details procedures the defendant will follow to comply with the asbestos NESHAP.
- Develop and implement an asbestos training program and implement it within a certain time frame.
- Train a corporate asbestos program manager who will be responsible for company compliance with the regulation.
- Supply some of the following information with future notifications:
 - date of previous notification;
 - if previous notification was made by telephone, name of Agency contact who received the call;
 - name of on-site supervisor;
 - facility contact and telephone number;
 - survey inspector name and address, date of training, and training provider identification;
 - specific information regarding the types of RACM to be disturbed;
 - working hours at abatement site;

- definitive description of abatement techniques (wetting, waste handling, etc.) to be employed;
- name of waste disposal facility contact; and
- reason for an ordered demolition.

Examine loads for obvious violations of the asbestos NESHAP (improperly contained ACWM, dry material, lack of labels, etc.) before accepting them for transport.