

THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103

IN RE: :
: DOCKET NO. CAA-III-112
Vesuvius USA Corp. :
1404 Newton Drive :
Champaign, IL 61821, :
: :
David Kowalski d/b/a :
Industrial Business Brokers :
3170 Ridge Road Extension :
Freedom, PA 15042, :
: :
and : ADMINISTRATIVE COMPLAINT AND
: NOTICE OF OPPORTUNITY FOR
Timothy Lawrence d/b/a : HEARING
T L Lawrence Construction Co. :
200 Second Avenue East :
Beaver Falls, PA 15010 :

I. JURISDICTION

This is an administrative action initiated pursuant to Section 113(a)(3) and (d) of the Clean Air Act ("CAA" or "Act"), as amended, 42 U.S.C. § 7413(a)(3) and (d), for the assessment of a civil penalty for violations of Section 112 of the Act and its implementing regulations, as alleged below against Vesuvius USA Corp. ("Vesuvius"), David Kowalski d/b/a Industrial Business Brokers ("IBB"), and Timothy Lawrence d/b/a T L Lawrence Construction Company ("T L Lawrence") (hereinafter collectively referred to as "Respondents"). This Administrative Complaint and Notice of Opportunity for Hearing is issued under authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by Section 113(a)(3) and (d) of the CAA, 42 U.S.C. § 7413(a)(3) and (d). The Administrator has delegated this authority to the Regional Administrator of EPA,

Region III, who in turn has delegated it to the Director of Air Protection Division of EPA Region III who, with the Director of the Waste and Chemicals Management Division, issues this Complaint. Complainants are the Director of the Air Protection Division and the Director of the Waste and Chemicals Management Division.

II. APPLICABLE STATUTES AND REGULATIONS

1. Section 112 of the CAA, 42 U.S.C. § 7412, requires the Administrator of EPA to publish a list of air pollutants determined to be hazardous, and to promulgate regulations establishing emission standards or, where necessary, design, equipment, work practice, or operational standards for each listed hazardous air pollutant.
2. Section 114 of the CAA, 42 U.S.C. § 7414, authorizes the Administrator of EPA to require any person who owns or operates any emission source or who is otherwise subject to the requirements of the CAA to, among other things, establish and maintain such records, make such reports and provide such information as the Administrator might reasonably require to develop or determine compliance with emission standards.
3. EPA listed asbestos as a hazardous air pollutant under the authority of Section 112 of the CAA, 42 U.S.C. § 7412. Pursuant to Sections 112 and 114 of the CAA, 42 U.S.C. §§ 7412 and 7414, EPA promulgated a National Emission Standard for Asbestos ("the asbestos NESHAP"), codified at 40 C.F.R Part 61, Subpart M, Sections 61.140 - 61.156. The asbestos NESHAP includes regulations governing, inter alia, the emission, handling, and disposal of asbestos by the owner or operator of a demolition or renovation activity at an affected facility. Pursuant to Section

112(q) of the CAA, 42 U.S.C. § 7412(q), the above referenced standards and provisions remain in full force and effect, notwithstanding the November 15, 1990 Clean Air Act Amendments.

4. Sections 113(a)(3) and (d) of the CAA, 42 U.S.C. §7413(a)(3) and (d), authorize the Administrator of EPA to issue an administrative order assessing a civil administrative penalty whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any rule, plan, order, waiver, or permit promulgated, issued, or approved under, inter alia, Section 112 of the CAA.

III. DEFINITIONS

5. Pursuant to 40 C.F.R. § 61.141, "adequately wet" means, to sufficiently mix or penetrate with liquid to prevent the release of particulates.

6. Pursuant to 40 C.F.R. § 61.141, "asbestos" means the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and actinolite-tremolite.

7. Pursuant to 40 C.F.R. § 61.141, "asbestos-containing waste material" means, in pertinent part, mill tailings or any waste that contains commercial asbestos and is generated by a source, subject to the provisions of this subpart, including friable asbestos material and materials contaminated with asbestos including disposable equipment and clothing.

8. Pursuant to 40 C.F.R. § 61.141, "Category II nonfriable asbestos-containing material" means, in pertinent part, any material that contains more than 1 percent asbestos as determined using the methods specified in 40 C.F.R. Part 763, Polarized Light Microscopy, that, when dry, cannot be crumpled, pulverized, or reduced to powder by hand pressure.

9. Pursuant to 40 C.F.R. § 61.141, "facility" means any institutional, commercial, public, industrial, or residential structure, installation, or building.

10. Pursuant to 40 C.F.R. § 61.141, "facility component" means any part of a facility, including equipment.

11. Pursuant to 40 C.F.R. § 61.141, "friable asbestos material" means, in pertinent part, any material that contains more than 1 percent asbestos as determined using the method, specified in 40 C.F.R. Part 763, Polarized Light Microscopy, that when dry, can be crumbled, pulverized, or reduced to powder by hand pressure.

12. Pursuant to 40 C.F.R. § 61.141, "owner or operator of a demolition or renovation activity" means 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 a demolition or renovation operation, or both.

13. Pursuant to 40 C.F.R. § 61.141, "regulated asbestos-containing material ("RACM")" means, in pertinent part, friable asbestos material or Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material

in the course of demolition or renovation operations regulated by this subpart.

14. Pursuant to 40 C.F.R. § 61.141, "renovation" means altering a facility or one or more facility components in any way, including the stripping or removal of regulated asbestos-containing material from a facility component.

15. Section 302(e) of the CAA, 42 U.S.C. § 7602(e), defines "person" to include "an individual, corporation, partnership, (or) association."

IV. GENERAL ALLEGATIONS

16. Respondent T L Lawrence is a sole-proprietor and a contractor and/or subcontractor doing business in the Commonwealth of Pennsylvania from a location at 200 Second Avenue East, Beaver Falls, Pennsylvania. At all times relevant to this Complaint, T L Lawrence was engaged in the removal of asbestos containing corrugated transite wall and roof panels from Buildings 22, 24 & 27 (collectively referred to as the "MgO Building"), located at 50 North Green Lane, Zelienople, Pennsylvania ("the Facility").

17. Respondent Vesuvius is a corporation with headquarters in Champaign, Illinois. Vesuvius has a branch located at 50 North Green Lane which includes the Facility. At all times relevant to this Complaint, Vesuvius was the owner of the subject Facility located at 50 North Green Lane.

18. Respondent IBB is a sole-proprietor who has a place of business at 3170 Ridge Road Extension, Freedom, PA. At all times

relevant to this Complaint, IBB was engaged in the removal of asbestos containing corrugated transite wall and roof panels from the Facility and controlled and/or supervised the Facility being renovated or the renovation operation at the Facility or both.

19. Respondents are "persons," as that term is defined in Section 302(e) of the CAA, 42 U.S.C. § 7602(e), and within the meaning of Section 113(d) of the CAA, 42 U.S.C. § 7413(d).

20. At all times relevant to this Complaint, Respondent T L Lawrence was the "operator of a demolition or renovation activity" as that term is defined at 40 C.F.R. § 61.141.

21. At all times relevant to this Complaint, Respondent Vesuvius was the "owner of a demolition or renovation activity" as that term is defined at 40 C.F.R. § 61.141.

22. At all times relevant to this Complaint, Respondent IBB was the "owner or operator of a demolition or renovation activity" as that term is defined at 40 C.F.R. § 61.141.

23. On August 19, 1997, Vesuvius and IBB entered a contract for IBB to conduct the renovation of the Facility including removal of approximately 20,000 square feet of asbestos-containing corrugated transite wall and roof panels from the Facility.

24. Upon information and belief, IBB subsequently subcontracted with T L Lawrence to conduct the renovation of the Facility including removal of approximately 20,000 square feet of asbestos-containing corrugated transite wall and roof panels from the Facility.

25. Upon information and belief, Respondents commenced asbestos removal at the Facility on October 8, 1997.

26. On October 20, 1997, a duly-authorized representative of EPA ("the inspector") conducted an inspection of the Facility. The purpose of this inspection was to verify Respondents' compliance with the asbestos NESHAP, 40 C.F.R. §§ 61.141 et seq. The inspector was accompanied by a duly-authorized representative of the Pennsylvania Department of Environmental Protection ("PaDEP").

27. Before and during the time of the October 20, 1997 inspection, Respondents were engaged in the renovation of the Facility -- which included the stripping, disturbing, and/or removal of approximately 20,000 square feet of asbestos-containing material, including corrugated asbestos transite wall and roof panels, from the Facility.

28. At the time of the October 20, 1997 inspection, the inspector observed in and around the Facility debris which contained broken, suspected asbestos-containing transite wall and roof panels, which were being removed from the Facility. The inspector took 16 samples and photographs of this debris, which appeared to be dry. The subsequent Polarized Light Microscopy tests of the samples revealed that they all contained more than one percent asbestos.

29. During the October 20, 1997 inspection, the inspector observed that the transite at the Facility was dry, damaged and broken into small pieces and was crumbled, pulverized, or reduced to a powder or had a high probability of becoming crumbled, pulverized or reduced to a powder by the renovation at the

Facility and that the transite was not in containment.

30. During the October 20, 1997 inspection, the inspector observed that Respondents failed to have at least one on-site representative, such as a foreman or management-level person or other authorized representative, trained in the provisions of the asbestos NESHAP and the means of complying with them, present during the stripping, removal, handling or other disturbance of RACM from the Facility on or before October 20, 1997.

31. Pursuant to 40 C.F.R. § 61.145(a), all of the requirements of paragraphs (b) and (c) of section 61.145 apply to the owner or operator of a renovation activity if the combined amount of RACM to be stripped, removed, dislodged, cut, drilled, or similarly disturbed at the facility is at least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components.

32. The Facility is a "facility" within the meaning of 40 C.F.R. § 61.141.

33. Prior to the commencement of the asbestos abatement activities, the asbestos-containing material referenced in Paragraphs 23 and 27 above was "Category II non-friable ACM" as defined at 40 C.F.R. § 61.141.

34. The asbestos-containing material referenced in Paragraphs 28 and 29 above constitutes "friable asbestos material," within the meaning of 40 C.F.R. § 61.141, because it contained more than one percent asbestos, as determined using the method specified in 40 C.F.R. Part 763, Polarized Light Microscopy, and was able to be crumbled; pulverized or reduced to powder by hand pressure.

35. The asbestos-containing material referenced in Paragraphs 28 and 29 constitutes "RACM" as that term is defined at 40 C.F.R. § 61.141.

36. The stripping, removal or disturbance of the RACM referenced hereinabove constitutes a "renovation activity" within the meaning of 40 C.F.R. § 61.141.

V. VIOLATIONS

COUNT I

FAILURE TO SUBMIT REQUIRED NOTIFICATION

37. Complainants reallege the allegations contained in Paragraphs 1 through 36 above.

38. Pursuant to 40 C.F.R. § 61.145(b), each owner or operator of a demolition or renovation activity subject to 40 C.F.R. § 61.145 must provide the Administrator of EPA with written notice of intention to demolish or renovate at least 10 working days before asbestos stripping or removal work begins.

39. Because Respondents were engaged in the renovation of the Facility in October 1997, which included the stripping, disturbing, and/or removal of approximately 20,000 square feet of RACM, Respondents were required to submit the notice required by 40 C.F.R. § 61.145(b).

40. Respondents failed to submit any notification pursuant to 40 C.F.R. § 61.145(b) before commencement of stripping, disturbing, and/or removal of approximately 20,000 square feet of RACM.

41. Respondents' failure to comply with the requirements of 40

C.F.R. § 61.145(b) constitutes a violation of Section 112 of the CAA, 42 U.S.C. § 7412.

COUNT II

FAILURE TO HAVE ON-SITE REPRESENTATIVE

42. Complainants reallege the allegations contained in paragraphs 1 through 41 above.

43. Pursuant to 40 C.F.R. § 61.145(c)(8), no RACM shall be stripped, removed, or otherwise handled or disturbed at a facility unless at least one on-site representative, such as a foreman or management-level person or other authorized representative, trained in the provisions of the asbestos NESHAP and the means of complying with them is present.

44. Respondents failed to have at least one on-site representative, such as a foreman or management-level person or other authorized representative, trained in the provisions of the asbestos NESHAP and the means of complying with them, present during the stripping, removal, handling or other disturbance of RACM from the Facility on or before October 20, 1997.

45. Respondents' failure to comply with the requirements of 40 C.F.R. § 61.145(c)(8) constitutes a violation of Section 112 of the CAA, 42 U.S.C. § 7412.

COUNT III

**FAILURE TO KEEP STRIPPED RACM
ADEQUATELY WET UNTIL COLLECTED FOR DISPOSAL**

46. Complainants reallege the allegations contained in

paragraphs 1 through 45 above.

..

47. Pursuant to 40 C.F.R. § 61.145(c)(6)(i), all RACM, including material that has been removed or stripped, must be adequately wet and remain wet until collected and contained or treated in preparation for disposal.

48. At the time of the October 20, 1997 inspection, the inspector determined that dry RACM which had been removed or stripped from the Facility was deposited in and around the Facility for subsequent collection. After inspecting representative samples of the RACM awaiting collection, the inspector observed that the RACM was dry and not adequately wetted pursuant to 40 C.F.R. §61.145(c)(6)(i).

49. Respondents' failure to comply with the requirements of 40 C.F.R. § 61.145(c)(6)(i) constitutes a violation of Section 112 of the CAA, 42 U.S.C. § 7412.

VI. PROPOSED CIVIL PENALTY

Section 113(d) of the CAA, 42 U.S.C. § 7413(d), authorizes a civil administrative penalty of up to \$ 27,500 per day for each violation of the CAA that occurred on or after January 30, 1997. EPA proposes to assess a civil penalty of sixty-three thousand eight hundred dollars (\$63,800) against Respondents as follows:

A. **Gravity Component**

Count I:

Failure to submit required notice
(> 50 units) 40 C.F.R. § 61.145(b) \$ 16,500.00

Count II:

Failure to have trained on-site

representative 40 C.F.R. § 61.145(c)(8)	\$ 16,500.00
<u>Count III:</u>	
Failure to keep stripped RACM (> 50 units) adequately wet until collected for disposal, 40 C.F.R. § 61.145(c)(6)(i).	\$ 16,500.00
Size of the Violator Based on Net Worth (\$100,000-1,000,000)	<u>\$ 5,500.00</u>
SUBTOTAL	\$ 55,000.00
B. Economic Benefit (\$18,800 bid - \$10,000 cost)	<u>\$ 8,800.00</u>
TOTAL PROPOSED PENALTY:	\$ 63,800.00

The proposed civil penalty has been determined in accordance with Section 113 of the CAA, 42 U.S.C. § 7413; 40 C.F.R. Part 19; U.S. EPA's Clean Air Act Stationary Source Civil Penalty Policy, dated October 25, 1992 ("CAA Penalty Policy"), and Appendix III thereto ("Asbestos Penalty Policy"); and Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (pursuant to the Debt Collection Improvement Act of 1996), dated May 9, 1997 ("Inflation Policy"). Copies of the CAA Penalty Policy, Asbestos Penalty Policy, and the Inflation Policy are enclosed with this Complaint. The proposed penalty is not a demand as that term is defined in the Equal Access to Justice Act, 28 U.S.C. § 2412.

In determining the amount of any penalty to be assessed, Section 113(e) of the CAA, 42 U.S.C. § 7413(e), requires EPA to 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, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. To develop the proposed penalty herein, Complainants have taken into account the particular facts and circumstances of this case with specific reference to EPA's Asbestos Penalty Policy.

EPA will consider, among other factors, Respondents' ability to pay to adjust the proposed civil penalty assessed in this Complaint. The proposed penalty reflects a presumption of Respondents' ability to pay the penalty and to continue in business based on the size of their businesses and the economic impact of the proposed penalty on their businesses. The burden of raising and demonstrating an inability to pay rests with Respondents. In addition, to the extent that facts or circumstances unknown to Complainants at the time of the issuance of the Complaint become known after issuance of the Complaint, such facts and circumstances may also be considered as a basis for adjusting the proposed civil penalty assessed in the Complaint.

EPA's applicable penalty policy represents an analysis of the statutory penalty factors enumerated above, as well as guidance on their application to particular cases. If the penalty proposed herein is contested through the hearing process described below, Complainants are prepared to support the statutory basis for the elements of the penalty policy applied in this case as well as the amount and nature of the penalty proposed.

The gravity component of the penalty accounts for the amount

of asbestos involved (more than 50 Units) and the substantive nature of the violation. No further adjustment of the penalty appears warranted under the applicable penalty policies at this time. If appropriate, further penalty adjustments may be made during settlement negotiations. EPA reserves the right to seek higher penalties if new evidence supports such assessment.

VII. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

These proceedings are governed by the Consolidated Rules of Practice, 40 C.F.R. Part 22, as amended, 57 Fed. Reg. 4316 (February 4, 1992) and 57 Fed. Reg. 5320 (February 13, 1992). Respondents have the right to request a hearing to contest any matter of law or material fact set forth in the Complaint or the appropriateness of the proposed penalty. To request a hearing Respondents must file a written Answer to this Complaint with the Regional Hearing Clerk, EPA Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103, within thirty (30) days of receipt of this Complaint. The Answer should clearly and directly admit, deny or explain each of the factual allegations contained in this Complaint of which Respondents have any knowledge. Where Respondents have no knowledge of a particular factual allegation, the Answer should so state. Such a statement is deemed to be a denial of the allegation. The Answer should contain (1) a statement of the facts which constitute the grounds of defense, (2) a concise statement of the facts which Respondents intend to place at issue in the hearing, and (3) a statement as to whether a hearing is requested. The denial of any material fact or the raising of any affirmative defense shall be construed as a request for a hearing. All material facts not denied in the Answer will be considered as admitted.

If Respondents fail to file a written Answer within thirty

(30) days of receipt of this Complaint, such failure shall constitute an admission of all facts alleged in the Complaint and a waiver of the right to a hearing under Section 113(d)(2)(A) of the CAA, 42 U.S.C. § 7413(d)(2)(A). Failure to Answer shall result in the filing of a Motion for Default Order imposing the penalties proposed herein without further proceedings.

Any hearing requested will be conducted in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 552 et seq., and the Consolidated Rules of Practice, 40 C.F.R. Part 22, as amended, 57 Fed. Reg. 4316 (February 4, 1992) and 57 Fed. Reg. 5320 (February 13, 1992). A copy of these Rules is enclosed. Hearings will be held in a location to be determined at a later date pursuant to 40 C.F.R. § 22.21(d).

VIII. SETTLEMENT CONFERENCE

EPA encourages settlement of the proceedings at any time after issuance of a Complaint if such settlement is consistent with the provisions and objectives of the CAA. Whether or not a hearing is requested, Respondents may confer with Complainants regarding the allegations of the Complaint and the amount of the proposed civil penalty.

In the event settlement is reached, its terms shall be expressed in a written Consent Agreement prepared by Complainants, signed by the parties, and incorporated into a Consent Order signed by the Regional Administrator or his designee. Settlement conferences shall not affect the requirement to file a timely Answer to the Complaint.

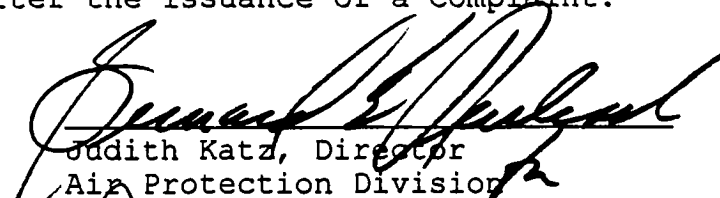
The staff attorney assigned to this case is **Donna L. Mastro**. A copy of the Answer and all other documents which Respondents


file in this action must also be furnished to Ms. Mastro at the Office of Regional Counsel (3RC11), EPA Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. If you are not represented by legal counsel and have any questions or desire to arrange an informal conference to explore settlement, please contact Ms. Donna Mastro, Assistant Regional Counsel, at (215) 814-2777 before the expiration of the thirty day period following your receipt of this Complaint. If you are represented by counsel, your counsel may contact Ms. Mastro before the expiration of the thirty day period following your receipt of this Complaint to discuss questions or arrange settlement conferences.

Please be advised that the Consolidated Rules of Practice, 40 C.F.R. § 22.08, prohibit any unilateral discussion of the merits of a case with, inter alia, the Administrator, the members of the Environmental Appeals Board, the Judicial Officer, Regional Administrator, Regional Judicial Officer, or the Administrative Law Judge after the issuance of a Complaint.

7/22/98
Date

7/22/98
Date


Judith Katz, Director
Air Protection Division


John A. Armstead, Director
Waste & Chemicals Management
Division

CERTIFICATE OF SERVICE

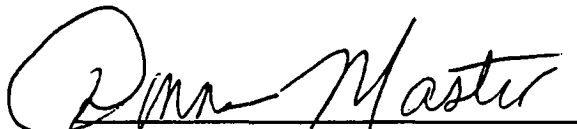
I hereby certify that the original of the foregoing Complaint and Notice of Opportunity for Hearing (re: Docket No. CAA-III-112) was hand-delivered to the Regional Hearing Clerk, EPA Region III, and that true and correct copies were mailed via certified mail, return receipt requested, postage prepaid, to the following persons:

Dave Kurtz, President
Vesuvius USA Corp.
1404 Newton Drive
Champaign, IL 61821

David Kowalski, President
Industrial Business Brokers
3170 Ridge Road Extension
Freedom, PA 15042

Timothy Lawrence, President
T L Lawrence Construction Co.
200 Second Avenue East
Beaver Falls, PA 15010

7/23/98
Date


Donna L. Mastro
Assistant Regional Counsel

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