

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Administrative  
Penalty Order Issued to Building  
Systems Corporation

**FINDINGS OF FACT, CONCLUSIONS  
AND RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Linda F. Close on January 24, 2007. The record closed at the end of the hearing.

Rick Cool, Assistant Attorney General, 445 Minnesota St. #900, St. Paul, MN 55101-2127, appeared on behalf of the Minnesota Pollution Control Agency staff (MPCA staff). Douglas Reiersen, President, Building Systems Corporation (the Corporation), 533 North 51<sup>st</sup> St., Grand Forks, ND 58203 appeared on behalf of the Corporation.

**STATEMENT OF THE ISSUES**

1. Did Respondent remove floor tile that was regulated under the National Emission Standard for Hazardous Air Pollutants (NESHAP)?<sup>1</sup>
2. Did Respondent comply with NESHAP requirements that regulated asbestos-containing material (RACM) be adequately wetted and contained in leak-tight containers while wet?
3. Is the nonforgiveable penalty of \$7,500.00 reasonable?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

**FINDINGS OF FACT**

***Regulatory Background***

1. The removal of asbestos-containing material (ACM) is regulated by MPCA and federal regulations.<sup>2</sup> Asbestos is a highly regulated substance because, when it is airborne, it can cause cancer.<sup>3</sup>

<sup>1</sup> 40 C.F.R. pt. 61.

<sup>2</sup> 40 C.F.R. pt. 61, subpt. M; Minn. R. ch. 7011.

<sup>3</sup> Testimony of Jackie Deneen. Ms. Deneen is the asbestos program coordinator for the MPCA.

2. MPCA defines Category I ACM to include floor tile, gaskets, and asphalt roofing products which contain greater than 1% asbestos. Category 1 ACM is regulated by NESHAP if it is friable or becomes friable during the removal process. When ACM is regulated by NESHAP, it is referred to as regulated asbestos-containing material, or RACM. Only a licensed asbestos removal contractor may remove RACM.<sup>4</sup>

3. Floor tile may be regulated or non-regulated, depending on what happens to it during the removal process. If the tile remains whole during removal, it is non-regulated. If it is damaged so that it may crumble or be reduced to a powder, then it is regulated. Floor tile may be damaged during removal even when hand tools are used to remove it.<sup>5</sup>

4. RACM must be wetted before it is packaged in leak-tight containers. The containers must be labeled with asbestos warning signs.<sup>6</sup> Floor tile should be thoroughly coated with water as it is removed. Wetting friable material will cause it to clump in the containers, and water will pool in the bottom of containers of properly-wetted RACM.<sup>7</sup>

5. MPCA may impose penalties for violations of its regulations. The Agency has developed a calculation worksheet for determining whether a penalty is forgivable or nonforgivable. Penalties for violations of regulations for the removal and storage of RACM are nearly always considered nonforgivable, due to the seriousness of such violations.<sup>8</sup>

### ***The Project***

6. During the late winter of 2005, the City of Red Lake Falls (the City) determined to demolish an old hospital building in the City. The City advertised for bidders, indicating that the work involved removal of hazardous materials, including asbestos.<sup>9</sup>

7. The Corporation is a business located in Grand Forks, North Dakota. It is owned and operated by its president, Douglas Reiersen. The business is licensed in the State of Minnesota as an asbestos abatement contractor.<sup>10</sup> The Corporation has been so licensed since 1994.<sup>11</sup>

8. As the successful bidder on the demolition project, the Corporation planned to begin work at the site on April 26, 2005. In connection with the project, the Corporation submitted to the Minnesota Department of Health (MDH)

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<sup>4</sup> MPCA Ex. 1.

<sup>5</sup> MPCA Ex. 2; MPCA Ex. 3; MPCA Ex. 4.

<sup>6</sup> MPCA Ex. 1.

<sup>7</sup> Test. of J. Deneen.

<sup>8</sup> Test. of J. Deneen; Ex. 35.

<sup>9</sup> MPCA Ex. 40.

<sup>10</sup> Testimony of Douglas Reiersen.

<sup>11</sup> Test. of J. Deneen.

a Notification of Asbestos Related Work. The Notification indicated that 9,000 square feet of non-friable floor tile would be removed.<sup>12</sup> On April 20, 2006, the Corporation sent to MDH an amended Notification, in which it indicated the work would not begin until May 2, 2005.<sup>13</sup>

9. The old hospital building had been vacant for several years, and there was no running water in it. As a result, the Corporation arranged with the City to use water from a fire hydrant located across the street from the building. Each work day, Reierson would hook up a hose to the fire hydrant, using a special wrench for that purpose. Each evening, Reierson would roll up the hose and store it.<sup>14</sup>

10. On May 6-7, 2005, Reierson and his brother worked at the job site and removed tile from the basement area.<sup>15</sup>

### ***The Inspection and Penalty***

11. On May 11, 2005, two MPCA staff—Jackie Deneen and another MPCA employee—went to the building for the purpose of conducting an inspection. When they arrived, they found Frank Voeller, the Corporation's employee, waiting outside the building for Reierson to arrive. Voeller explained that he was waiting for Reierson to arrive with the wrench for turning on the water. Voeller stated that he could not begin work until running water was available.<sup>16</sup>

12. The doors of the building were marked with signs warning of the asbestos danger within the building. MPCA staff entered the building without protective clothing. Staff saw no problems on the first floor of the building. When they went to the basement, they saw that floor tile had been removed. There were bags of material, fragments of floor tile, and dust on the floor. They saw eight closed bags, which they then opened and found fragments of floor tile. The tile was not wet, and there was no water in the bags. There were also five open bags. These bags contained dry material, including floor tile.<sup>17</sup>

13. Staff took a number of photos and twenty samples for testing. The photos showed the following:

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<sup>12</sup> MPCA Ex. 6.

<sup>13</sup> MPCA Ex. 7.

<sup>14</sup> Test. of D. Reierson; Ex. E.

<sup>15</sup> Test. of J. Deneen. Deneen's testimony was based on her conversation with Reierson's employee, Frank Voeller. Reierson confirmed, during cross examination, that he had worked during that time, but he could not say whether he had worked in the basement area then. Test. of D. Reierson.

<sup>16</sup> Test. of J. Deneen.

<sup>17</sup> Test. of J. Deneen.

- Floor areas covered with tile fragments and dust.<sup>18</sup>
- Bagged floor tile debris in fragmented form, some of it in closed bags and other debris in open bags.<sup>19</sup>
- Dry, dusty green floor tile debris in the open.<sup>20</sup>
- Light tan floor tile debris in the open.<sup>21</sup>
- Black baseboard material.<sup>22</sup>

14. MPCA staff noted the presence of brooms and a spud bar<sup>23</sup> in the basement. Staff concluded that water had not been used during the removal process because there were brooms rather than squeegees present. In addition, they saw brush marks on the floor, and there was no evidence that the dust on the floor had clumped, which it would have done had water been used. Upon opening the bags that had been closed, staff found no water in the bottom of the bags, and the dust in the bags had not clumped. The open bags also had no water in them.<sup>24</sup>

15. Reiersen arrived at the building while MPCA staff were still there. Deneen discussed with Reiersen the inspection results. She told him that he needed to wet the material and submit a new notification to MDH.<sup>25</sup>

16. On May 11, 2005, the Corporation submitted a second amended Notification to MDH. This Notification indicated that, of the 9,000 square feet of floor tile, 4,000 was non-friable and 5,000 was friable. The Notification further stated that the 5,000 square feet of friable floor tile was in the basement.<sup>26</sup>

17. The samples staff gathered on May 11<sup>th</sup> were submitted to Techtron, a testing firm that is under contract to MPCA.<sup>27</sup> On May 16, 2007, Techtron submitted its report on the samples. The test results showed the following:

- The light tan floor tile and its black mastic contained asbestos.
- The black baseboard debris contained asbestos.

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<sup>18</sup> MPCA Ex. 9- 10; Ex. 19.

<sup>19</sup> MPCA Ex. 11-14.

<sup>20</sup> MPCA Ex. 15; Ex. 22-23.

<sup>21</sup> MPCA Ex. 16-17; Ex. 20.

<sup>22</sup> MPCA Ex. 18; Ex. 21.

<sup>23</sup> A spud bar is a tool similar to a long-handled ice scraper and is used for tile removal. Test. of J. Deneen.

<sup>24</sup> Test. of J. Deneen.

<sup>25</sup> Test. of J. Deneen.

<sup>26</sup> MPCA Ex. 25.

<sup>27</sup> Test. of J. Deneen.

- The green floor tile debris contained asbestos.
- Black floor tile samples contained asbestos.<sup>28</sup>

18. After the May 11<sup>th</sup> inspection, MPCA staff requested a copy of the pre-demolition asbestos survey that had been performed by Brian Bykum. Bykum is a licensed asbestos inspector who conducted the survey for the City. Bykum's report showed that the floor tile had not been friable prior to the commencement of the work by the Corporation.<sup>29</sup>

19. On June 3, 2005, Deneen sent the Corporation a letter alleging violations of federal and state rules regulating asbestos removal. Specifically, it was alleged that the Corporation failed to adequately wet RACM and failed to seal it in leak-tight containers while wet. Deneen asked the Corporation to respond to the allegations within ten days.<sup>30</sup>

20. On June 15, 2005, the Corporation responded that the RACM had been properly wetted and sealed in leak-tight containers.<sup>31</sup> On September 14, 2005, following discussion with Deneen, the Corporation sent a letter to Deneen explaining how water had been made available to the Corporation by the City, because Deneen had questioned whether any water was available in the building.<sup>32</sup>

21. MPCA staff and their attorney met to discuss the disposition of the matter. They discussed the case development form prepared by MPCA staff,<sup>33</sup> and they prepared a penalty calculation worksheet.<sup>34</sup> Staff concluded that the violations were serious and a nonforgiveable penalty should be assessed.<sup>35</sup>

22. On October 5, 2005, the MPCA Commissioner sent the Corporation an Administrative Penalty Order (APO) assessing a nonforgiveable penalty of \$7,500.00. The Commissioner assessed the penalty based on the Corporation's failure to adequately wet RACM and failure to seal the RACM in leak-tight containers in violation of Minn. R. pt. 7011.9920, which incorporates 40 C.F.R. § 61.145-.150.<sup>36</sup>

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<sup>28</sup> MPCA Ex. 28.

<sup>29</sup> MPCA Ex. 29; Test. of J. Deneen.

<sup>30</sup> MPCA Ex. 31.

<sup>31</sup> MPCA Ex. 32.

<sup>32</sup> MPCA Ex. 33.

<sup>33</sup> MPCA Ex. 34.

<sup>34</sup> MPCA Ex. 35.

<sup>35</sup> Test. of J. Deneen.

<sup>36</sup> MPCA Ex. 36.

23. On October 26, 2005, the Commissioner received a request for hearing from the Corporation.<sup>37</sup> On November 1, 2005, the Corporation followed this hearing request with a faxed waiver of the 30-day hearing requirement.<sup>38</sup>

Based on these Findings of Fact, the Administrative Law Judge makes the following:

### CONCLUSIONS

1. MPCA has jurisdiction over this matter.<sup>39</sup>
2. MPCA staff has fulfilled all procedural requirements of law and rule so that this matter is properly before the Administrative Law Judge.
3. MPCA staff has shown, by a preponderance of the evidence, that the Corporation removed tile regulated by NESHAP.
4. MPCA staff has shown, by a preponderance of the evidence, that the Corporation violated Minn. R. pt. 7011.9920, which incorporates 40 C.F.R. § 61.145, by failing to properly wet RACM during the removal process.
5. MPCA staff has shown, by a preponderance of the evidence, that the Corporation violated Minn. R. pt. 7011.9920, which incorporates 40 C.F.R. § 61.150, by failing to seal RACM in wetted condition in leak-tight containers.
6. The amount of the penalty is reasonable within the meaning of Minn. Stat. § 116.072, subd. 6.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

### RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends that: the MPCA AFFIRM the administrative penalty of \$7,500.00.

Dated: February 22, 2007.

s/Linda F. Close  
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LINDA F. CLOSE  
Administrative Law Judge

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<sup>37</sup> MPCA Ex. 37.

<sup>38</sup> MPCA Ex. 38.

<sup>39</sup> Minn. Stat. 116.072.

Reported: Taped, 3 tape(s)  
No transcript prepared

### **NOTICE**

This report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Pursuant to Minn. Stat. § 116.072, subd. 6, the parties have 5 calendar days after receiving this report to file comments to the report. The Commissioner must consider the comments in making the final decision. Parties should contact Brad Moore, Commissioner of the Pollution Control Agency, 520 Lafayette Road, St. Paul, MN 55155-4194 (651) 296-6300, to learn the procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## MEMORANDUM

There is no dispute that the floor tile here was regulated by NESHAP. Under NESHAP, floor tile is not regulated unless it is friable.<sup>40</sup> Although the floor tile was non-friable before the Corporation began work,<sup>41</sup> removal resulted in the tile fragmenting so as to become regulated. The Corporation admitted this by filing with MDH an amended Notification immediately after the MPCA staff inspection on May 11, 2007.<sup>42</sup> The amended Notification stated that 5,000 square feet of floor tile was friable. This admission disposes of the first issue.

The Corporation instead disputes whether the tile was wetted during and after removal. It claims that it wetted the RACM during removal and ensured that the material remained wet when it was bagged. The Corporation further maintains that all bags of RACM were sealed, after wetting, in leak-tight containers. MPCA staff, on the other hand, asserts that they found open and closed bags of dry RACM and further saw RACM littered about the basement of the building when they inspected.

The ALJ finds the staff's version more credible. Staff took numerous photographs of the basement on the day of the inspection. The photographs are highly persuasive as to the friability of the floor tile and the dryness of the RACM debris. In one photo, for example, staff wrote the word "Dry" in the accumulated dust on the floor.<sup>43</sup> There is no evidence, such as clumping, to indicate the debris had been wetted at any point. The presence of brooms and brush marks further supports the staff's version of the facts. The photos also show fragmented tile lying about throughout the inspected area.<sup>44</sup> Thus, even if staff did open bags and leave them open, the Corporation violated the law requiring that RACM be sealed in leak-tight containers upon removal. While some material had been placed in bags, much material remained on the basement floor.

The statute requires the Commissioner, in determining the amount of a penalty, to consider six factors:

- 1) the willfulness of the violation;
- (2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;
- (3) the history of past violations;
- (4) the number of violations;
- (5) the economic benefit gained by the person by allowing or committing the violation; and
- (6) other factors as justice may require....

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<sup>40</sup> 40 C.F.R. pt. 61.141.

<sup>41</sup> See MPCA Ex. 29; Test. of J. Deneen,

<sup>42</sup> See MPCA Ex. 30.

<sup>43</sup> MPCA Ex. 15.

<sup>44</sup> *E.g.*, MPCA Ex. 10, 15.

Minn. Stat. § 116.072, subd. 2.

In imposing the APO, the staff found no willfulness; no past history of violations; no numerous violations; no economic benefit to the Corporation and no other factors. Instead, the staff focused on the gravity of the violation. The Commissioner may impose a nonforgiveable APO when a violation is serious.<sup>45</sup> In the case of asbestos, the potential for harm is great. Asbestos is a carcinogen.<sup>46</sup> As a result, violations involving asbestos are virtually always addressed with a nonforgiveable APO.

The ALJ agrees that the violations here are serious. The Corporation undertook extensive removal work in the basement without taking the precaution of watering down the tile during removal. It further failed to bag all material that had been removed, and it failed to wet the material in the bags it did fill. An Administrative Law Judge may not recommend a change in the penalty unless the penalty amount is unreasonable.<sup>47</sup> Given the potential for harm of leaving RACM throughout the basement of the building, the ALJ finds the penalty amount is not unreasonable.

**L. F. C.**

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<sup>45</sup> Minn. Stat. § 116.072, subd. 5 (b).

<sup>46</sup> Test. of J. C

<sup>47</sup> Minn. Stat. § 116.072, subd. 6 (c).