

**Commissioner, Indiana Department of Environmental Management
August 31, 1995 Notice & Order of the Commissioner
DORE & ASSOCIATES CONTRACTING INC.
1997 OEA 005, OEA CAUSE NO.: 95-A-J-1414**

Official Short Cite Name:	Dore & Associates Asbestos Removal, 1997 OEA 005
OEA Cause No.:	95-A-J-1414
Topics/Keywords:	326 IAC 14-10-3 326 IAC 14-10-3(4) 326 IAC 14-10-4(3) 326 IAC 14-10-4(5)(A) 326 IAC 14-10-2(q) and (t) 326 IAC 18-3-8(2) 40 CFR 61.152 / 329 IAC 2-21 40 CFR 61.154 removal start date stripping and removing certificate of accreditation and photographic identification friable asbestos civil penalty calculation
Presiding ELJ:	Wayne E. Penrod
Party Representatives:	Catherine A. Gibbs, Esq. for IDEM Tammi Forster, Esq. for IDEM Timothy J. Frost, Esq. for Respondent
Order Issued:	28-Jan-97
Index Category:	Air enforcement
Further Case Activity:	

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JAN 28 1997



INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Wayne E. Penrod
Chief Administrative Law Judge

150 West Market Street
Suite 618
Indianapolis, IN 46204
Telephone 317-232-8591
Fax 317-233-0851

STATE OF INDIANA)
) SS: BEFORE THE INDIANA OFFICE OF
COUNTY OF MARION) ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
COMMISSIONER OF THE DEPARTMENT) CAUSE NO. 95-A-J-1414
OF ENVIRONMENTAL MANAGEMENT)
)
Complainant,)
)
vs.)
)
DORE & ASSOCIATES)
CONTRACTING, INC.)
)
Respondent.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND FINAL ORDER

Indiana Department of Environmental Management ("IDEM"), by counsel, proposes the following findings of fact and conclusions of law. Hearing in this cause was held September 19, 1996. The Indiana Department of Environmental Management ("IDEM") was represented by Catherine A. Gibbs, Office of Legal Counsel, and by Tammi Forster, Office of Legal Counsel. Dore and Associates, Contracting, Inc. ("Dore") was represented by Timothy J. Frost, P.O. Box 534, Bay City, MI 48707.

FINDINGS OF FACT

1. On January 5, 1995, IDEM issued a Notice of Violation to the Respondent for its alleged violations of 326 IAC § 14-10-3(4), 326 IAC § 18-3-8(2), 326 IAC § 14-10-4(5)(A), and 326 IAC 14-10-4-(3). Respondent received the Notice of Violation (R. and 6, 9 & Exhibit 1).
2. On August 31, 1995, a Notice and Order of the Commissioner was issued to the Respondent for these violations. This Notice and Order of the Commissioner assessed a civil penalty of \$19,000 and was received by the Respondent (R. at 7, 9 & Exhibit 2).

3. Respondent was offered the opportunity to resolve the violations through an Agreed Order, but the parties were unable to come to agreement. More than sixty (60) days had passed between issuance of the Notice of Violation and issuance of the Notice and Order of the Commissioner (R. at 9, 14).
4. The Respondent timely filed its Petition for Review on October 25, 1995.
5. Respondent conducted an asbestos removal project at the Bartholomew County Hospital, located at 2400 East 17th Street, Columbus, Indiana. The project began in July 11, 1994 (R. at 71, Exhibits 3, 4, 5). The project involved the stripping and removal of asbestos containing material in an amount, for regulatory purposes, which was greater than three (3) linear feet on pipes, or three (3) square feet on other facility components, or a total of greater than or equal to seventy-five hundredths (0.75) cubic feet on or off all facility components. The amount of regulated friable asbestos containing material being stripped or removed from the facility was approximately 7,500 linear feet from pipes, 57,000 square feet from surface area, and 600 cubic feet from facility components (R. at 7, 8, 9 & Exhibits 3, 4, 5).
6. Mr. David White testified as keeper of the records for the asbestos section of IDEM (R at 25). The original notification submitted by Dore indicated a stripping and removal start date of June 27, 1994. A revised notification with a new start date of July 11, 1994, was postmarked June 27, 1994. (R. at 30, 31).
7. Rule 326 IAC § 14-10-3 governs time frames for notifications and revisions of notifications. In July, 1994, 326 IAC § 14-10-3(4) stated:

Each owner or operator to whom this section applies shall establish the following:

- (4) If the stripping or removal of asbestos containing material in demolition or renovation operations described in section 1(1) through 1(2) and 1(4) of this rule will begin on a date other than the date specified in the original or the most recent revised notification, written notice of the new start date must be postmarked and sent by certified mail, return receipt requested, at least five (5) working days or delivered at least two (2) working days before the start date of asbestos stripping or removal specified in the following:
 - (A) The notification that is being revised.
 - (B) The new revised notification.

8. Five (5) working days before the start date in the notification being revised would have been June 20, 1994 (R. at 36). Thus Dore's postmarked revision of June 27, 1994, failed to comply with part (A) of the rule.
9. Dore's fax of this same revised notification was delivered on June 27, 1994 (R. at 32). Two (2) working days before the start date in the notification being revised would have been June 23, 1994 (R. at 37). Thus Dore's revision delivered by fax on June 27, 1994, failed to comply with part (A) of the rule.
10. On July 12, 1994, John Clevenger, an IDEM inspector, went to the Bartholomew County Hospital to inspect the stripping and removal of asbestos which Dore had notified IDEM was to have begun on July 11, 1994 (R. at 74, Exhibits 4, 5).
11. During this inspection, Mr. Clevenger observed that no stripping and removal had begun, but he did observe workers handling polyvinyl sheeting ("poly") in order to build containment (R. at 109). Mr. Clevenger was told that stripping and removal had not yet begun because Dore was having difficulty obtaining workers (R. at 74).
12. Mr. David White testified that he recalled no notification revisions to the July 11, 1994 start date (R. at 39). In addition, Dore offered no testimony that any other revisions were sent or delivered to IDEM. This constitutes a second violation of 326 IAC § 14-10-3(4), which requires notification revisions whenever the start date of a project changes.
13. On August 4, 1994, John Clevenger returned to the Bartholomew County Hospital to conduct an inspection of the Dore asbestos abatement project. On that date, Mr. Clevenger asked to see the accreditation cards of all workers and supervisors (R. at 80).
14. Mr. Clevenger was shown photocopies of the accreditation cards of three individuals: Alfred Lopez, Virgil Dishaw, and Fred Ricupati (R. at 112).
15. Upon return to his IDEM office, Mr. Clevenger later discovered that these three individuals were accredited by IDEM (R. at 112).
16. 326 IAC § 18-3-8(2) currently and in July 1994 states:

The following requirements shall apply to the implementation of all asbestos projects at a facility:

- (2) Each asbestos removal contractor shall ensure that the current certificate of accreditation and photographic identification card belonging to each project supervisor and worker is kept on the job site during all asbestos projects. The certificate of accreditation and photographic identification card shall be kept outside the work area, and shall be available for inspection by the department of environmental management.
17. On August 16, 1994, John Clevenger returned to the Bartholomew County Hospital to conduct an inspection of the Dore asbestos abatement project. On this date, Mr. Clevenger observed a worker on scaffolding removing a plaster ceiling to access fire proofing above (R. at 84).
18. Three asbestos waste bags were found within ten feet of this worker. No water hose or evidence of the use of water was present in this room (R. at 84).
19. Mr. Clevenger took samples of this waste material, which was analyzed and found to be positive for asbestos (R. at 91). While sampling the material, Mr. Clevenger lifted the bags and found them to be light for the amount of material in the bags. He felt the inside and bottom of the bags and found no water present. He observed no water droplets or condensation inside or outside of the bags. When he felt the material, it felt dry to the touch (R. at 88).
20. Mr. Clevenger was able to determine that the material was friable because he was able to reduce it to a powder by exerting hand pressure. He observed visible emissions when exerting hand pressure (R. at 88).
21. In July, 1994, Rule 326 IAC § 14-10-4(3) stated:

Each owner or operator to whom this section applies shall comply with the following procedures to prevent emissions of particulate asbestos material:

- (3) Adequately wet friable asbestos-containing materials when they are being stripped from facility components before the members are removed from the facility. In renovation operations, wetting that would unavoidably damage equipment or present a safety hazard is not required if the owner or operator:

- (A) asks the department to determine whether wetting to comply with this subdivision would unavoidably damage equipment or present a safety hazard, and, before beginning to strip, supplies the commissioner with adequate information to make this determination; and
 - (B) when the department determines that equipment damage would be unavoidable, uses a local exhaust ventilation and collection system designed and operated to capture particulate asbestos material produced by the stripping and removal of the friable asbestos-containing materials. The system must exhibit no visible emissions to the outside air or be designed in accordance with the requirements of 40 CFR 61.154*.
- 22. Dore did not submit a request to the department to forgo the use of water on this project, nor was such a request granted by the department (R. at 64).
- 23. In July, 1994, Rule 326 IAC § 14-10-4(5)(A) stated:
For friable asbestos materials that have been stripped:
 - (A) Adequately wet the materials to ensure that they remain wet until they are collected for disposal in accordance with 40 CFR 61.152* and 329 IAC 2-21.
- 24. On September 27, 1994, John Clevenger returned to Bartholomew County Hospital to conduct an inspection of the asbestos abatement project conducted by Dore. On that date, Mr. Clevenger observed an asbestos containing waste bag taped to scaffolding which held thermal system insulation. He observed two other asbestos containing waste bags which also held thermal system insulation. The thermal system insulation appeared to be dry (R. at 94).
- 25. When Mr. Clevenger lifted the bags, they felt light for the amount of material contained in them. He observed no water droplets or condensation inside or outside of these bags. He touched the thermal system insulation, which felt dry and left a white powder on his hands (R. at 94).
- 26. Mr. Clevenger observed one hose in containment to be shared by five to six workers (R. at 95). He observed no puddles or evidence of water in this area of containment (R. at 102).

27. Mr. Clevenger took samples of the waste materials found in the bags. While sampling, Mr. Clevenger determined that the material was friable. He was able to crumble the material with hand pressure and observe visible emissions while doing so (R. at 102).
28. The samples were analyzed for the presence of asbestos. The analysis results showed that the material was positive for asbestos (R. at 101).
29. The factors that case manager Matthew Stuckey considered in assessing the civil penalty were:
 - a. The late revision violation was relatively minor because it was a paperwork violation, thus a low penalty of \$1000 was assessed (R. at 147).
 - b. The subsequent failure to revise the project start date notification was also relatively minor. However, is slightly more serious than the original violation because IDEM resources had been expended by sending an inspector to observe work practices which were not in progress. A slightly higher penalty of \$2000 was thus assessed (R. at 148).
 - c. Failure to provide proof of accreditation hindered the inspector in determining that the workers were in fact properly trained to perform asbestos work. However, the workers were in fact, accredited, and so a minimal penalty of \$1000 was assessed (R. at 149).
 - d. The work practice requirements of 326 IAC § 14-10-4(5)(A) and 326 IAC § 14-10-4(3) which involved adequately wetting the asbestos containing material during and after stripping and removal are intended to diminish the risk of airborne exposure of workers and other members of the public (R. at 150, 152). This is significant because asbestos is a known carcinogen and is classified as a hazardous air pollutant (R. at 150). Thus, a significantly higher penalty of \$7,500 was assessed for each date that these violations were found.
 - e. The penalties assessed to each violation are consistent with other penalties assessed in other cases in 1994 (R. at 153).
30. To the extent that any finding of fact above is also a Conclusion of Law, said finding is also hereby incorporated in the following Conclusions.

CONCLUSIONS OF LAW

1. The Indiana Office of Environmental Adjudications has jurisdiction over this matter.
2. The Complainant has the Burden of Proof in this Matter.
3. The rule, 326 IAC § 14-10-3(4), requiring that revisions to start dates of asbestos removal projects be submitted within a specified time frame is enforceable as a matter of law.
4. The rule, 326 IAC § 18-3-8(2), requiring that certificates of accreditation and photographic identification cards for each worker and supervisor on an asbestos removal project be kept on site and available for inspection is enforceable as a matter of law.
5. The rule, 326 IAC § 14-10-4(3), requiring that friable asbestos containing material be adequately wet when they are being removed from facility components is enforceable as a matter of law.
6. The rule, 326 IAC § 14-10-4(5)(A), requiring that friable asbestos containing materials that have been removed be adequately wetted and remain wet until collected for disposal is enforceable as a matter of law.
7. As a matter of law, IDEM met its burden of proof by following proper procedure and producing substantial evidence of the violations.
8. The evidence warrants a finding against the Respondent.
9. Dore violated 326 IAC § 14-10-3(4) by failing to submit its revised start date within the specified time limit and by failing to submit a new revised start date when it was unable to begin on the original revised start date.
10. Handling poly for use in building containment does not constitute "stripping and removal" as these activities are defined at 326 IAC § 14-10-2(q) and (t).
11. Proof of harm is not necessary to establish that a violation occurred.
12. Dore violated 326 IAC 18-3-8(2) by failing to have the original certificates of accreditation on site for three of its employees.

13. Dore violated 326 IAC § 14-10-4(3) and 326 IAC § 14-10-4(5)(A) on August 16, 1994, when it failed to adequately wet friable asbestos containing material both during and after the material was stripped from facility components.
14. Dore violated 326 IAC § 14-10-4(3) and 326 IAC § 14-10-4(5)(A) on September 27, 1994, when it failed to adequately wet friable asbestos containing material both during and after the material was stripped from facility components.

ORDER

Dore and Associated Contracting, Inc. shall pay a civil penalty in the amount of \$19,000. The assessed civil penalty is a reasonable sum based upon the statutory and regulatory requirements and the purpose to be achieved. This penalty shall be remitted to the Department of Environmental Management within thirty (30) days of the effective date of this Order. Checks shall be made payable to the Asbestos Trust Fund, with Cause Numbers indicated on the check and mailed to: Cashier, IDEM 100 North Senate Avenue, P.O. Box 6015, Indianapolis, IN 46206-6015.

You are further notified that pursuant to provisions of S.E.A. 156 (P.L.41-1995 amending IC 4-21.5-7) which became effective July 1, 1995, the Office of Environmental Adjudication serves as the Ultimate Authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within (30) days after the date this notice is served.

Wayne E. Penrod, Chief
Administrative Law Judge