

**STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC HEALTH
PUBLIC HEALTH HEARING OFFICE**

In re: Environmental Consulting and Contracting Petition No. 2001-0307-053-005
 d.b.a. ENCO Environmental Consulting
 and Contracting, LLC July 22, 2002

MEMORANDUM OF DECISION

Procedural History

On August 31, 2001, the Department of Public Health (“the Department”) filed a Statement of Charges (“the Charges”) against Environmental Consulting and Contracting, LLC (“respondent”) notifying it that the Department was proposing to revoke or order other disciplinary action against its asbestos contractor license #000024 (“the license”). H.O. Exh. 1.

On September 21, 2001, the Department issued a Notice of Hearing in which the Commissioner of the Department appointed this Hearing Officer to rule on all motions, determine findings of fact and conclusions of law, and issue an order. H.O. Exh. 2.

On October 4, 2001, respondent filed an Answer denying most of the factual allegations in the Charges. H.O. Exh. 3.

On November 1 and 2, 2001, and March 14 and April 8, 2002, administrative hearings were held to adjudicate the Charges. The hearings were conducted in accordance with Chapter 54 of the Connecticut General Statutes (the Uniform Administrative Procedure Act) and §§19a-9-1, et seq. of the Regulations of Connecticut State Agencies (“the Regulations”). Attorney Edward G. Fitzpatrick represented respondent and Attorney Linda Fazzino represented the Department at the hearing. On the first day of hearing the Department filed a Motion to Deem Allegations admitted that was denied on that date. H.O. Exh. 4, Tr. I., p. 5.¹

¹ As used herein, Tr. I., Tr. II., Tr. III., and Tr. IV. refer, respectively, to the transcripts of November 1 and 2, 2001, and March 14 and April 8, 2002.

This Memorandum of Decision is based entirely on the record and sets forth this Hearing Officer's findings of fact, conclusions of law, and order.

Allegations

A. FIRST COUNT

1. In paragraph 1 of the Charges, the Department alleges that respondent is, and has been at all times referenced in the Statement of Charges, the holder of Connecticut asbestos contractor license number 000024.
2. In paragraph 2 of the Charges, the Department alleges that in or about the fall of 2000, respondent performed an asbestos abatement project at a vacant store in the Torrington Plaza, South Main Street, Torrington, Connecticut ("the Torrington property").
3. In paragraph 3 of the Charges, the Department alleges that on or about October 2, 2000, in connection with the asbestos abatement project at the Torrington property, respondent violated Connecticut's regulations applicable to the performance of asbestos abatement, found at §§19a-332a-1 to 19a-332a-16, inclusive, of the Regulations, in that it:
 - a. failed to submit an asbestos abatement notification form to the Department that satisfies the requirements of Section 19a-332a-3 of the Regulations;
 - b. failed to post warning signs at all approaches to the work area;
 - c. failed to properly construct, operate and/or maintain a worker decontamination system;
 - d. failed to ensure that no person left the work area unless first decontaminated and cleaned free of asbestos debris;
 - e. failed to seal air-tight, with polyethylene sheeting, all openings between the work area and non-work area(s), including, but not limited to, windows and doorways;
 - f. failed to cover all wall surfaces in the work area with polyethylene sheeting or the equivalent;

- g. failed to provide negative pressure ventilation units with high efficiency particulate air (“HEPA”) filtration in a sufficient number to allow at least one air change every fifteen minutes in the work area; and/or
 - h. failed to adequately wet all asbestos containing materials (“ACM”) to be removed or disturbed by removal.
4. In paragraph 4 of the Charges, the Department alleges that the above described facts constitute grounds for disciplinary action pursuant to the *Conn. Gen. Stat.* §§20-440 and/or 19a-332a(b), taken in conjunction with §§19a-332a-1, 19a-332a-2, 19a-332a-5(a), 19a-332a-5(c), 19a-332a-5(e), 19a-332a-5(h), 19a-332a-6, 19a-332a-7(a), 20-440-1 and/or 20-440-6(b) of the Regulations.

B. SECOND COUNT

5. In paragraph 5 of the Charges, the Department incorporates Paragraph 1 of the first count by reference.
6. In paragraph 6 of the Charges, the Department alleges that in or about the summer of 2000, respondent performed an asbestos abatement project at a vacant office building known as the Capital West Building, One Myrtle Street, Hartford, Connecticut (“the Hartford property”).
7. In paragraph 7 of the Charges, the Department alleges that on or about June 26, 2000, in connection with the asbestos abatement project at the Hartford property, respondent violated the Regulations, in that it:
- a. failed to restrict work area access to authorized personnel afforded proper respiratory protection and/or protective clothing;
 - b. failed to shut down, lock out and isolate applicable portions of the facility heating, ventilating and air conditioning (“HVAC”) system(s) within the work area(s) to prevent contamination of, and fiber dispersal to, other areas of the facility;
 - c. failed to seal air-tight, with polyethylene sheeting, all openings between the third floor work area and the non-work areas;
 - d. failed to adequately wet all ACM to be removed or disturbed by removal;
 - e. failed to adequately wet all asbestos waste with an amended water solution before placing it in leak-tight containers for disposal;

- f. failed to provide negative pressure ventilation units with HEPA filtration in a sufficient number to allow at least one air change every fifteen minutes in each work area;
 - g. failed to cover all applicable floor and wall surfaces with at least two (2) layers of polyethylene sheeting or the equivalent; and/or
 - h. failed to seek and/or obtain an alternative work practice procedure ("AWP") from the Department.²
8. In paragraph 8 of the Charges, the Department alleges that the above facts constitute grounds for disciplinary action pursuant to the *Conn. Gen. Stat.* §§20-440 and/or 19a-332a(b), taken in conjunction with §§19a-332a-1, 19a-332a-2, 19a-332a-5(b), 19a-332a-5(c), 19a-332a-5(e), 19a-332a-5(f), 19a-332a-5(h), 19a-332a-5(j), 19a-332a-7(a), 19a-332a-11, 20-440-1 and/or 20-440-6(b) of the Regulations.
- C. THIRD COUNT**
9. In paragraph 9 of the Charges, the Department incorporates Paragraph 1 of the first count by reference.
10. In paragraph 10 of the Charges, the Department alleges that in or about the fall of 1999, respondent performed an asbestos abatement project at 500 State Street, Bridgeport, Connecticut ("the Bridgeport property").
11. In paragraph 11 of the Charges, the Department alleges that on or about October 25, 1999, in connection with the asbestos abatement project at the Bridgeport property, respondent violated the Regulations, in that it:
- a. failed to notify the Department of all ACM to be removed by respondent from the facility on the Bridgeport property and/or the total abatement cost for the project, and/or failed to pay the notification fee required by *Conn. Gen. Stat.* §191-332a(c);
 - b. failed to provide and maintain complete and/or accurate records of the asbestos abatement project at the Bridgeport property;

² Pursuant to §19a-332a-11 of the Regulations an asbestos contractor can apply for an exception from one or more of the regulatory requirements governing asbestos abatement by proposing an alternative procedure to the Department that provides an equivalent or a greater measure of asbestos emission control than the work practices prescribes by the Regulations. Such alternative procedures, known as "alternative work practices" or "AWP's", must be applied for and approved by the Department in advance and are limited to a specific facility and a specific period of time. Tr. I, pp. 132, 133.

- c. failed to isolate the work area(s) from the non-work areas with air-tight barriers attached securely in place;
 - d. failed to restrict work area access to authorized personnel afforded proper respiratory protection and/or protective clothing;
 - e. failed to ensure that no person left the work area unless first decontaminated and cleaned free of asbestos debris;
 - f. failed to properly construct, operate and/or maintain a worker decontamination system;
 - g. failed to cover all non-moveable objects in the work area with a minimum of six (6) mil polyethylene sheeting secured in place;
 - h. failed to cover all wall surfaces in the work area with at least two (2) layers of polyethylene sheeting or the equivalent;
 - i. failed to provide negative pressure ventilation units with HEPA filtration in a sufficient number to allow at least one air change every fifteen minutes in each work area;
 - j. failed to properly label all containers holding asbestos waste; and/or
 - k. failed to seek and/or obtain an AWP from the Department.
12. In paragraph 12 of the Charges, the Department alleges that the above facts constitute grounds for disciplinary action pursuant to *Conn. Gen. Stat.* §§20-440, 19a-332a(b), 19a-332a(c) and/or 19a-332b, taken in conjunction with §§19a-332a-1, 19a-332a-2, 19a-332a-3, 19a-332-4, 19a-332a-5(c), 19a-332a-5(d), 19a-332a-5(e), 19a-332a-5(f), 19a-332a-5(h), 19a-332a-5(k), 19a-332a-6, 19a-332a-11, 20-440-1 and/or 20-440-6(b) of the Regulations.

Findings of Fact

A. First Count

1. Respondent holds Connecticut asbestos contractor license number 000024. H.O. Exh. 3 (the Answer).
2. The mastic used to adhere some or all of the floor tiles to the floor at the Torrington property contained asbestos. Dept. 1, App. C-1, C-2; Tr. I, pp. 59, 66-68; Tr. II, p. 64.

3. In the summer or early fall of 2000, a contractor performing interior demolition work disturbed some of the floor tiles at the Torrington property. Dept. Exh. 1, App. B-2 – B-5; Tr. I., pp. 87, 93; Tr. III, p. 89.
4. Because of concern about the disturbance of the floor tiles, the owner of the Torrington property hired an asbestos contractor, A-1 Asbestos Abatement, Inc. (A-1), to remove the floor tiles. Tr. I, pp. 87-88.
5. A-1 subcontracted the job at the Torrington property to respondent. Dept. Exh. 1, p. 13; Tr. I, p. 89; Tr. III, p. 291, 292.
6. Respondent failed to file a notification form with the Department for the work it planned to perform at the Torrington property. Dept. Exh. 1, pp. 1-2, App. E-1, E-2; Tr. I, p. 46.
7. On October 2, 2000, respondent was working at the Torrington property. Dept. Exh. 1, pp. 1-5; Tr. I, p. 49; Tr. II, pp. 42, 151, 157.
8. On the morning of October 2, 2000, the Department's investigator approached the rear door to the work area at the Torrington property and heard the sound of scraping coming from within the work area.³ When he entered the work area he observed scraping tools, scrap marks on the floor indicative of floor tile removal activities, and a cloud of dust indicative of abatement activity, but no demolition debris. Dept. Exh. 1, p. 2, App. B-2, B-5, B-6; Tr. I, pp. 36, 39, 61, 63, 69; Tr. II, p. 41; Tr. III, pp. 168, 186, 257, 258, 272.
9. On the morning of October 2, 2000, respondent failed to post warning signs on or near the front or rear door of the work area at the Torrington property. Dept. Exh. 1, App. B-1, App. D-1, D-2; Tr. I, pp. 53, 54.
10. On the morning of October 2, 2000, there was no worker decontamination system or HEPA fans in operation at the Torrington property. Dept. Exh. 1, p. 2; Tr. I, pp. 38, 41-43; Tr. III, pp. 190, 191.
11. On the morning of October 2, 2000, respondent's employees left the work area at the property without first decontaminating themselves or ensuring that they were free of asbestos debris.⁴ Dept. Exh. 1, p. 3; Tr. I, pp. 38, 44, 48; Tr. III, p. 190.

³ The investigator testified that because of the absence of posted notices, he was only able to identify the exact location of the work area at the Torrington property from the scraping noise he heard coming from within that area. Tr. II, p. 41; Tr. III, p. 168

⁴ When, the investigator originally arrived at the site he approached the work area from the rear door. He then knocked on the door and was told by someone inside to drive around to the front entrance. When he

12. On the morning of October 2, 2000, respondent failed to apply polyethylene sheeting to all walls, windows and doorways in the work area at the Torrington property. Dept. Exh. 1, p. 2, App. B-2 – B-9, App. D-1, D-2; Tr. I, pp. 41, 42, 62; Tr. III, pp. 171, 181.
13. On the morning of October 2, 2000, respondent failed to adequately wet all of the ACM it was removing or disturbing by removal in the work area at the Torrington property. Dept. Exh. 1, p. 2; Tr. I, p. 58.
14. Respondent's actions at the Torrington property endangered the health of its employees and the general public. Tr. I, pp. 73-74.

B. *Second Count*

15. On June 26, 2000 respondent was performing asbestos abatement work on the Hartford property. H.O. Exh. 3; Dept. Exh. 3, pp. 1-3, App E-1 – E-7.
16. On June 26, 2000, all of respondent's employees performing asbestos abatement work on the third floor of the Hartford property were wearing protective clothing over their street clothes⁵ and were not wearing respirators. Dept. Exh. 3, p. 2; Tr. I, pp. 140, 168, 169; Tr. II, p. 86; Tr. III, p. 246; Tr. IV, p. 38.
17. On June 26, 2000, respondent failed to apply polyethylene sheeting to the HVAC system within the work area at the Hartford property. Dept. Exh. 3, p. 2; Dept. Exh. 5; Tr. I, pp. 141, 161; Tr. III, p. 304.
18. On June 26, 2000, respondent failed to apply polyethylene sheeting to all openings between the third floor work area and the non-work areas at the Hartford property. Dept. Exh. 3, p. 2; Tr. I, p. 174.

drove around to the front of the building, all of the workers inside had inexplicably left the work area. The investigator did not observe any protective clothing in or near the work area, indicating that the exiting workers were not wearing such clothing prior to leaving the work area. Tr. I, pp. 37, 42; Tr. II, p. 62; Tr. III, pp. 175, 176. The fact that respondent's employees left before the investigator had the chance to drive from the rear to the front of the facility suggests that they were aware that they were caught red-handed violating the Regulations and thought they could somehow escape, or lessen, their liability by leaving the work area before the investigator arrived.

⁵ The purpose of requiring asbestos abatement workers to wear protective clothing is, in part, to avoid the possibility that they might carry harmful asbestos fibers on their clothes outside the work area. This purpose may be frustrated if the employees wear their street clothes under their protective clothing. Tr. I, pp. 74, 186; Tr. II, p. 148.

19. On June 26, 2000, respondent failed to adequately wet all of the ACM it was removing from the Hartford property. Dept. Exh. 3, p. 2, App. E-1, E-3, E-4; Tr. I, pp. 156, 170, 172; Tr. II, p. 90.
20. On June 26, 2000, respondent failed to adequately wet the asbestos waste it was removing from the Hartford property with an amended water solution before placing it in leak-tight containers for disposal. Dept. Exh. 3, p. 2, App. E-1, E-3, E-4; Tr. I, pp. 156, 170, 172; Tr. II, p. 89; Tr. IV, p. 40.
21. On June 26, 2000, respondent failed to provide HEPA fans in a sufficient number to allow at least one air change every fifteen minutes in each work area at the Hartford property. Dept. Exh. 3, p. 3, App. D-1, E-4 – E-6; Tr. I., p. 164; Tr. IV, p. 35.
22. On June 26, 2000, respondent failed to apply polyethylene sheeting to all applicable floor and wall surfaces at the Hartford property. Dept. Exh. 3, p. 3, App. E-6, E-7; Tr. I, p. 172; Tr. III, p. 210.
23. On June 26, 2000, respondent failed to obtain an AWP from the Department that would have allowed it to avoid covering the walls and floors of the work area at the Hartford property with polyethylene sheeting. Dept. Exh. 3, p. 3, App. E-1, E-3; Dept. Exh. 4.
24. Respondent's actions at the Hartford property endangered the health of its employees and the general public. Tr. I, pp. 165-166, 178.

C. *Third Count*

25. On October 25, 1999, respondent was performing asbestos abatement work at the Bridgeport property. H.O. Exh. 3; Dept. Exh. 6, pp. 1-4.
26. Respondent failed to notify the Department of all the ACM it planned to remove from the Bridgeport property and the total abatement cost for the project. Dept. Exh. 6, p. 3; Tr. I, pp. 190, 195; Tr. II, pp. 7, 135; Tr. III, p. 316.
27. Respondent failed to pay the requisite notification fee to the Department for the asbestos abatement work it performed at the Bridgeport property. Tr. I, pp. 190, 197-201.
28. The records respondent maintained for the work it performed at the Bridgeport property were incomplete and inaccurate. Dept. Exh. 6, p. 4; Dept. Exh. 10, pp. 22, 39, 42; Tr. II, pp. 14-16, 18-20, 23-26, 129, 130.

29. On October 25, 1999, respondent failed to maintain access logs for all of the work areas at the Bridgeport property. Dept. Exh. 6, p. 4.
30. On October 25, 1999, respondent's employees threw concrete blocks, potentially contaminated with asbestos, out of the window of the second floor work area at the Bridgeport property into a dumpster. There were no air locks, no waste decontamination system, and no source of water at the window opening through which the concrete blocks were thrown. Dept. Exh. 6, p. 1; Tr. I, pp. 183, 188.
31. On October 25, 1999, several of respondent's employees engaged in asbestos removal activities were not wearing protective clothing and respirators. Dept. Exh. 6, pp. 1-4; Tr. I, pp. 185-186; Tr. II, p. 148; Tr. III, p. 246.
32. On October 25, 1999, several of respondent's employees left the work areas without undergoing decontamination or ensuring that they were free of asbestos debris. Dept. Exh. 6, pp.3-4; Tr. I, p. 186.
33. On October 25, 1999, the worker decontamination system at the Bridgeport property did not have a water source and the handles of the shower within the decontamination area did not work. Dept. Exh. 6, p. 2; Tr. I, pp. 185, 186.
34. On October 25, 1999, respondent failed to cover several bathroom fixtures in the work area at the Bridgeport property with polyethylene sheeting. However, there is insufficient evidence to establish that it was necessary to cover these fixtures. Dept. Exh. 6, p. 2; Tr. II, p. 12.
35. On October 25, 1999, respondent failed to provide HEPA fans in a sufficient number to allow at least one air change every fifteen minutes in the work areas at the Bridgeport property. Dept. Exh. 6, pp. 2, 4; Tr. I, p. 187.
36. On October 25, 1999, respondent failed to cover portions of the exterior walls of the work area at the Bridgeport property with polyethylene sheeting. Respondent failed to apply or receive an AWP from the Department for this practice. Dept. Exh. 6, p. 3; Tr. II, pp. 11, 109; Tr. III, p. 321.
37. On October 25, 1999, respondent used a portion of the HVAC system at the Bridgeport property to discharge air from HEPA fans to the outside of the facility. Dept. Exh. 6, p. 2.
38. On October 25, 1999, respondent failed to cover the HVAC system at the Bridgeport property with polyethylene sheeting. Dept. Exh. 6, p. 2.

39. On October 25, 1999, the asbestos waste trailer at the rear of the Bridgeport property was not properly labeled. Dept. Exh. 6, p. 4.
40. Respondent's actions at the Bridgeport property endangered the health of its employees and the general public. Tr. II, p. 148.

D. Other Findings

41. Exposure to asbestos fibers is a significant risk to human health. Tr. I, pp. 73, 74; Tr. III, pp. 181-182, 278, 279, 281.

Discussion and Conclusions of Law

Pursuant to §20-440-6(b) of the Regulations, the Department may take any action authorized by Conn. Gen. Stat. §19a-17 against an asbestos contractor who violates any regulation governing asbestos abatement or licensure. Section 19a-332a-2 of the Regulations prohibits any person from engaging in asbestos abatement unless it is in compliance with §§19a-332a-3 to 19a-332a-12 of the Regulations. Those regulations require an asbestos contractor, *inter alia*, to: (1) notify the Commissioner before engaging in any asbestos abatement which involves more than ten linear feet or more than 25 square feet of ACM; (2) post signs at all approaches to the work area; (3) construct and use a worker decontamination system; (4) decontaminate any person or equipment leaving a work area; (5) isolate the work area from non-work areas and seal all openings between the work area and non-work areas, including all windows and doors, with polyethylene sheeting; (6) cover all floors and wall surfaces in the work area with polyethylene sheeting; (7) provide a sufficient number of HEPA fans to allow at least one work place air change every 15 minutes; (8) wet all ACM removed or disturbed by removal; (9) restrict the work area to authorized personnel afforded respiratory protection and protective clothing; (10) isolate a facility's HVAC system to avoid fiber dispersal to other areas; (11) wet all asbestos containing waste and place it in leak-tight containers; (12) apply for and receive a Department-approved AWP for the use of any asbestos emission control different than that required by the Regulations; (13) maintain certain specified records on all asbestos abatement projects; (14) cover all non-moveable objects

in a work area with polyethylene sheeting; and, (15) properly label all leak tight containers. See, §§19a-332a-3, 19a-332a-5(a), 19a-332a-6(a), 19a-332a-6(b), 19a-332a-5(c), 19a-332a-5(e), 19a-332a-5(h), 19a-332a-7(a), 19a-332a-5(f), 19a-332a-5(b), 19a-332a-5(j), 19a-332a-11, 19a-332a-4, 19a-332a-5(d), and, 19a-332a-5(k) of the Regulations, respectively.

The Department bears the burden of proof by a preponderance of the evidence in establishing a violation of any of the regulatory provisions cited above. *Swiller v. Comm'r. of Public Health*, CV-950705601, (Superior Court, J.D. Hartford/New Britain at Hartford, October 10, 1995); *Steadman v. SEC*, 450 U.S. 91, 101 S. Ct. 999, reh'g den., 451 U.S. 933 (1981); *Bender v. Clark*, 744 F. 2d 1424 (10th Cir. 1984); *Sea Island Broadcasting Corp. v. F.C.C.*, 627 F. 2d 240, 243 (D.C. Cir. 1980); all as cited in *Bridgeport Ambulance Service, Inc., v. Connecticut Dept. of Health Services*, No. CV 88-0349673-S (Sup. Court, J.D. Hartford/New Britain at Hartford, July 6, 1989

A. First Count

With regards to paragraphs 1, 5, and 9 of the Charges, respondent admits that it held asbestos contractor license number 000024 at all times referenced in the Charges. H.O. Exh. 3. The Department, therefore, sustained its burden of proving these allegations.

With regard to paragraph 2 of the Charges, respondent admits this allegation. H.O. Exh. 3. The Department, therefore, sustained its burden of proving this allegation.

With regard to paragraph 3a of the Charges, respondent admits that it failed to submit an asbestos abatement notification form to the Department regarding the asbestos abatement project it performed at the Torrington property as required §19a-332a-3 of the Regulations. H.O. Exh. 3. However, it claims it was not required to file such a notification because another asbestos contractor, A-1, had already done so. Section 19a-332a-3 of the Regulations requires “the asbestos abatement contractor” to file the notification form. Section 19a-332a-1(i) of the Regulations specifies that the “[a]sbestos contractor means any . . . entity engaged in asbestos abatement *whose employees actually perform the asbestos abatement work.*” Emphasis added. Respondent’s employees

actually performed the work at the Torrington property. FF 7. Thus, respondent was the entity obligated by the Regulations to file the notification form with the Department. The Department, therefore, sustained its burden of proving this allegation.

With regard to paragraph 3(b) of the Charges, respondent admits that no signs were posted on the rear door to the work area as required by §19a-332a-5(a) of the Regulations. H.O. Exh. 3. Respondent claims that it was not necessary to post such signs because the rear door did not work. However, §19a-332a-3 requires that signs be posted “at all approaches to the work area.” This provision does not require that those approaches actually provide easy physical access to the work area.⁶ In addition, respondent failed to post signs at the front door to the work area as well, and that door clearly opened. FF 9. The Department, therefore, sustained its burden of proving this allegation.

With regard to paragraphs 3(c) through 3(h) of the Charges, the evidence establishes that when the Department’s investigator arrived at the work area on October 2, 2000, respondent had not: (1) set up the worker decontamination system; (2) ensured that all persons that left the work area decontaminated themselves and were free of asbestos debris; (3) sealed all openings and covered all walls with polyethylene sheeting; (4) provided adequate HEPA filtration; and, (5) wet all ACM to be removed or disturbed by removal as required by §§19a-332a-6(a), 19a-332a-6(b), 19a-332a-5(c), 19a-332a-5(e), 19a-332a-5(h), 19a-332a-5(j) of the Regulations, respectively. FF 10-13. Respondent claims, however, that it was not obligated to comply with these regulatory requirements because it was not conducting asbestos abatement activity at the time. More specifically, respondent asserts that it was merely conducting preliminary site preparation work.

⁶ It is essential that all approaches to an asbestos abatement work area be clearly marked by appropriate signage. In the case of a fire or other emergency, for example, emergency personnel might need to enter the work area through a door whether it opened or not. In that situation, emergency personnel would need to know, for their own protection and that of the general public, that they were entering an asbestos contaminated work area. Tr. I, p. 54.

The Department and respondent agree that another contractor previously disturbed the work area⁷ before October 2, 2000. Both parties also agree that the prior activity in the work area resulted in the dislocation and breaking of some of the floor tiles in the work area, although they disagree as to the exact percentage of tiles disturbed. FF 3. They also agree that some of those tiles were covered with asbestos containing mastic and that respondent's employees were in the process of bagging those tiles when the Department's investigator arrived at the work area on the morning of October 2, 2000. FF 2, 7.

Respondent claims that when the Department's investigator arrived at the facility its workers were merely bagging a small number of tiles to make it easier to set up the work area in conformance with the Regulations. Tr. II, pp. 158, 160. However, the investigator testified that he counted approximately one hundred bags of asbestos containing material when he arrived at the site – an amount far in excess of the amount needed to bag a few tiles.⁸ Dept. Exh. 1, p. 2; Tr. III, pp. 192, 232. In addition, respondent had no difficulty setting up the work area without bagging additional tiles when instructed to do so by the investigator. Tr. I, p. 50; Tr. II, p. 65; Tr. III, 196, 296; Tr. IV, p. 23. The Regulations do not permit contractors to conduct “pre-cleaning” activities in non-compliance with the Regulations without first obtaining an AWP from the Department. Tr. III, p. 197. Respondent makes no claim that had applied for, let alone obtained, such an AWP.

The investigator, Stephen Dahlem, testified that he observed evidence of the scraping of floor tiles but no evidence of demolition waste when he arrived at the site.⁹

⁷ Section 19a-332a-1(ii) of the Regulations defines “work area” to mean “the specific area or location where the actual asbestos abatement work is being performed”

⁸ Respondent's own witness, George Carey, testified that it should not have been necessary to bag more than 10 to 15 bags of tiles in order to set up the work area at the Torrington property. Tr. I, p. 114.

⁹ Since there was no evidence of other demolition debris in the work area on October 2, 2000, it would have been necessary for the workers who conducted the original demolition at the facility to have separated the contaminated floor tiles out from the rest of the debris if respondent's scenario is to be believed. It is not likely that workers unskilled in asbestos removal would have gone to such trouble. Tr. III, pp. 257, 258, 272.

FF 8. Mr. Dahlem presented as a very knowledgeable and credible witness.¹⁰ On the other hand, the testimony of respondent's witness who denied scraping any tiles on the day in question, Patrick Summa, was contradictory, unreliable, and evasive. Tr. III, pp. 53-59, 66-67, 136; *see also*, f.n.'s 11 and 13. Given this evidence, it is concluded that respondent's employees were scraping floor tiles, in addition to bagging previously disturbed tiles, on the morning of October 2, 2000.

Section 19a-332a-1(d) of the Regulations defines "asbestos abatement" to include "the removal . . . or other disturbance of asbestos-containing materials" Respondent's bagging of the loose floor tiles clearly constituted a "disturbance" of ACM within the meaning of the Regulations. Section 19a-332a-1(bb) of the Regulations defines "removal" to include "the taking out or stripping of any asbestos containing materials from surfaces . . . of a facility." Respondent's scraping of contaminated floor tiles from the work area constituted "a removal" of ACM and, thus, asbestos abatement within the meaning of the Regulations. Respondent was clearly engaging in asbestos abatement when the investigator arrived at the Torrington property on October 2, 2000. Thus, it was required to comply with all of the regulatory requirements applicable to such abatement, but failed to do so. The Department, therefore, sustained its burden of proving these allegations.

B. *Second Count*

With regard to paragraph 6, respondent admits this allegation. H.O. Exh. 3. The Department, therefore, sustained its burden of proving this allegation.

With regard to paragraph 7(a), respondent admits that its employees were not wearing respirators on the day of the inspection as required by §19a-332a-5(f) of the Regulations. H.O. Exh. 3. However, it claims that those employees were provided respirators, but chose not to wear them. The purpose of §19a-332a-5(f) is to protect asbestos workers from exposure to asbestos fibers. Tr. I, p. 178. It is respondent's responsibility to ensure that its employees wear such protection, and not merely to

¹⁰ Mr. Dahlem's qualifications and experience are discussed at Tr. I, p. 31, and Tr. II, p. 13, 37-39.

provide it to them. Tr. II, p. 103. The Department, therefore, sustained its burden of proving this allegation.

With regard to paragraph 7(b) of the Charges, respondent admits that on June 26, 2000, it failed to place polyethylene sheeting over the HVAC system at the work area at the Hartford property as required by §19a-332a-5(b) of the Regulations. H.O. Exh. 3. However, it claims that it was not required to do so because the work area had already been contaminated and the project design, which had been approved by the Department, called for the HVAC system to be vacuumed and cleaned out. Section 19a-332a-5(b), however, contains no exceptions for previously contaminated work areas, and respondent had not obtained a AWP that permitted an alternative method of asbestos control. In addition, the project design cited to by respondent, itself, required the covering of the HVAC system by polyethylene sheeting prior to further abatement. Dept. Exh. 3, App. C, pp. 2, 17, 29; Tr. I, p. 142. The Department, therefore, sustained its burden of proving this allegation.

With regard to paragraph 7(c) of the Charges, the evidence establishes that on June 26, 2000, no critical barriers were in place between the stairwell landing (part of the work area) and the doorways to the 2nd and 4th through 7th floors as required by §19a-332a-5(c) of the Regulations. FF 18. Respondent claims that it was not required to isolate the third floor work area because other areas of the facility were already contaminated. Respondent also claims that it was in the process of setting up power to the various floors throughout the building and had not yet had the opportunity to set up those critical barriers. Absent an AWP approved by the Department, which respondent lacked, the fact that the floors at issue may have been previously contaminated did not relieve respondent of its responsibility to avoid further contamination by installing the critical barriers required by the Regulations. In addition, respondent was required to install the critical barriers before commencing asbestos removal. However, the evidence establishes that respondent had already commenced abatement activities on the 3rd floor before the critical barriers at issue were installed. FF 15. The Department, therefore, sustained its burden of proving this allegation.

With regard to paragraph 7(d) and 7(e) of the Charges, respondent claims that the ACM at issue had been wetted as required by §§19a-332a-5(g), 19a-332a-5(j), and 19a-332a-7(a) of the Regulation. However, the investigator testified that he personally observed no evidence of wetting going on at the site during his inspection and that the water hose on the third floor was not long enough to reach to within a 100 feet of the area where asbestos abatement was occurring. Tr. I, p. 156; Tr. II, p. 89; *see also*, FF 19, 20. Respondent failed to present any credible evidence to refute the investigator's testimony. The Department, therefore, sustained its burden of proving this allegation.

With regard to paragraph 7(f) of the Charges, respondent admitted at hearing that it did not have sufficient HEPA fans in operation on June 26, 2000 to satisfy the requirements of §§19a-332a-5(g) and 19a-332a-5(h) of the Regulations. Tr. IV, p. 35; *see also*, FF 21. The Department, therefore, sustained its burden of proving this allegation.

With regard to paragraph 7(g) of the Charges, respondent also admits that it did not cover all applicable floor and wall surfaces with polyethylene sheeting as required by §19a-332a-5(e). H.O. Exh. 3; *see also*, FF 22. Respondent claims that it was not required to cover the walls and floors because they had been previously contaminated. In addition, respondent claims that the project design called for the entire building to be decontaminated, and that it was in the process of obtaining an AWP from the Department to allow it to proceed with asbestos removal without covering the floors and walls. As noted above, the Regulations do not exempt projects from compliance due to previous contamination except in cases where a contractor has an approved AWP in place. Respondent did not receive an AWP approving this practice until the day *after* the inspection. Emphasis added. FF 23; Dept. Exh. 4. Section 19a-332a-11 of the Regulations requires asbestos contractors to obtain an AWP "in advance" of conducting the asbestos abatement at issue. *See*, f.n. 2. The Department, therefore, sustained its burden of proving this allegation.

With regard to paragraph 7(h) of the Charges, as previously noted, respondent did not have an approved AWP in place on June 26, 2000 to exempt it from the regulatory

requirement to cover all floors and walls in all work areas with polyethylene sheeting. FF 23. Respondent claims that it was not required to obtain an AWP because the Department had previously reviewed and approved the project design for the project and that project design did not require the application of polyethylene sheeting to the walls and floors of the work area. The Department's review of the project design, however, did not relieve respondent of its obligation to obtain an AWP; a fact implicitly acknowledged by respondent since it filed a request for an AWP with the Department for just this purpose. Dept. Exh. 4; Tr. I, pp. 130, 131. The Department, therefore, sustained its burden of proving this allegation.

C. Third Count

With regard to paragraph 10, respondent admits this allegation. H.O. Exh. 3. The Department, therefore, sustained its burden of proving this allegation.

With regard to paragraph 11(a) of the Charges, the evidence establishes that the notification filed by respondent had expired at the time of the October 25, 1999 inspection. FF 26. Respondent admits that the notification it filed with the Department for the project did not accurately list the amount and type of ACM to be removed from the Bridgeport property or the project's scheduled completion date as required by §§19a-332a-3(c)(7) and 19a-332a-3(c)(8) of the Regulations. Tr. III, p. 315. Respondent claims that its notification was within the "1/20th percentage" rule of the Regulations. The Regulations, however, contain no such exception. Tr. II, p. 136. The respondent also failed to submit the correct notification fee for the project. FF 27. The Department, therefore, sustained its burden of proving this allegation.

With regard to paragraph 11(b) of the Charges, respondent admits that it prepared a single original of the sign-in logs and then copied it for each day its employees were on the job.¹¹ Tr. III, p. 317; Tr. IV, p. 42. While such conduct is not specifically prohibited by §19a-332a-4 of the Regulations, it certainly calls into question the accuracy and

¹¹ Respondent's supervisor, Mr. Summa, originally claimed that he prepared originals of these logs every day, however, his superior, Michael Robichaud, later contradicted and clarified Mr. Summa's testimony in this regard. Tr. III, pp. 94, 95, 97-99, 121, 128, 317; Tr. IV, p. 42. Mr. Summa's testimony concerning the duplicated logs is further evidence of his lack of credibility.

truthfulness of those logs.¹² In addition, the evidence establishes numerous inconsistencies, if not outright fabrications, in respondent's records. FF 28. Significantly, many of the questionable entries relate to other potential violations of the Regulations, *see* f.n. 13, which suggests that respondent, altered the logs to avoid providing documentary evidence of its own violations. The Department, therefore, sustained its burden of proving this allegation.

With regard to paragraph 11(c) of the Charges, the evidence establishes that on October 25, 1999, respondent's employees were tossing concrete blocks that potentially contained asbestos out of a second floor window of an asbestos work area although that window was not isolated from the outside by a secure air-tight barrier as required by §19a-332a-4 of the Regulations. FF 30. The Department, therefore, sustained its burden of proof regarding this allegation.

With regard to paragraph 11(d) of the Charges, the evidence establishes that on October 25, 1999, many of respondent's workers at the Bridgeport property were not wearing the protective clothing and proper respiratory protection required by §19a-332a-5(f) of the Regulations. FF 31. The Department, therefore, sustained its burden of proof regarding this allegation.

With regard to paragraph 11(e) of the Charges, the evidence establishes that on October 25, 1999, respondent's employees left the work areas at the Bridgeport property without properly decontaminating themselves as required by §19a-332a-6(b) of the Regulations. FF 32, 33. Respondent claims that its employees were not conducting asbestos abatement at the time and, thus, were not required to comply with this regulation. On the day in question, however, respondent's employees were removing a concrete block wall to access some potential ACM behind it. This work was conducted inside a contained work area and occurred after other ACM had been disturbed and removed from the same work area.¹³ Because the concrete block had not been tested,

¹² It is hard to believe that the same exact crew of workers arrived at the facility, broke for lunch, and left the facility each day at exactly the same times indicated in the duplicated logs. *See* Dept. Exh. C.

¹³ Respondent denied removing any asbestos containing material from the second floor prior to the date of the inspection, October 25, 1999. However, the Project Design and the Notification respondent filed with

respondent had no way of knowing whether or not it was contaminated with asbestos. Tr. II, pp. 111, 116, 183; Tr. III, p. 7.

Section 19a-332a-12 of the Regulations provides that an asbestos abatement project is not complete until it has been cleaned of all visible residue and has passed certain specified air testing. As of October 25, 1999, the work area at the Bridgeport property had not satisfied those criteria. Dept. Exh. 6, App. D; Tr. II, pp. 185, 190; Tr. III, pp. 211-213. Respondent's removal of concrete blocks on that date, therefore, was part of an on-going asbestos abatement project and constituted a form of asbestos abatement within the meaning of §19a-332a-1(d) of the Regulations. To conclude otherwise would allow contractors to avoid complying with the Regulations every time they conducted some activity in a contained work area, such as running hoses or hooking up HEPA fans to electricity, which did not specifically involve the removal or disturbance of asbestos. Such a result would be inconsistent with the entire regulatory scheme governing asbestos removal. Tr. II, p. 118; Tr. III, pp. 212, 213, 221.

In addition §19a-332a-6(b) provides that “[n]o person . . . shall leave the *asbestos abatement project work area* unless first decontaminated by showering, wet washing or HEPA vacuuming to remove all asbestos debris.” Emphasis added. The regulation does not require that active asbestos abatement be occurring at the time, only that the workers at issue be in an asbestos abatement project work area. Respondent's workers were within an asbestos abatement project work area and, thus, were required to decontaminate themselves prior to leaving that work area whether or not asbestos abatement was occurring. The Department, therefore, sustained its burden of proving this allegation.

the Department identified three forms of asbestos abatement respondent was scheduled to perform on that floor. Dept. Exh. 6. When the investigator arrived at the facility on October 25th all three forms of abatement had been completed. Tr. II, pp. 9, 11, 114, 119; Tr. III, p. 214. Since no other asbestos contractor was working at that facility during that time period, that work had to have been performed by respondent. In addition, a Daily Log prepared by respondent for October 12, 1999 states “went to 2nd [F]loor began bagging.” Dept. Exh. 10, p. 40. Such “bagging” of ACM is a form of asbestos abatement. Tr. II, pp. 127-128. Further, other logs prepared by respondent that seem to document asbestos abatement occurring on the second floor prior to October 25, 1999 appear to have been struck out or otherwise altered to conceal that work. Dept. Exh. 10, pp. 41, 42.

With regard to paragraph 11(f) of the Charges, the evidence establishes that on October 25, 1999, the decontamination unit for the third floor was not fully operational as required by §19a-332a-6(a) of the Regulations. FF 33. Respondent claims it was not obligated to comply with that regulatory requirement because it was not engaging in asbestos abatement at the time. As discussed above in connection with paragraph 11e, the evidence does not support this contention. The Department, therefore, sustained its burden of proving this allegation.

With regard to paragraph 11(g) of the Charges, the evidence establishes that on October 25, 1999, several bathroom fixtures within the work area were not covered by polyethylene sheeting. FF 34. Section 19a-332a-5(d) of the Regulations requires asbestos contractors to cover all “non-movable” objects in a work area with polyethylene sheeting. Respondent claims that it was not required to cover these fixtures because they were going to be removed from the work area. There is insufficient evidence in the record to determine whether or not respondent’s claim is correct. FF 34. However, the Department bears the burden of proof on this issue. The Department, therefore, failed to sustain its burden of proving this allegation.

With regard to paragraph 11(h) and 11(k) of the Charges, respondent admits that on October 25, 1999, the upper portions of certain exterior walls were not fully covered with polyethylene sheeting as required by §19a-332a-5(e) of the Regulations. Tr. III, p. 321. Respondent claims that these walls were not fully covered to allow access to ACM on the walls. However, respondent failed to apply for and receive an AWP for such a procedure as required §19a-332a-11 of the Regulations. FF. 36. The Department, therefore, sustained its burden of proving these allegations.

With regard to paragraph 11(i) of the Charges, the evidence establishes that on October 25, 1999 respondent was conducting asbestos abatement activities (the removal of potentially contaminated concrete blocks from a contaminated work area) on the 2nd floor of the Bridgeport property without the requisite number of HEPA fans required by §19a-332a-5(h) of the Regulations. FF 35. Respondent claims that the fans were not in operation because power had been temporarily lost to the building and that abatement

work had stopped until the power was restored. However, the evidence does not support this claim. Dept. Exh. 6, pp. 1-4; Tr. I, pp. 183, 188; Tr. II, p. 113. The Department, therefore, sustained its burden of proving this allegation.

With regard to paragraph 11(j) of the Charges, the evidence establishes that on October 25, 1999, an asbestos waste trailer was located in the rear of the Bridgeport property without the label required by §19a-332a-5(k) of the Regulations. FF 39. Respondent admits that the trailer was not labeled at the time of the inspection, but argues that it was labeled previously and that the label must have fallen off or been stolen. It was respondent's responsibility to ensure that all facilities were labeled as required by the Regulations. The fact that the label may have fallen off or been stolen, even if true, did not relieve respondent of this responsibility. The Department, therefore, sustained its burden of proving this allegation.

D. Penalty

The Department requests that, pursuant to *Conn. Gen. Stat.* §19a-17 and §20-440-6(b) of the Regulations, respondent be assessed the following as discipline for the above violations: a civil penalty of \$20,000; and, a three month suspension of its license followed by probation until a Department-approved monitor supervises the completion of ten asbestos abatement projects. Since respondent admits only a few minor violations, it requests that it be assessed only a minor penalty. H.O. Exh. 5.¹⁴ For the reasons discussed in greater detail below, the remedy requested by the Department, with minor modifications, is fully supported by the record.

The Regulations have a simple but critically important function – to protect the public health by eliminating or reducing, by as much as reasonably possible, the release of asbestos into the atmosphere at asbestos abatement projects. The Regulations are particularly intended to limit the release outside of the work area of fine asbestos fibers, the form of asbestos that poses the greatest threat to human health. Tr. I, pp. 74, 166. The Regulations are also intended to protect the health of the asbestos workers

¹⁴ The Department and respondent's post-hearing briefs are hereby entered into the record as H.O. Exhs. 5 and 6, respectively.

themselves while they are in the work area. FF 14, 24, 40. To accomplish these goals, the Regulations set forth an elaborate system of procedures and protocols that apply to every stage of an asbestos abatement project. The Regulations are entitled to a liberal interpretation to further this remedial purpose.

The record demonstrates a repeated and systematic failure on respondent's part to comply with these regulatory requirements. Its violations span the gamut from simple, but important, requirements like failing to post the proper signs, file and maintain the requisite records and forms, and ensure that its employees wear protective clothing and respirators, to more complex requirements such as the establishment of proper decontamination systems, wetting the asbestos containing material prior to its removal or disturbance, and constructing the required protective barriers. Many of these violations occurred at three separate locations over a two-year period. Such conduct evidences a gross disregard by respondent for the entire regulatory scheme governing asbestos abatement and, thus, ultimately, the health and safety of its own employees and the general public. *See*, FF 14, 24, 40, 41. In defense of its actions, respondent offers obtuse legal arguments and implausible factual assertions that strain, and sometimes exceed, credulity. Given this record, the relief requested by the Department is fully justified.

a. Civil Penalty

Section 19a-17(a)(6) of the General Statutes authorizes the Department to award a civil penalty of \$10,000 for each violation. As concluded above, respondent committed at least 26 separate violations at three separate locations. Respondent could be assessed up to \$260,000 in civil penalties for these violations. Given the egregiousness of respondent's conduct, including its flight from the Torrington property to avoid detection, its apparent falsification of records, and its lack of credibility and acknowledgement of its wrongful conduct at hearing, the \$20,000 civil penalty recommended by the Department is entirely reasonable and fully supported by the record.

b. Suspension

Section 19a-17(a)(2) of the General Statutes authorizes the Department to suspend an asbestos contractor's license. Respondent claims that ordering it to serve a three-

month suspension would, effectively, put it out of business. However, respondent offered no specific or concrete evidence to support this contention. Given the extent and nature of respondent's violations, and the risk posed to its employees and the general public, a significant period of suspension is required. However, in light of the sizeable civil penalty assessed in this case and the costs associated with a three-month suspension, the suspension should be stayed after one month. It is contemplated that imposition of such a suspension would allow respondent to remain in business, while protecting the health and safety of the general public and deterring future violations.

c. Probation

Section 19a-17(a)(5) of the General Statutes authorizes the Department to place an asbestos contractor on probation with conditions. The conditions recommended by the Department would protect the public while also requiring that respondent demonstrate that it is capable of operating in compliance with the Regulations. They are also intended to provide notice to respondent's clients and to local directors of health of respondent's past violations. Given the extent and nature of respondent's violations, the probation recommended by the Department is entirely reasonable and fully supported by the record.

Order

Based on the record in this case, the above Findings of Fact and Conclusions of Law, and pursuant to *Conn. Gen. Stat.* § §19a-17(a) and 20-440, and §20-440-6(b) of the Regulations, the following Order is hereby issued concerning the asbestos contractor license of Environmental Consulting and Contracting, LLC, license number 000024:

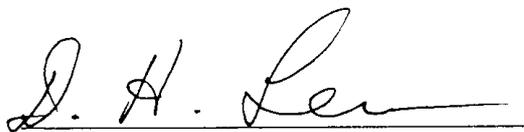
1. Respondent shall pay a civil penalty of \$20,000 by certified or cashier's check payable to "Treasurer, State of Connecticut." The check shall reference the Petition Number on its face, and shall be payable within thirty days of the effective date of this decision.
2. Respondent's license shall be suspended for a period of three months from the effective date of this decision with said suspension stayed after one month. All originals of respondent's license shall be surrendered to the Department within ten days of the effective date of this decision.

3. Following the one month of actual suspension, respondent's license shall be concurrently placed on probation under the following terms and conditions:
 - a. Respondent shall obtain at its own expense the services of a licensed asbestos abatement project monitor ("the monitor"), pre-approved by the Department, to conduct on-site inspections of all asbestos abatement projects undertaken by respondent until the monitor reports to the Department that respondent has successfully completed ten such projects in compliance with all applicable statutes and regulations.
 - (1) The monitor shall have the right to monitor any and all work on the projects by any means that he or she deems necessary to determine whether respondent is conducting the abatement in accordance with all applicable statutes and regulation;
 - (2) Respondent shall cooperate fully with the monitor;
 - (3) Respondent shall provide the monitor with the original records maintained on each asbestos abatement project monitored; and,
 - (4) The monitor shall prepare and submit directly to the Department a written report setting forth his/her findings regarding each such project, including the site records. The monitor's reports shall include documentation of the dates and duration of all site inspections and meetings with respondent's officers and employees, a general description of the work reviewed and the monitoring techniques utilized, a statement that the monitor personally observed respondent's work and site records, and that such work and site records were completed with reasonable skill and safety and in compliance with applicable federal, state, and local laws and regulations. If the monitor determines at any time that respondent is not in compliance with the statutes and/or regulations regarding its license, he/she shall immediately notify the Department;
 - b. During the period of probation respondent shall provide a copy of this Memorandum of Decision (Decision) to every person or entity with which it contracts for an asbestos abatement project and to the Local Director of Public Health of the town or city in which the project is located.
 - c. During the period of probation respondent shall provide to the Department the name of each client and the location where it is conducting an asbestos

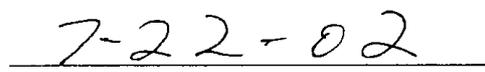
abatement project at least ten days prior to conducting such project, and shall certify that it has complied with Paragraph 3b of this Order; and,

- d. During the period of probation respondent is prohibited from engaging in any asbestos abatement project if the monitor is unavailable to monitor such project.
 - e. Respondent's probation shall terminate when the monitor reports to the Department that respondent has successfully completed the ten projects described above.
- 4. The respondent shall bear all costs associated with its compliance with this Order.
 - 5. The civil penalty, and all notices and reports shall be sent to:

Ronald Skomro
State of Connecticut Department of Public Health
450 Capitol Avenue, MS #51AIR
P.O. Box 34038
Hartford, Connecticut 06134-0308
 - 6. This Order shall be effective thirty days from the date of signature.



Donald H. Levenson, Esq.
Hearing Officer



Date