

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:) Docket No. CAA-04-2001-1502
)
U.S. ARMY TRAINING) Proceeding to Assess
CENTER AND FORT JACKSON) Administrative Penalty
) Under Clean Air Act,
Respondent) Section 113(d)
_____)

ADMINISTRATIVE COMPLAINT AND NOTICE OF OPPORTUNITY TO REQUEST
HEARING

I. STATUTORY AUTHORITY

This Administrative Complaint is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 113(d) of the Clean Air Act (the "Act"), 42 U.S.C. § 7413(d). The Administrator has delegated this authority to the Regional Administrator of EPA, Region 4, who has in turn delegated it to the Director, Air, Pesticides & Toxics Management Division, EPA Region 4 ("Complainant"). Pursuant to Section 113(d)(1) of the Act, 42 U.S.C. § 7413(d)(1), the Administrator and the Attorney General have jointly determined that this administrative penalty action is appropriate.

II. ALLEGATIONS

1. Asbestos is a hazardous air pollutant as defined in Sections 112(a)(6) and 112(b)(1) of the Act, 42 U.S.C. §§ 7412(a)(6) and 7412(b)(1), and is the subject of regulations codified at 40 C.F.R. Part 61, Subpart M, "National Emission Standards for Asbestos."

2. The U.S. Army Training Center and Fort Jackson, located in Fort Jackson, South Carolina, ("Respondent") is a person within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e), and is therefore subject to the provisions of the Act and its implementing regulations.

3. On March 19, 1997, and March 20, 1997, Fort Jackson personnel removed floor tile from a dining hall at Fort Jackson. During the removal, the floor tile was subject to sanding, cutting, grinding or abrading. This activity constituted a renovation as defined at 40 CFR § 61.141.

4. With respect to the renovation described in Paragraph 3 above, Respondent was an "owner or operator of a demolition or renovation activity" as that term is defined in 40 C.F.R. § 61.141.

5. The renovation of the dining hall involved approximately 5600 square feet of floor tile.

6. Laboratory analysis indicated that the samples contained asbestos containing material, that is, contained more than one percent asbestos pursuant to Appendix E, subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy.

7. The floor tile is regulated asbestos containing material (RACM), as defined at 40 CFR § 61.141.

8. The dining hall was a "facility" as that term is defined in 40 C.F.R. § 61.141.

COUNT I

9. Paragraphs 1 through 8 are realleged and incorporated herein by reference.

10. 40 CFR § 61.145(b) requires that the owner or operator of a demolition or renovation activity shall provide to the Administrator written notice of intention to demolish or renovate at least ten days prior to the start of the demolition or renovation activity.

11. Respondent did not provide notice of intention to renovate at the dining hall prior to such renovation.

12. Respondent violated 40 CFR § 61.145(b).

COUNT II

13. Paragraphs 1 through 8 are realleged and incorporated herein by reference.

14. CFR § 61.145(a) requires that the owner or operator of a demolition or renovation activity thoroughly inspect the facility for the presence of asbestos prior to the commencement of the demolition or renovation.

15. Respondent did not thoroughly inspect the dining hall for the presence of asbestos prior to the commencement of the renovation of the dining hall.

16. Respondent violated 40 CFR § 61.145(a).

COUNT III

17. Paragraphs 1 through 8 are realleged and incorporated

herein by reference.

18. 40 CFR § 61.145(c)(8) requires that at least one person adequately trained in compliance with the asbestos NESHAP regulations be present at the facility during the stripping, removing or other handling of RACM.

19. Respondent did not have appropriately trained personnel at the dining hall during the renovation of the dining hall.

20. Respondent violated 40 CFR § 61.145(c)(8).

COUNT IV

21. Paragraphs 1 through 8 are realleged and incorporated herein by reference.

22. 40 CFR § 61.145(c)(6)(i) requires that the owner or operator adequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with 40 C.F.R. § 61.150.

23. Respondent did not adequately wet the material until it was properly collected and contained or treated in preparation for disposal.

24. Respondent violated 40 CFR § 61.145(c)(6)(i).

III. NOTICE OF PROPOSED CIVIL PENALTY

25. Section 113(d)(1) of the Act, 42 U.S.C. § 7413(d)(1), authorizes the assessment of a civil administrative penalty of up to \$25,000 per day for each violation of the Act.

26. Section 113(e)(1) of the Act, 42 U.S.C. § 7413(e)(1),

requires Complainant to consider the following factors in determining the amount of the penalty to be assessed under Section 113: the size of Respondent's business, the economic impact of the penalty on the business, Respondent's full compliance history and good faith efforts to comply, the duration of the violations alleged in the Complaint as established by credible evidence (including evidence other than the applicable test method), payment by Respondent of penalties previously assessed for the same alleged violations, the economic benefit of noncompliance, and the seriousness of the alleged violations (in addition to such other factors as justice may require).

27. Having considered these factors, Complainant proposes to assess a civil penalty in the amount of \$85,800 against Respondent. The proposed penalty has been calculated in accordance with the Clean Air Act Stationary Source Civil Penalty Policy and Appendix III thereto, a copy of which is enclosed with this Complaint.

28. Attached to this Complaint and incorporated herein is a "Penalty Worksheet" which explains the penalty calculation.

IV. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

29. This proceeding is governed by rules promulgated at 40 C.F.R. Part 22. A copy of those Rules accompanies this Complaint. Under those Rules, Respondent has the right to request a formal hearing to contest the appropriateness of the amount of the

proposed penalty.

30. To avoid being found in default, which constitutes an admission of all material facts alleged in the Complaint and a waiver of the right to a hearing, and which will result in the assessment of the above civil penalty without further proceedings, Respondent must file with the Regional Hearing Clerk a written Answer within thirty(30)days after receipt of this Complaint. Respondent's Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with regard to which Respondent has any knowledge. Where Respondent has no knowledge of a particular fact and so states, the allegation is deemed denied. The Answer shall also state: 1) the circumstances or arguments which are alleged to constitute the grounds for defense; 2) the facts which Respondent intends to place at issue; and(3) whether a hearing is requested. Failure to admit, deny, or explain any material factual allegation contained herein constitutes an admission of the allegation. A hearing is deemed requested should Respondent contest any material fact upon which the Complaint is based or raise any affirmative defense, or contend that the amount of the penalty proposed in the Complaint is inappropriate, or claim that Respondent is entitled to judgment as a matter of law.

31. The Answer must be sent to:

Regional Hearing Clerk, Region 4
U.S. Environmental Protection Agency
61 Forsyth Street, S.W.
Atlanta, Georgia 30303.

32. A copy of the Answer and all other documents intended to be filed in this action must also be sent to:

Charles V. Mikalian
Associate Regional Counsel
U.S. Environmental Protection Agency
61 Forsyth Street, S.W.
Atlanta, Georgia 30303.

V. INFORMAL SETTLEMENT CONFERENCE

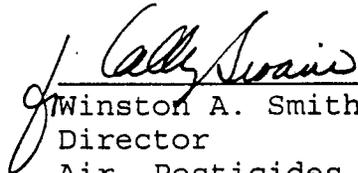
33. Whether or not a hearing is requested, Respondent may contact the above-named attorney to arrange for an informal settlement conference to discuss the facts of this case, the amount of the proposed penalty, or the possibility of settlement. An informal settlement conference does not, however, affect Respondent's obligation to file a timely written Answer to the Complaint.

34. EPA has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement reached with Respondent in an informal conference. The terms of such an agreement would be embodied in a Consent Agreement and Consent Order. A Consent Agreement and Consent Order entered into by and between EPA Region 4 and Respondent would be binding as to all terms and conditions specified therein upon signature by the EPA Regional Administrator.

VI. PAYMENT OF PENALTY

35. Instead of requesting an informal settlement conference or filing an Answer requesting a hearing, Respondent may choose to pay the proposed penalty. In order to do this, Respondent must contact the EPA attorney named in Part IV above to arrange for the preparation of a Consent Agreement and Consent Order.

9/27/01
Date



Winston A. Smith
Director
Air, Pesticides, and Toxics
Management Division
EPA, Region 4

CERTIFICATE OF SERVICE

I certify that on the date below I hand-delivered the original and one copy of the Administrative Complaint and Notice of Opportunity to Request a Hearing for In the Matter of U.S. Army Training Center and Fort Jackson, EPA Docket No. CA-04-2001-1502, to the Regional Hearing Clerk at the following address:

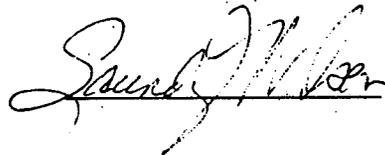
Regional Hearing Clerk
U.S. EPA Region 4
Atlanta Federal Center
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

I also certify that, on the date below, I sent by certified mail, return receipt requested, a copy of the Administrative Complaint and Notice of Opportunity to Request a Hearing and a copy of the Consolidated Rules of Practice, 40 C.F.R. Part 22, to the following address:

David W. Barno, Brigadier General
Installation Commander
U.S. Army Training Center and Fort Jackson
ATZJ-CG
Fort Jackson, South Carolina 29207-5600

9/28/01

Date



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4**

IN THE MATTER OF:)	Docket No. CAA-04-2001-11502
)	
U.S. ARMY TRAINING)	ANSWER TO ADMINISTRATIVE
CENTER AND FORT JACKSON)	COMPLAINT AND REQUEST
)	FOR HEARING
Respondent)	
)	
)	
)	

**ANSWER TO ADMINISTRATIVE COMPLAINT AND REQUEST FOR
ADMINISTRATIVE HEARING**

The United States Army Training Center and Fort Jackson ("Respondent"), hereby files its Answer to Administrative Complaint and Request for Administrative Hearing in response to the Environmental Protection Agency, Region 4's ("EPA" or "Complainant") Administrative Complaint ("Complaint"), filed September 28, 2001 and served on the Respondent on October 3, 2001, and the "Penalty Worksheets," served on Respondent on October 12, 2001. Respondent hereby requests a hearing in this matter, to be held at Fort Jackson, South Carolina, the site of the alleged violations. Respondent has no knowledge of any joint determination between the Administrator and the Attorney General concerning the appropriateness of the administrative penalty action. Respondent reserves the right to question that determination until after an exchange of information has occurred.

ANSWER

Respondent answers the corresponding numbered paragraphs of the Complaint as follows:

1. Paragraph 1 contains conclusions of law to which no response is required.

2. Respondent admits to being a person as defined in Section 302 (e) of the Act. The remainder of this paragraph contains conclusions of law to which no response is required.
3. Respondent admits the allegations in the first and second sentences of paragraph 3. The third sentence contains conclusions of law to which no response is required.
4. Paragraph 4 contains conclusions of law to which no response is required.
5. Respondent admits the allegations set forth in paragraph 5 of the Complaint.
6. Respondent admits the allegations set forth in paragraph 6 of the Complaint.
7. Paragraph 7 contains conclusions of law to which no response is required.
8. Paragraph 8 contains conclusions of law to which no response is required.
9. Respondent reasserts its responses to paragraphs 1 through 8 of the Complaint.
10. Paragraph 10 contains conclusions of law to which no response is required.
11. Respondent admits the allegations set forth in paragraph 11 of the Complaint.
12. Paragraph 12 contains conclusions of law to which no response is required.
13. Respondent reasserts its responses to paragraphs 1 through 8 of the Complaint.
14. Paragraph 14 contains conclusions of law to which no response is required.
15. Respondent admits the allegations set forth in paragraph 15 of the Complaint.
16. Paragraph 16 contains conclusions of law to which no response is required.
17. Respondent reasserts its responses to paragraphs 1 through 8 of the Complaint.
18. Paragraph 18 contains conclusions of law to which no response is required.
19. Respondent admits the allegations set forth in paragraph 19 of the Complaint.
20. Paragraph 20 contains conclusions of law to which no response is required.
21. Respondent reasserts its responses to paragraphs 1 through 8 of the Complaint.
22. Paragraph 22 contains conclusions of law to which no response is required.

23. Respondent admits the allegations set forth in paragraph 23 of the Complaint.
24. Paragraph 24 contains conclusions of law to which no response is required.
25. Paragraph 25 contains conclusions of law to which no response is required.
26. Paragraph 26 contains conclusions of law to which no response is required.
27. Paragraph 26 contains conclusions of law to which no response is required.
28. Paragraph 28 contains no allegations to which a response is required.
29. Paragraph 29 contains conclusions of law to which no response is required.
30. Paragraph 30 contains conclusions of law to which no response is required.
31. Paragraph 31 contains no allegations to which a response is required.
32. Paragraph 32 contains no allegations to which a response is required.
33. Paragraph 33 contains no allegations to which a response is required.
34. Paragraph 34 contains conclusions of law to which no response is required.
35. Paragraph 35 contains no allegations to which a response is required.
36. Respondent denies each and every allegation not previously admitted or otherwise qualified.

OBJECTION TO PROPOSED PENALTY

37. Respondent opposes Complainant's proposed penalty to the extent that any portion of such penalty is based on the size-of-business factor.

WHEREFORE, Respondent respectfully requests that a hearing upon the issues be held at Fort Jackson, South Carolina

RESPECTFULLY SUBMITTED this 8th day of November, 2001, at Fort Jackson, South
Carolina.

Counsel for Respondent



Melvin G. Olmscheid
Staff Judge Advocate
USATC & Fort Jackson
9475 Kershaw Road
Fort Jackson, South Carolina 29207
(803) 751-7657



Robert F. Gay
Attorney-Advisor
USATC & Fort Jackson
9475 Kershaw Road
Fort Jackson, South Carolina 29207
(803) 751-6828

Original Sent by Overnight Mail:

Regional Hearing Clerk, Region 4
U.S. Environmental Protection Agency
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Copy sent by Overnight Mail:

Mr. Charles V. Mikalian
Associate Regional Counsel
U.S. Environmental Protection Agency
61 Forsyth Street, S.W.
Atlanta, Georgia 30303



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

February 7, 2002

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Robert F. Gay
Attorney-Advisor
USATC & Fort Jackson
9475 Kershaw Road
Fort Jackson, South Carolina 29207

Dear Bob:

As you know from our conference call last week with Administrative Law Judge Moran, Judge Moran instructed the parties to file a supplement to the joint stay request. In that supplement, Judge Moran apparently wants to see an analysis of the effect on the penalty calculation of valuing different Army components for purposes of the size of business penalty factor.

In order to allow the Environmental Protection Agency (EPA) to fully comply with Judge Moran's request, I would appreciate your client providing to EPA the information outlined below. Although EPA has made efforts to collect some of that information independently, it appears that most of the information is not readily available to persons outside the military. In addition to allowing compliance with Judge Moran's request, submittal of this information will also provide a common frame of reference for continued discussions or litigation between our parties.

Information Sought

1. Identify each department, agency, command, facility, office, installation or other instrumentality in the organizational structure of the Department of the Army within Fort Jackson's chain of command. The response to this question shall address, but shall not be limited to, the Department of the Army, the United States Army, the Training and Doctrine Command (hereinafter, "TRADOC"), and U.S. Army Training Center and Fort Jackson (Fort Jackson).
2. For each organizational component identified in response to Question #1, identify, for fiscal year 2002:

- a. the total budget for that organizational component;
 - b. the Operation and Maintenance budget for that organizational component; and
 - c. the total budget for environmental compliance for that organizational component.
3. For each organizational component identified in response to Question #1, identify whether environmental compliance activities are funded under the Operation and Maintenance budget. To the extent any part of this answer is in the negative, identify the budget(s) used to fund environmental compliance activities and the amount of said budget(s).
4. With respect to Fort Jackson, identify for fiscal year 2002:
- a. each organizational subcomponent responsible for or otherwise performing environmental compliance activities;
 - b. the total number of persons in those organizational subcomponents responsible for or otherwise performing environmental compliance activities; and
 - c. a description of the duties of each such person. If multiple persons at Fort Jackson perform similar duties, the number of such persons performing similar activities may be identified and the duties of each class of such persons may be described collectively.
5. With respect to TRADOC, identify for fiscal year 2002:
- a. each organizational subcomponent responsible for or otherwise performing environmental compliance activities;
 - b. the total number of persons in those organizational subcomponents responsible for or otherwise performing environmental compliance activities; and
 - c. a description of the duties of each such person. If multiple persons at Fort Jackson perform similar duties, the number of such persons performing similar activities may be identified and the duties of each class of such persons may be described collectively;
6. For each organizational component identified in response to Question #1 other than Fort Jackson and TRADOC, identify, for fiscal year 2002:
- a. each organizational subcomponent responsible for or otherwise performing environmental compliance activities;
 - b. the total number of persons in those organizational subcomponents responsible for or otherwise performing environmental compliance activities; and

c. a description of the duties of each such person. If multiple persons at Fort Jackson perform similar duties, the number of such persons performing similar activities may be identified and the duties of each class of such persons may be described collectively.

7. With respect to each organizational subcomponent identified in response to Questions 5 and 6, describe whether each organizational subcomponent is potentially available to perform environmental compliance activities at Fort Jackson. For each organizational subcomponent potentially available to perform environmental compliance activities at Fort Jackson, describe the nature of the activities such organizational subcomponent is potentially able to perform at Fort Jackson.

8. Other than organizational units already identified in response to Questions 1-7, identify all other departments, agencies, commands, facilities, offices, installations or any other instrumentality within the Department of the Army, which are in any way responsible for, which are potentially able to perform, or which provide resources, personnel or other support to, environmental compliance activities at Fort Jackson. With respect to each such department, agency, command, facility, office, installation or other instrumentality, identify:

- a. the name and location of such organization;
- b. the budget of such organization;
- c. the number of persons in such organization; and
- d. a description of the duties or capabilities of such organization.

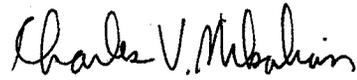
In order to allow us to respond in a timely manner to Judge Moran's request, please provide the information requested above not later than next Thursday (February 14, 2002). If you won't be responding within that time frame, please notify me not later than next Monday (February 11, 2002)

Please submit your response to:

US EPA, Region 4
61 Forsyth St, SW
Atlanta, GA 30303
ATTN: Melvin Russell (AEEB)

If you have any questions regarding this request or suggestions concerning minimizing the burden of responding to this request, feel free to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Charles V. Mikalian".

Charles V. Mikalian
Associate Regional Counsel

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

IN THE MATTER OF:)

**U.S. ARMY TRAINING)
CENTER AND FORT JACKSON)**

Respondent)

Docket No. CAA-04-2001-11502

RESPONDENTS' PREHEARING EXCHANGE

The United States Army Training Center and Fort Jackson ("Respondent"), hereby files its Prehearing Exchange in the above captioned matter.

1. Witnesses. The Respondent intends to call the following witnesses:

a. Mr. Ed B. McDowell, Fort Jackson Environmental Office. Mr. McDowell will testify to Respondent's compliance history and its good faith efforts to comply. He will describe the remedial efforts once the violations were discovered by the Environmental Office, and the Respondent's cooperation with the South Carolina Department of Health and Environmental Control and Complainant, and his understanding of why the matter was referred to Complainant.

b. Mr. Lewis R. Bedenbaugh, Director, Environmental Quality Control, Central Midlands District, South Carolina Department of Health and Environmental Control

(SCDHEC). Mr. Bedenbaugh will testify to Respondent's compliance history and its continuing good faith efforts to comply with all environmental laws and regulations. His agency will require a subpoena before he may testify.

c. Mr. Jack E. Porter III, Environmental Quality Manager in the Bureau of Air Quality, Air Compliance Management Division, Compliance Section, SCDHEC. Mr. Porter can testify to Respondent's cooperation in resolving this matter with SCDHEC and how the matter would have been resolved with a nongovernmental entity. His agency will require a subpoena before he can testify.

d. Mr. Richard Sharpe, Director, Bureau of Air Quality, Air Compliance Management Division, SCDHEC. Mr. Sharpe can testify to Respondent's cooperation in resolving this matter with SCDHEC, how the matter would have been resolved with a nongovernmental agency and how this matter was referred to Complainant and efforts to have the case returned to SCDHEC. His agency will require a subpoena before he can testify.

e. Mrs. Martha McCravy, Fort Jackson Director of Resource Management. Mrs. McCravy can testify concerning budgetary matters affecting Respondent and the economic impact of the penalty on Respondent.

2. Documents. The respondent intends to offer the following documents into evidence which are enclosed:

R-1. Army Regulation 405-90, Disposal of Real Estate, May 10, 1985.

R-2. Department of Defense Instruction Number 7310.1, Subject: Disposition of Proceeds from DoD Sales of Surplus Personal Property, July 10, 1989.

R-3. October 25, 1991, EPA Clean Air Act Stationary Source Civil Penalty Policy.

R-4. Appendix III to October 25, 1991, EPA Clean Air Act Stationary Source Civil Penalty Policy.

R-5. January 17, 1992, EPA Clarification to the October 25, 1991 Clean Air Act Stationary Source Civil Penalty Policy.

R-6. 26 October 1995 DAJA-EL memo re CAA fines and penalties.

R-7. 8 July 1997 Office of the Staff Judge Advocate letter to Mr. Porter (SCDHEC) responding to the SCDHEC NOV.

R-8. July 22, 1998 letter to the Fort Jackson Office of the Staff Judge Advocate from Mr. Porter with enclosed proposed Consent Order.

R-9. August 19, 1998 letter to SCDHEC attorney Kelly Lowry responding to SCDHEC proposed order.

R-10. October 9, 1998 EPA Memorandum, Guidance on Implementation of EPA's Penalty/Compliance Order Authority Against Federal Agencies Under the Clean Air Act (CAA).

R-11. February 4, 1999 letter from Mr. Porter with enclosed proposed Consent Order.

R-12. February 11, 1999 letter to attorney Lowry responding to SCDHEC proposed Consent Order.

R-13. May 23, 2000 11:51 a.m. email from SCDHEC attorney Alexander Shissias.

R-14. May 24, 2000 9:55 a.m. email from SCDHEC attorney Alexander Shissias.

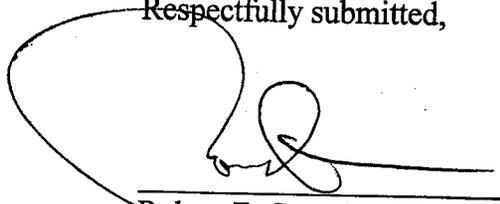
R-15. May 24, 2000 10:14 a.m. email from SCDHEC attorney Alexander Shissias.

3. Respondent does not intend to take a position that it is unable to pay the proposed penalty or that payment will have an adverse effect on Respondent's ability to perform its mission.

4. The Place for Hearing. Respondent requests the hearing be held in Columbia, South Carolina, where Respondent and most of the witnesses are located.

February 28, 2002
Date

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Robert F. Gay', written over a horizontal line.

Robert F. Gay
Attorney-Advisor

CERTIFICATE OF SERVICE

In the Matter of: U.S. Army Training Center and Fort Jackson, Docket No. CAA-04-2001-11502. I hereby certify that a copy of Respondent's Prehearing Exchange was sent this day by the method indicated to the following:

Original and one copy was sent by overnight mail to:

Regional Hearing Clerk, Region 4
U.S. Environmental Protection Agency
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Copy by overnight mail to:

Mr. Charles V. Mikalian
Associate Regional Counsel
U.S. Environmental Protection Agency
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Copy by overnight mail to:

Honorable William B. Moran
Administrative Law Judge
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20005

Dated: _____

USATC and Fort Jackson
Fort Jackson, South Carolina

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:)	Docket No. CAA-04-2001-1502
)	
U.S. ARMY TRAINING)	Proceeding to Assess
CENTER AND FORT JACKSON)	Administrative Penalty
)	Under Clean Air Act,
Respondent)	Section 113(d)
)	

COMPLAINANT'S INITIAL PRE-HEARING EXCHANGE

Pursuant to the December 19, 2001, Prehearing Order in this matter, Complainant submits its Initial Pre-hearing Exchange.

1. List of Witnesses Complainant Expects to Call

Mark Fairleigh

Mr. Fairleigh is employed by the South Carolina Department of Health and Environmental Control (SCDHEC). Mr. Fairleigh conducted an inspection of Respondent's facility on March 20, 1997. Mr. Fairleigh is expected to testify as to his observations during and relating to the inspection. Mr. Fairleigh is further expected to testify as to his knowledge of the compliance status of Respondent with respect to the asbestos renovation activities which gave rise to this action.

Jack E. Porter, III

Mr. Porter is employed in the Air Compliance Section of SCDHEC. Mr. Porter is expected to testify as to his knowledge concerning the compliance status of Respondent with respect to the asbestos renovation activities which gave rise to this action.

Melvin Russell

Mr. Russell employed as an Environmental Scientist in the Air Enforcement Section of USEPA Region 4, Air Pesticides and Toxics Management Division. Mr. Russell calculated the proposed penalty in this matter. Mr. Russell is expected to testify as to that penalty calculation. A summary of that penalty calculation is included as Complainant's Exhibit 7 and is described in more detail in Attachment A to Complainant's Initial Prehearing Exchange.

Mr. Tom Ripp

Mr. Ripp is employed by the United States Environmental Protection Agency in Washington, D.C. Mr. Ripp is expected to testify as an expert on the Asbestos NESHAP program. Areas of testimony are expected to include the risks posed by asbestos and by the improper removal of asbestos, the purpose behind the regulations violated in this matter, and the way in which compliance with those regulations is designed to minimize the risks. Mr. Ripp is expected to further testify that Respondent's conduct in this matter implicated the very risks which the Asbestos NESHAPs program is designed to address. The *curriculum vitae* for Mr. Ripp is included as Complainant's Exhibit 16.

Michael J. Walker

Mr. Walker is employed by EPA as the Senior Enforcement Counsel for Administrative Litigation in Washington, D.C. Mr. Walker is expected to testify as an expert witness concerning EPA's interpretation of the statutory penalty factors at issue in this matter with respect to federal agency respondents. Mr. Walker is also expected to testify concerning EPA's interpretation and application of EPA-issued enforcement and penalty policies with respect to

federal agency respondents, including EPA's interpretation and application of those policies in this matter. The *curriculum vitae* for Mr. Walker is included as Complainant's Exhibit 17.

Complainant reserves the right to call all fact witnesses named by Respondent, to call rebuttal witnesses, to substitute names on its list of witnesses and to supplement its list of witnesses upon adequate notice to the Respondent and to the Presiding Officer.

2. Documents and Exhibits Complainant Intends to Offer into Evidence

Each of Complainant's exhibits is referred to below as "C - " and is marked in the form "Com Ex. __."

C-1. Notice of Violation issued by South Carolina Department of Health and Environmental Control (June 4, 1997). Includes as attachments the March 20, 1997, Inspection Report concerning Fort Jackson inspection and the March 24, 1997, Inspection Report concerning Fort Jackson.

C-2. Letter from Lieutenant Colonel Kevin B. Wall to Jeffrey E. DeLong (March 26, 1997).

C-3. Letter from Robert F. Gay to Jack E. Porter, III (July 8, 1997).

C-4. Notice of Violation issued by Environmental Protection Agency (March 23, 2001).

C-5. Waiver by Department of Justice of \$200,000 and 12 month statutory limitations on EPA Authority to Initiate Administrative Case (February 20, 2001).

C-6. Concurrence by EPA Headquarters on initiation of administrative penalty action (December 29, 2000).

C-7. Summary of Complainant's Calculation of Proposed Penalty

C-8. Clean Air Act Stationary Source Civil Penalty Policy (Revised October 25, 1991)

C-9. Asbestos Demolition and Renovation Civil Penalty Policy (Appendix III to Clean Air Act Stationary Source Civil Penalty Policy). Revised May 5, 1992.

C-10. Civil Monetary Penalty Inflation Adjustment Rule. (December 31, 1996).

C-11. Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (Pursuant to the Debt Collection Improvement Act of 1996). May 9, 1997.

C-12. Administrative Assessment of Civil Penalties against Federal Agencies under the Clean Air Act. (July 16, 1997).

C-13. Guidance on Implementation of EPA's Penalty/Compliance Order Authority Against Federal Agencies under the Clean Air Act (CAA). October 9, 1998.

C-14. Policy on Civil Penalties. EPA General Enforcement Policy #GM-21.

C-15. A Framework for Statute-specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties. EPA General Enforcement Policy #GM-22.

C-16. *Curriculum Vitae* of Thomas Ripp

C-17. *Curriculum Vitae* of Michael Walker

C-18. Letter from Charles V. Mikalian to Robert F. Gay (February 7, 2002).

C-19. E-mail from Robert F. Gay to Charles V. Mikalian (February 13, 2002).

C-20. Website printout. [Http://www.dtic.mil/comptroller/fy2002budget/index.html](http://www.dtic.mil/comptroller/fy2002budget/index.html).

C-21. Website printout. [Http://www.defenselink.mil/news/Jun2001/bo6272001_bt287-01.html](http://www.defenselink.mil/news/Jun2001/bo6272001_bt287-01.html)

C-22. Website printout. [Http://www.asafm.army.mil/budget/fybm/fybm-chart.asp](http://www.asafm.army.mil/budget/fybm/fybm-chart.asp). Excerpts from Army (OMA) Vol. II Data Book (PDF).

C-23. Website printout. [Http://www.dtic.mil/comptroller/fy2002budget/budget_justification/pdfs/operation/fy02pb-overview.pdf](http://www.dtic.mil/comptroller/fy2002budget/budget_justification/pdfs/operation/fy02pb-overview.pdf). Excerpts from Operation and Maintenance Overview (June 2001).

C-24. Website printout. [Http://tradoc.monroe.army.mil/images/scopescale.jpg](http://tradoc.monroe.army.mil/images/scopescale.jpg).

3. Description of Penalty Calculation

See Attachment A to Complainant's Initial Prehearing Exchange.

4. Applicability of Paperwork Reduction Act

There is an Office of Management and Budget control number in effect for the regulations involved in this matter. EPA has identified no lapses for the Information collection Request for these regulations with respect to the time periods addressed in this matter. Therefore, there are no Paperwork Reduction Act issues in this matter.

5. Location and Timing of Hearing

Complainant suggests that the most appropriate place for the hearing would be in or near Fort Jackson, South Carolina.

Complainant suggests that an appropriate time for hearing would be in early May, 2002.

Complainant anticipates that its case in chief would take no longer than 1 ½ full days to present.

Respectfully submitted,

March 4, 2002
Date

Charles V. Mikalian
Charles V. Mikalian
Counsel for Complainant

ATTACHMENT A

COMPLAINANT'S STATEMENT OF CALCULATION OF APPROPRIATE PENALTY

A. Summary of Asbestos NESHAP Requirements and Violations in this Matter

In the Administrative Complaint and Notice of Opportunity to Request Hearing (Complaint), Complainant alleges that Respondent violated the four following provisions of the National Emission Standard for Asbestos, 40 C.F.R. Part 61, Subpart M. In particular, these violations are:

1. Failure to provide written notice at least 10 days prior to beginning a demolition activity. 40 C.F.R. § 61.145(b);

2. Failure to thoroughly inspect the facility for the presence of asbestos prior to commencement of the renovation. 40 C.F.R. § 61.145(a);

3. Failure to use appropriately trained personnel during the renovation. 40 C.F.R. § 61.145(c)(8); and

4. Failure to keep removed asbestos material wet until properly collected or treated in preparation of disposal. 40 C.F.R. § 61.145(c)(6)(i).

Respondent has already stipulated to liability in this matter. Therefore, it is undisputed that the violations outlined above occurred. As liability is not in issue, the sole remaining issue to be decided is the amount of penalty to be assessed. Set forth below is Complainant's proposed penalty calculation for these violations.

B. Statutory Authority and Penalty Guidelines

1. General Guidelines

Section 113(d) of the Clean Air Act (CAA), 42 U.S.C. § 9613(d), governs the assessment of civil and administrative penalties for violations of 40 C.F.R. Part 61. As amended by the Debt Collection Improvement Act of 1996, 42 U.S.C. § 3701 (Debt Collection Improvement Act), Section 113(d) of the CAA provides that EPA may assess a penalty not to exceed \$27,500 per violation per day for violations occurring after January 30, 1997.

Section 113(e) of the CAA, 42 U.S.C. § 9613(e), requires consideration of the following in determining the amount of a penalty under Section 113(d): the size of a violator's business, the economic impact of the proposed penalty on the violator's business, the violator's full compliance history and good faith efforts to comply, the duration of the violations, payment by the violator of penalties previously assessed for the same violations, the economic benefit of noncompliance, the seriousness of the violations, and such other factors and justice may require. To guide its assessment of Clean Air Act penalties under Section 113(d), EPA developed the Clean Air Act Stationary Source Civil Penalty Policy (General Penalty Policy). The factors outlined in the General Penalty Policy correspond to the statutory penalty factors in Section 113(e) of the CAA.

Under the General Penalty Policy and Asbestos Penalty Policy, a two step process is used to calculate a penalty. First, under the General Penalty Policy, EPA calculates a "Preliminary Deterrence Amount." The Preliminary Deterrence Amount generally consists of two components referred to as the "economic benefit" component and the "gravity" component. The economic benefit component removes any significant economic benefit resulting from noncompliance. The

gravity component recognizes the seriousness of the violation beyond any consideration of economic benefit. With respect to violations of 40 C.F.R. Part 61, Subpart M, such as those in this case, EPA has also developed the Asbestos Demolition and Renovation Civil Penalty Policy (Asbestos Penalty Policy), which is found as Appendix III to the General Penalty Policy. The Asbestos Penalty Policy provides additional guidance on calculating the gravity component for such violations.¹

In the second step, after calculating the Preliminary Deterrence Amount, EPA applies certain adjustment factors to the Preliminary Deterrence Amount which can either raise or lower the penalty. These factors, as set forth in the General Penalty Policy, include: degree of willfulness or negligence; degree of cooperation; history of noncompliance; environmental damage; ability to pay; and payment of other penalties. EPA also considers any other factors as justice may require. As set forth below, Complainant applied this two-step methodology in calculating its proposed penalty in this matter.

2. Guidelines on Calculation of Preliminary Deterrence Amount

Complainant is not alleging that Respondent realized an economic benefit in this matter. Therefore, calculation of the Preliminary Deterrence Amount in this matter is limited to calculation of a gravity component and the guidance on calculation of economic benefit is not discussed.

¹ Although these penalty policies were originally created prior to passage of the Debt Collection Improvement Act, EPA has since amended those policies to reflect the increased statutory maximum penalties authorized by the Debt Collection Improvement Act.

The General Penalty Policy identifies three general components of the gravity portion of a penalty. Those components are:

- | | |
|----------------------------------|---|
| Actual or possible harm: | Whether and to what extent the activity of a defendant actually resulted or was likely to result in the emission of a pollutant in violation of the level allowed by an applicable State Implementation Plan, federal regulation or permit. |
| Importance to regulatory scheme: | This factor focuses on the importance of the requirement to achieving the goals of the Clean Air Act and its implementing regulations. |
| Size of violator: | The gravity portion should be increased in proportion to the size of the violator's business. |

The General Penalty Policy provides guidance on each of those components. However, for purposes of assessing penalties for the violations of 40 C.F.R. Part 61 Subpart M at issue in this matter, the Asbestos Penalty Policy supercedes the General Penalty Policy with respect to the "actual or potential harm" and "importance to regulatory scheme" components of the gravity factor.

Under the Asbestos Penalty Policy, the "actual or possible harm" and "importance to regulatory scheme" components of the gravity factor are determined by reference to charts which classify the violation by type and/or by the amount of asbestos material involved. Those charts assign a penalty amount to each classified violation. The Asbestos Penalty Policy then provides that the "size of violator" component of the gravity factor be determined in accordance with the General Penalty Policy. The size of violator component is then added to the penalty amounts determined from the Asbestos Penalty Policy charts to determine the Preliminary Deterrence Amount.

3. Guidelines on Application of Adjustment Factors to Preliminary Deterrence Amount

The General Penalty Policy identifies several factors which are to be considered in adjusting the gravity based portion of a penalty. These factors include:

- a. Degree of willfulness or negligence;
- b. Degree of cooperation;
- c. History of noncompliance;
- d. Environmental damage;
- e. Payment of other penalties; and
- f. Ability to pay.

In addition to these General Penalty Policy factors, Section 113(e) of the CAA requires consideration of "other factors as justice may require."

C. Calculation of Penalty in this Matter

1. Calculation of Preliminary Deterrence Amount

a. Penalty Components from Asbestos Penalty Policy

As described above, Complainant is not alleging that Respondent received an economic benefit through its noncompliance in this matter. Therefore, calculation of the Preliminary Deterrence Amount is limited to calculation of the gravity based penalty.

The General Penalty Policy provides that, for cases involving multiple violations, the size of violator component of the gravity factor should be applied only once. Therefore, Complainant calculated the gravity factor, other than size of violator component, for each violation. To the sum of these individual gravity factor components, Complainant then added a single size of violator component to arrive at a total gravity factor. Since Complainant is not alleging that Respondent received an economic benefit through its noncompliance in this matter, that total gravity factor is also the Preliminary Deterrence Amount in this case.

Count I of the Complaint is Respondent's violation of 40 C.F.R. § 61.145(b). Respondent violated that provision by failing to provide advance written notice of Respondent's intent to perform the asbestos renovation at Fort Jackson. The chart in the Asbestos Penalty Policy entitled "Notification and Waste Shipment Record Violations" calls for a \$15,000 penalty component for a 1st violation of this type of provision. With a 10% increase to account for the inflation adjustment under the Debt Collection Improvement Act, this component increases to \$16,500.

Count II of the Complaint is Respondent's violation of 40 C.F.R. § 61.145(a). Respondent violated that provision by failing to conduct a thorough inspection of the facility to identify the presence of asbestos prior to beginning the renovation. Penalties for violations of this type by determined by referencing the chart on the last page of the Asbestos Penalty Policy (hereinafter, the Work Practices Chart). The renovation involved approximately 5600 square feet of asbestos tile. Pursuant to the Work Practices Chart, 5600 square feet of tile equals 35 "units." For a first time violation of this provision involving 35 units, the Work Practices Chart calls for a penalty component of \$10,000. With a 10% increase to account for the inflation adjustment under the Debt Collection Improvement Act, this component increases to \$11,000.

Count III of the Complaint is Respondent's violation of 40 C.F.R. § 61.145(c)(8). Respondent violated this provision by failing to have adequately trained personnel at the facility during the two days of illegal asbestos renovation. Penalties for violations of this type by determined by referencing the Work Practices Chart. For a first time violation of this provision involving 35 units, the Work Practices Chart calls for a penalty component of \$10,000. In addition, the Work Practices Chart calls for an additional penalty of \$1,000 for each additional

day of violation. Since Respondent conducted the illegal renovation over two days, one additional day of violation must be assessed for an additional \$1,000 penalty, resulting in a total penalty component of \$11,000. With a 10% increase to account for the inflation adjustment under the Debt Collection Improvement Act, this component increases to \$12,100.

Count IV of the Complaint is Respondent's violation of 40 C.F.R. § 61.145(c)(6)(i). Respondent violated this provision by failing to keep the stripped asbestos wet until the material was properly contained in preparation for disposal. Penalties for violations of this type are determined by referencing the Work Practices Chart. For a first time violation of this provision involving 35 units, the Work Practices Chart calls for a penalty component of \$10,000. In addition, the Work Practices Chart calls for an additional penalty of \$1,000 for each additional day of violation. Since Respondent did not adequately wet the material until at least March 26, Respondent violated this provision on the original date of the violation plus six additional days. Therefore, the total penalty component for this violation is \$16,000. With a 10% increase to account for the inflation adjustment under the Debt Collection Improvement Act, this component increases to \$17,600.

The sum of the individual gravity components described above for the four violations is \$57,200. To determine the total gravity based factor and Preliminary Deterrence Amount, a single size of violator factor must be added to this amount.

b. Size of Violator Penalty Component

The size of violator factor is determined using the chart contained in Section II..B.3. of the General Penalty Policy. This factor corresponds to the size business statutory factor in CAA Section 113(e). This chart assigns a size of violator penalty component which increases in

proportion to the size of the violator. On this chart, the violator is sized based on its "net worth" or "net assets." For example, for a violator sized at between \$70,000,000 and \$100,000,000, this chart calls for a penalty component of \$70,000. In the case of companies with more than one facility, the General Penalty Policy provides that this component should be based on the size of the entire corporate entity, not just the violating facility. However, where the violating facility is a subsidiary corporation, the size of the subsidiary and not the parent should be used.

Under the General Penalty Policy, the gravity component of a penalty is increased for larger violators in order to serve as an effective deterrent. This policy is based, at least in part, on the assumption that a larger violator has greater resources (e.g., money, staff and experience) available than smaller violators to understand and comply with environmental laws.

Because "assets" and "worth" are financial concepts that apply most readily to private respondents rather than federal agency respondents, EPA believes that it is appropriate to size a federal agency respondent based on budget and availability of resources, not assets. Such a valuation more realistically reflects the resources available to an agency for compliance purposes, as agencies generally do not have the ability to sell assets to fund compliance activities. In this case, Respondent is a base within the Training and Doctrine Command (TRADOC) of the United States Army, Department of the Army. Respondent can draw on its own budget, as well as other resources within TRADOC, the Army, and/or the Department of the Army, for purposes of complying with environmental laws. Respondent's ability to fund its environmental compliance activities is dependent on budget and resources provided to it by those higher levels of command. Therefore, valuation based on budget and resources is an appropriate

way to apply the size of violator factor under the General Penalty Policy and therefore the size of business factor under CAA Section 113(e).

Respondent is not a corporate subsidiary of its higher commands. Rather, it is simply one facility within a larger command structure. EPA is not aware of a legal separation similar to a parent-subsidary relationship between Respondent and its higher command levels. Rather, Respondent receives its orders, policy directives, and funding from its higher levels of command and is directly answerable to those higher levels. For these reasons, it is appropriate to size Respondent based on the size of its higher command levels rather than looking only at Respondent.

Regardless of which level of command is sized, the same size of violator factor results in this case. Fort Jackson, TRADOC, the Army and the Department of the Army each have budgets in excess of \$70,000,000. Therefore, under the size of violator chart in the General Penalty Policy, the size of violator component would be at least \$70,000 regardless of which of these entities is sized.

In order to prevent the assessment of unreasonably large penalties in the case of very large corporations, the General Penalty Policy provides that the size of violator factor may be limited to 50% of the overall preliminary deterrence amount. As described above, the other gravity based penalty factors for this matter total \$57,200. Therefore, using the 50% limitation, EPA has elected to reduce the \$70,000 size of violator factor to \$57,200.

c. Preliminary Deterrence Amount

The Preliminary Deterrence Amount is the sum of the penalty components from the Asbestos Penalty Policy and the size of violator factor. These amounts total \$114,400.

2. Application of Adjustment Factors

In accordance with CAA Section 113(e) and the General Penalty Policy, Complainant considered the following adjustment factors with respect to the \$114,400 Preliminary Deterrence Amount.

a. Degree of willfulness or negligence

The General Penalty Policy recognizes that the CAA is a strict liability statute. The lack of willfulness or negligence therefore does not serve to lower the Preliminary Deterrence Amount; rather, it indicates only that no greater penalty is merited. Although Respondent is a large and sophisticated entity that has substantial experience in dealing with environmental matters, Complainant has not sought to increase the penalty based on this factor.

b. Degree of cooperation

Under the General Penalty Policy, the Preliminary Deterrence amount may be reduced by up to 30% to reflect the violator's degree of cooperation. The General Penalty Policy limits this reduction to 30% because EPA expects all violators to promptly and cooperatively address noncompliance. The General Penalty Policy sets forth three situations to consider in determining whether this adjustment is appropriate:

1. Prompt Reporting of Noncompliance;
2. Prompt Correction of Environmental Problems; and
3. Cooperation during pre-filing investigation.

Respondent did not disclose its noncompliance to regulatory authorities. Rather, the noncompliance was discovered through investigations by the State. Respondent promptly correct the violations when discovered. In addition, Respondent has been generally cooperative

during the investigation of this matter, although Respondent has not yet provided all the financial information sought by Complainant with respect to the size of business penalty factor. Based on these considerations, Complainant reduced the Preliminary Deterrence Amount by 25% to \$85,800.

c. History of noncompliance

Under the General Penalty Policy, prior instances of noncompliance with environmental requirements can justify an increase in the Preliminary Deterrence Amount. Complainant has not sought to increase the Preliminary Deterrence Amount in this case based on this factor.

d. Environmental damage

The General Penalty Policy provides that the Preliminary Deterrence Amount may be increased based on severe environmental damage. Complainant has not sought to increase the Preliminary Deterrence Amount in this case based on this factor.

e. Payment of other penalties

Under the General Penalty Policy, the Preliminary Deterrence Amount may be reduced if a respondent establishes that it paid penalties to state or local agencies or citizens groups for the same violations. This corresponds to the CAA Section 113(e) factor "payment by the violator of penalties previously assessed for the same alleged violations." In this case, Respondent has made no such payments. Therefore, this adjustment factor is inapplicable in this case.

f. Ability to pay

Under the General Penalty Policy, a penalty may be reduced if a Respondent is unable to pay. This corresponds to the CAA Section 113(e) factor "the economic impact of the proposed

penalty on the violator's business." To date, Respondent has not alleged an ability to pay issue. Therefore, this factor is inapplicable in this matter.

In addition to these General Penalty Policy adjustment factors, Section 113(e) of the CAA requires consideration of "other factors as justice may require." Complainant has not identified any factors in this case which suggest that further adjustments in the Preliminary Deterrence Amount are necessary or appropriate. Therefore, Complainant has made no further changes to the Preliminary Deterrence Amount based on this factor.

Conclusion

For the reasons set forth above, Complainant has proposed a penalty of \$85,800 in this matter. This amount reflects consideration of the statutory penalty factors in Section 113(e) of the Clean Air Act as well as the factors outlined in the General Penalty Policy and the Asbestos Penalty Policy.

CERTIFICATE OF SERVICE

I certify that on the date below I hand-delivered the original and one copy of Complainant's Initial Prehearing Exchange to the Regional Hearing Clerk at the following address:

Regional Hearing Clerk
U.S. EPA Region 4
Atlanta Federal Center
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

I also certify that, on the date below, I sent by certified mail, return receipt requested, a copy of Complainant's Initial Prehearing Exchange to the following address:

David W. Barno, Brigadier General
Installation Commander
U.S. Army Training Center and Fort Jackson
ATZJ-CG
Fort Jackson, South Carolina 29207-5600

I also certify that, on the date below, I sent by certified mail, return receipt requested, a copy of Complainant's Initial Prehearing Exchange to the Presiding Officer at the following address:

William B. Moran
Administrative Law Judge
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Avenue, NW
Washington, D.C. 20005

3/4/02
Date

Claudette Honey