Boards Beware

The EPA Can Come Calling!

By: George E. Nowack, Jr.

It was ten minutes after 5 pm on a Wednesday. A FedEx letter was delivered. It was from the Environmental Protection Agency. Opening it and scanning it, our attention was drawn to **$47,350**. That was the amount of the DAILY fine, PER VIOLATION that was set to commence against our client. We were informed we had *seven* days to schedule and attend a meeting with the undersigned investigator.

The greeting from the EPA referenced a violation of 42 U.S.C.§ 7412 and 40 C.F.R. Part 61, Subpart M (National Emission Standard for Asbestos). Known as the Clean Air Act, as amended in 1990, it has been the law since 1973. It holds the owner or operator of property responsible for compliance.

Applicable to construction or renovation or repair of an area of 160 square feet or more, the Clean Air Act requires that prior to the commencement of ANY work, an assessment of the area is required to be performed and documented that it is the reasonable belief of the person performing the inspection that the project will not involve asbestos containing material ("ACM"). If ACM is present or suspected, the EPA must be notified. If no ACM is suspected, the EPA need not be notified. The written assessment of no ACM must be available upon request of the EPA. Failure to perform the assessment is one violation and failure to provide a copy of the assessment upon request is an additional violation. Fines accrue from the first day of the contract and continue until the job is completed.

The letter explained that the EPA had determined that approximately two years ago, our client had the roofs replaced on multiple buildings in its community. The work was performed over a 71-day period by a national company, after the work needed was identified by an engineer hired by the Association. The project was supervised by management. With fines of just under $100,000 per day, the amount of the fines would be close to $7,000,000.

Our client's immediate response was that the law could not apply because the roofs had been replaced within the last 15 years with non-ACM shingles. And, if the law applied, it should be the responsibility of the roof company, or the engineer, or the manager. **WRONG!**

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The Clean Air Act makes the owner/operator of the property responsible for the pre-construction assessment of the project and either notifying the EPA of the presence of ACM or providing the assessment of the absence of ACM upon request. No pre-construction assessment of the project had been performed. The Association also could not provide the EPA with the required assessment of the absence of ACM. It was irrelevant that based on their date of manufacture, the shingles that were removed did not contain ACM. The Association was in violation of two provisions of the Clean Air Act.

Within 48 hours of our receipt of the notice, we retained an attorney who specializes in pollution claims and EPA defense. The meeting with the EPA occurred within five days of the notice. That was followed by another meeting a week later and at least one other meeting. Only because of the attorney's experience, it appears that the total amount of the fines the Association will have to pay will be less than $25,000. Fines and pollution claims are excluded from coverage in all community association property and liability policies. Fortunately, the Association has sufficient reserves to pay the fines. The Association is likely to seek reimbursement of the fines and the attorney's fees from the roof company, the engineer, and the manager for gross negligence and violation of federal law. The EPA is also likely to contact those other parties to the project.

The pre-construction assessment of the project requires a qualified person to review the project and make a good faith/reasonable assessment of the presence of ACM. An assessment of this project, that the existing shingles were non-ACM and preparing a written statement that could have been presented when the EPA came calling, would have avoided the fines and the attorney's fees the Association has incurred.

Also applicable to community associations as the owner/operator of the property is the Resource Conservation and Recovery Act. 40 C.F.R. 261. It establishes requirements for the disposal of hazardous waste. Oil-based paint, varnish, stains and polyurethane, turpentine and mineral spirits are classified as hazardous wastes. Again, the association, as the owner/operator of the property is responsible for

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compliance. So, whether hired directly by an association or through a construction division of a management company, the contractor exposes an association to fines for improper disposal of hazardous waste.

While it is common for contracts to require the service provider to obtain all permits and to comply with all laws, it is now essential that contracts must be written to obligate every contractor to comply with all state and federal laws, particularly the Clean Air Act and the Resource Conservation and Recovery Act, with failure to do so an act of gross negligence. Although that language will not shift the liability to the contractor since the law applies to the owner/operator of the property, that language will give an association a right to recover the costs it incurs if the association is sanctioned by the EPA.

And, how did the EPA possibly find out about this project with the countless projects involving more than 160 square feet of roof that take place every day? A unit owner in a dispute with the association about damage to the interior of a unit contacted the EPA.

As always, contact your NowackHoward attorney for guidance, questions or concerns your Board may have about contracts for construction projects in your community.