

STATE OF MICHIGAN
IN THE 30TH JUDICIAL CIRCUIT FOR INGHAM COUNTY

MICHIGAN DEPARTMENT OF
ENVIRONMENT, GREAT LAKES,
AND ENERGY,

Plaintiff,

v

J BROWN ENVIRONMENTAL
CONSTRUCTION COMPANY, INC.,

Defendant.

ORDER

Case No. 19-898-CE

HON. WANDA M. STOKES

At a session of said Court
held in the city of Mason, county of Ingham,
this 10th day of December, 2021.

PRESENT: HON. WANDA M. STOKES

This matter comes before the Court on Plaintiff Michigan Department of Environment, Great Lakes, and Energy's (the Department) Motion for Summary Disposition pursuant to MCR 2.116(C)(10) and Motion for Reconsideration. Though Defendants requested oral argument, the Court finds the briefs and record adequately present the facts and legal arguments and, pursuant to MCR 7.114(A), dispenses with oral argument. The Court having been apprised of the facts and otherwise being fully informed regarding the issues, **GRANTS** the Department's motions for the reasons stated below.

FACTS

The city of Detroit hired J Brown Environmental Construction Company, Inc. (Brown Construction) to demolish nine residential buildings as part of a city-wide abatement project. Prior

to the demolition, Brown Construction notified the Department in writing that it would demolish each of the subject residential buildings starting either on May 14 or May 16, 2016 and ending between July 14-29, 2016. Brown Construction hired a subcontractor to remove the asbestos-containing material, and the subcontractor notified the Department that it planned to remove the materials on June 22 or June 23, 2016. On June 2 and June 3, before the subcontractor could remove the asbestos, Brown Construction demolished the residences.

On June 16, 2016, based on personal inspections of several of the demolitions sites and surveys provided by the city of Detroit, the Department issued violation notices to Brown Construction for violating 40 CFR 61, Subpart M of the federal regulations focused on the safe removal of asbestos referred to as the National Emissions Standards for Hazardous Air Pollutants (NESHAP). These rules are incorporated by reference into Michigan's Admin Code, R 336.1942 (Rule 942).

The Department brings this claim alleging Brown Construction failed to properly notify the Department of the demolition, that the buildings were demolished before the materials containing asbestos were removed, and that the asbestos materials were not properly handled or disposed of, all in violation of NESHAP. The Department has submitted affidavits from its senior analyst, a deputy director of Detroit's Demolition Department, and an enforcement specialist with the Department in support of its allegations. Brown Construction does not dispute that it demolished the buildings and has not filed a response to the Department's motion for summary disposition.

STANDARD OF REVIEW

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A court may grant a

motion summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmoving party, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-55; 597 NW2d 28 (1999) (citations omitted). If the nonmoving party does not respond in accordance with the rules, judgment shall be entered against that party if appropriate. MCR 2.116(G)(4).

A motion for reconsideration is properly granted where the moving party demonstrates palpable error by which the court and parties have been misled and that a different disposition of the motion must result from the correction of the error. MCR 2.119(F).

LAW & ANALYSIS

The Department argues that summary disposition is proper because the NESHAP rules are applicable to the residences that are installations demolished as a part of a city-wide project. The undisputed record documentation shows that Brown Construction demolished the residences prior the asbestos-containing materials removal, failed to give the Department proper notice, and failed to dispose of the asbestos laden debris as soon as practical. Thus, there is no genuine issue of any material fact, and the Court should dismiss this case as a matter of law, granting the recovery Plaintiff seeks.

NESHAP applies to the demolitions of facilities that contain a threshold amount of asbestos. 40 CFR 61.145(a)(1).¹ A facility is defined to include buildings and installations but not residential structures with fewer than four units. 40 CFR 61.141. An installation is defined as any building or structure or group of buildings or structures at a single demolition site that is under the control of the same owner or operator. *Id.*

NESHAP requires that the operator of a demolition activity provide notice of when the demolition operation will begin. 40 CFR 61.145(b). Likewise, NESHAP requires that all asbestos-containing material be removed prior to demolition. 40 CFR 61.145(c)(1); Rule 942. Finally, all asbestos containing waste must be disposed of as soon as practical by the waste generator. 40 CFR 61.150(b). Failure to comply with NESHAP requirements automatically results in liability. *United States v Sealtite Corp*, 739 F Supp 464, 468 (ED Ark 1990).

I. VIOLATION OF WASTE REMOVAL REGULATIONS

A. The Residential Buildings Are Installations Subject To NESHAP

Even though the residences demolished have fewer than four units, since they were destroyed under the Detroit Building Authority's abatement project they are all considered part of a "single demolition site."

While the issue of whether a "single demolition site" can encompass buildings that are not geographically contiguous has not been decided in Michigan, the Department cites to persuasive authority on this issue. Upon review, the Court finds the Missouri Federal District case, *Families for Asbestos Compliance, Testing & Safety v St Louis*, unpublished decisions of the United States District Court for the Eastern District of Missouri, Eastern Division, issued September 15, 2008

¹ Specifically, the rules apply to where there is asbestos-containing materials of 260 linear feet on pipes, 160 square feet on other components, or 35 cubic feet off facility components where the length of the area could not be previously measured.

(Docket No 405-CV-719), persuasive.² The court in that case held that NESHAP covered single-family residential homes that were not geographically contiguous but were *contained within a relatively compact area*, such as a city block, if they were under control of the same owner and demolished as part of the same project. (Emphasis added.)

While not binding precedent, the Court finds the reasoning of the *Families for Asbestos Compliance* persuasive. The court relied on clarifications to the NESHAP rules issued by the EPA to hold that the single-family homes in the same compact area, taken together, did not fall into the residential four units' exception. The court noted "Deference is due when an agency has developed its interpretation contemporaneously with the regulation, when the agency has consistently applied the regulation over time, and when the agency's interpretation is the result of thorough and reasoned consideration." *Id.* at 17–18 (citing *Sioux Valley Hosp v Bowen*, 792 F.2d 715, 719 (CA 8, 1986) (citations omitted)). Further, the court stated, "While language in the preamble of a regulation is not controlling over the language of the regulation itself ... the preamble to a regulation is evidence of an agency's contemporaneous understanding of its proposed rules." *Id.* at 18–19 (citing *Wyoming Outdoor Council v. United States Forest Serv*, 165 F3d 43, 53 (CA DC, 1999) (citation omitted)).

In 1990, the EPA issued revisions to NESHAP further defining "facility" and providing a definition for "installation." 55 Fed. Reg. 48406, 1990. The preamble clarified that "residential structures that are demolished . . . as part of a commercial or public project" are not exempt from NESHAP. In 1995, the EPA issued Clarification of Intent, 60 Fed Reg 38725, 38726 (July 28, 1995) which stated:

² The Court recognizes that MCR 7.215(C)(1) provides that an unpublished opinion is not precedentially binding under the rule of stare decisis; however, the Court finds the cited opinion instructional on the issues asserted in the instant case.

EPA believes that the *residential building exemption does not* apply where multiple (more than one) small buildings on the same site are demolished or *renovated by the same owner or operator as part of the same project* or where a single residential building is demolished or renovated as part of a larger project that includes demolition or renovation of nonresidential buildings

...
[A] “site” should be a relatively compact area. In EPA's view, an entire municipality, or even a neighborhood in a municipality, should not be considered a single site.... [I]f a demolition project involves several contiguous city blocks, the entire area could be considered a site. (Emphasis added).

This Court is persuaded by the EPA's guidance and the reasoning set forth in *Families for Asbestos Compliance*. Here, the demolition is part of the city of Detroit's city-wide abatement project and, therefore, are not meant to be exempted from NESHAP. The Department also provides evidence in the form of affidavits and pleadings that the asbestos-containing houses demolished by Brown Construction were located on blocks with groups of other houses also being demolished as part of the abatement project. While several of the residences may have fallen into the residential plan individually, the demolitions were done under control of the same owner and part of the same demolition site with other buildings making them subject to NESHAP.

B. Defendant Demolished The Residential Structures In Violation of NESHAP

As stated above, the NESHAP rules apply to demolitions of “installations” containing a threshold amount asbestos-containing material. An installation is defined, in part, as *any group* of buildings at a single demolition site. Seven of the residences demolished by Brown Construction indisputably contained more than the threshold amount and, therefore, are subject to NESHAP. Accordingly, summary disposition is appropriate for violations of 40 CFR 61.145(c)(1) and Rule 942. (“Each owner or operator of a demolition or renovation activity . . . shall . . . [r]emove all [asbestos containing material] from a facility being demolished or renovated before any activity begins that would break up, dislodge, or similarly disturb the material or preclude access to the material for subsequent removal”).

The Court notes that two of the residences, 17172 Caldwell (Caldwell) and 12649 Glenfield (Glenfield) did not individually meet the statutory threshold for asbestos removal and require further consideration. Plaintiff argues that given the location of the residences, when combined with the other asbestos-containing residences, the Caldwell and Glenfield residences meet the threshold and thus the NESHAP regulations are applicable. Plaintiff has provided affidavits and other documentary evidence that both the Caldwell and Glenfield residences were located on blocks with other residences that were demolished as part of the abatement project and contained the asbestos materials above the threshold amount.

Accordingly, the Court finds it appropriate to consider the installation as a whole to determine whether a residence, which contains asbestos material, meets the threshold amount of asbestos containing material to fall under NESHAP. Because both the Caldwell and Glenfield residences are installations that, as a whole, meet or exceed the threshold for regulatory compliance, NESHAP regulations are applicable to both residences. Summary disposition is likewise appropriate for violations of 40 CFR 61.145(c)(1) and Rule 942.

C. Defendant Failed To Provide An Appropriate Update As Required Under NESHAP

Before renovating or demolishing a building or structure subject to NESHAP regulations, the responsible parties must notify the Department and EPA. 40 CFR 61.145(b)(1). The notification must include planned work dates, a description of the planned demolition, and it must be updated as necessary. 40 CFR 61.145(b)(4)(ix)(x). If the demolition operation will begin on a date after the one previously provided, new notice must be provided to the administrator as soon as possible before the original start date and the party must provide follow up prior to the new start date. 40 CFR 61.145(A)(1) and (2).

Here, Plaintiff provides affidavits and documentary evidence demonstrating that Brown Construction did not provide updated notice that the demolition was set to start after the originally proposed dates on May 14 and May 16, 2020. Accordingly, Brown Construction violated the notice provisions when it began demolitions on June 2 and June 3, 2020.

D. Defendant Failed To Remove Asbestos-Containing Waste As Soon As Practical

Plaintiff also claims that Brown Construction violated NESHAP when it failed to remove the asbestos laden waste from the demolition sites within two-weeks after the demolition. The regulation requires the removal of asbestos waste ‘as soon as practical’ but the term is not defined in the regulation. Undefined terms are generally to be given their plain and ordinary meaning. *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007). The court should consult a lay dictionary when defining common words or phrases that lack a unique legal meaning. *Robinson v Detroit*, 462 Mich 439, 456; 613 NW2d 307 (2000).

The *Cambridge Dictionary* defines ‘practical’ as “able to be done or put into action.” Accordingly, NESHAP requires that an operator remove asbestos-containing material as soon as the owner is able to do so.

After demolishing the residences, Brown Construction left the asbestos-containing material sitting on-site for over two weeks. It is unknown what may have caused such a delay in removing these materials, but under the common understanding of the phrase and evidence proffered by Plaintiff, failing to remove the hazardous waste from the demolition site within two weeks constitutes a violation of NESHAP’s removal provision. 40 CFR 61.150(b)(1) and (2).

II. MOTION FOR RECONSIDERATION

Plaintiff seeks reconsideration of the Court's prior order awarding Brown Construction attorney's fees and costs for time spent responding to the Plaintiff's motion for summary disposition that was served to Defendant's late. Plaintiff argues that because Brown Construction has not responded to the current motion, the Court should prohibit Brown Construction from collecting those fees and costs.

A motion for reconsideration is properly granted where the moving party demonstrates a palpable error by which the Court was misled and that a different outcome will result if the error is corrected. MCR 2.119(F)(3). In this case it appears that the Court has been misled in assuming Defendants were prejudiced by the untimely filing of the Plaintiff's motion. Since Defendant's have failed to file a response or in any way challenge the Plaintiff's motion, there is no prejudice or basis for sanctions. Accordingly, Plaintiff's motions for reconsideration is granted.

CONCLUSION

For the reasons stated above, and Defendant's failure to provide any documents or even an argument to rebut Plaintiff's factual evidence, the Court finds that summary disposition pursuant to MCR 2.116(C)(10) is appropriate. The residences demolished by Brown Construction qualify as installations under 40 CFR 61.141, and noncompliance with the regulations results in a compensable violation. Accordingly, Brown Construction is liable for demolishing the residences without first removing the asbestos-containing material in a safe manner, failing to properly notify the Department, and not removing the asbestos laden waste as soon as practical.

THEREFORE, it is ordered that Plaintiff's Motions for Summary Disposition pursuant to MCR 2.116(C)(10) is granted and Plaintiff is awarded the requested relief.

IT IS FURTHER ORDERED the Plaintiff's Motion for Reconsideration is granted, and Plaintiff is not required to pay attorney fees or costs to Defendant.

In accordance with MCR 2.602(A)(3) this order disposes of the last pending claim and closes the case.

12-10-22

Date

Wanda M. Stokes

Hon. Wanda M. Stokes
Circuit Court Judge

PROOF OF SERVICE

I hereby certify that I provided a copy of the above ORDER to each attorney of record, or to the parties, by hand delivery, or by placing a true copy in a sealed envelope, addressed to each, with full postage prepaid and placing said envelope in the United States mail, on December 10, 2021.

Samuel Kane

Samuel Kane
Law Clerk/Court Officer