

Asbestos NESHAP Criminal Enforcement: Federal Court Addresses Challenges to Indictments



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A United States District Court (“Court”) (D. Idaho) addressed in a February 27th Memorandum Decision and Order (“Memorandum”) an issue arising out of the United States Department of Justice (“DOJ”) charging an individual (Brek “Pilling”) with violation of the Clean Air Act National Emissions Standard for Hazardous Air Pollutant (“NESHAP”) regulations for asbestos.

The Memorandum addresses whether two of the seven counts should be dismissed.

The Clean Air Act NESHAP for asbestos specifies certain work practices that must be followed during demolitions and renovations of all facilities. This includes but is not limited to structures, installations, and buildings (excluding residential buildings that have four or fewer dwelling units). Such regulations mandate tasks such as:

- Thorough inspection where the demolition or renovation operation will occur
- Notification of appropriate delegated governmental authorities before any demolition or renovation that contain a certain threshold amount of regulated asbestos-containing material
- Work practice standards that control asbestos emissions

These work practice standards apply to “owners” and “operators” or demolition and renovation activities. See §61.145(a).

Violation of this NESHAP can under appropriate circumstances constitute a crime.

DOJ is stated to have charged Pilling with seven counts of violating the asbestos NESHAP. The violations allegedly arose from the demolition of two buildings in Burley, Idaho. The NESHAP work practice standards were allegedly not followed. Each count of the Indictment is stated to correspond to a separate work practice standard that Pilling allegedly violated.

Pilling filed motions to dismiss Counts One and Six of the Indictment.

The stated basis for the motions to dismiss included:

- Count One (failure to allege a criminal offense or alternatively based on erroneous legal instructions given to the grand jury)
- Count Six (failure to allege an essential element of the charged crime – does not link the alleged “visible emissions” to the relevant “source” of those emissions)

The Court in addressing the motions to dismiss notes that an indictment must only contain:

...a plain, concise, and definite written statement of the essential facts constituting the offense charged.

When an indictment is challenged, the court is required to accept the truth of the allegations and confine its review to the four corners of the indictment.

Count One charged Pilling with failing to thoroughly inspect a facility for the presence of asbestos before causing it to be demolished. Pilling argued that the Indictment is legally deficient because the Clean Air Act does not criminalize the failure to thoroughly inspect a facility for asbestos.

The Court agrees and dismisses this Count.

The question is phrased by the Court as whether thoroughly inspecting a facility for asbestos is a “requirement”. It undertakes an analysis of the three paragraphs which address demolition and renovation.

The Court ultimately concludes that:

...It is simply not clear from the text of the regulations that failing to thoroughly inspect a facility for asbestos is a “requirement”, the violation of which constitutes a crime under the CAA. Nor is the Court persuaded by the two non-binding cases the government cites.

One of the cases is a civil case (Fried v. Sungard Recovery Services, Inc.) which is noted to have not discussed the relevant standards governing the adequacy of a criminal indictment. The other case (United States v. Farley) involved a failure to inspect in a criminal context but the Court disagrees with that decision, stating:

...the textual analysis is not that simple, because the stated purpose of conducting a thorough inspection is to determine which of those requirements apply. Put another way, the regulation frames a thorough inspection as a predicate to the application of the substantive requirements.

The Court also cites the rule of lenity which requires that in interpreting criminal statutes that any ambiguity must be construed against the government.

Count Six of the Indictment is not dismissed.

Pilling was charged with causing a discharge of visible emissions to the outside air without following one of the prescribed methods of emissions control or waste treatment. The Indictment was argued to have failed to allege a necessary element of the offense because it did not link the alleged visible emissions to the relevant source (demolition activities at the two buildings).

The Court states that Count Six could have been more precise but is not fatally flawed. It states that:

...Viewed as a whole, the Indictment clearly links the “visible emissions” alleged in Count Six to the relevant “source” of asbestos-containing material.

In other words, Count Six is stated to expressly link Pilling to a particular demolition activity – the one at the two buildings. Further, DOJ is stated to have alleged underlying facts showing why the particular demolition activities are governed by the NESHAP.

Count Six of the Indictment is characterized as having not been precise. However, the Court does not view it as fatally flawed. It states:

...Viewed as a whole, the Indictment clearly links the “visible emissions” alleged in Count Six to the relevant “source” of asbestos-containing material.

Count Six is noted to have linked Pilling to a particular demolition activity (i.e. the one at the two structures). Further, the underlying facts are stated to have demonstrated why the particular demolition activities are governed by the NESHAP. As a result, the Court states that as a whole, the Indictment plainly alleges (without explicitly stating) that the alleged visible emissions were generated by the demolition activities at the relevant source.

A copy of the Memorandum can be downloaded [below](#).

