

Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 16
Issue 3 *Summer 2009*

Article 5

2009

Greater Protection: Missouri Says No to Possible Asbestos Contamination due to NESHAP and Possible RCRA Violations. Families for Asbestos Compliance, Testing and Safety v. City of St. Louis, Missouri

Erin P. Seele

Follow this and additional works at: <https://scholarship.law.missouri.edu/jesl>



Part of the [Environmental Law Commons](#)

Recommended Citation

Erin P. Seele, *Greater Protection: Missouri Says No to Possible Asbestos Contamination due to NESHAP and Possible RCRA Violations. Families for Asbestos Compliance, Testing and Safety v. City of St. Louis, Missouri*, 16 Mo. Env'tl. L. & Pol'y Rev. 730 (2009)

Available at: <https://scholarship.law.missouri.edu/jesl/vol16/iss3/5>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Environmental and Sustainability Law by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Greater Protection: Missouri Says No to Possible Asbestos Contamination due to NESHAP and Possible RCRA Violations

*Families for Asbestos Compliance, Testing and Safety v. City of St. Louis, Missouri*¹

I. INTRODUCTION

The National Emission Standards for Hazardous Pollutants for asbestos (hereinafter “NESHAP”) was issued in 1973.² The NESHAP prescribes work practices for demolition and renovation of buildings found to contain asbestos.³ Although there is an exception to the NESHAP for single-family residences with four or fewer dwelling units, no court had yet interpreted whether a group of single-family residences under the same control or ownership fell under this exception.⁴ Although the EPA has long answered that question in the negative, agreement from this court makes this case no less important with both environmental and developmental impacts.

In addition, Congress enacted the Resource Conservation and Recovery Act (hereinafter “RCRA”) in 1976 to deal with expanding consumer and industrial waste.⁵ Due to Congress’ frustration with various “loopholes” in RCRA regulations, in 1984, Congress added the ability for citizens to bring suits for “solid hazardous waste that may present an imminent and substantial endangerment to health or the environment.”⁶ While imminent and substantial endangerment has consistently been construed liberally, the holding in this case, allowing a showing of

¹ No. 4:05-CV-719, 2008 WL 4279569 (E.D. Mo. 2008).

² R Robert M. Howard et al., *The EPA’s Prosecution of Clean Air Act Asbestos NESHAP Cases Based Upon Nonbinding Bulk Material Test Methods*, 44 SAN DIEGO L. REV. 173, 192 (2007) (citing National Emission Standards for Hazardous Air Pollutants; Asbestos, Beryllium, and Mercury, 38 Fed. Reg. 8,826, 8,829-30 (Apr. 6, 1973)).

³ 40 C.F.R. § 61.145 (2008).

⁴ *Id.* §§ 61.141, 61.145.

⁵ Christopher Rizzo, *RCRA’s “Imminent and Substantial Endangerment” Citizens Suit Turns 25*, 23 NAT. RESOURCES & ENV’T, Fall 2008, at 50 (citing 42 U.S.C. §§ 6901-6992k (2006)).

⁶ *Id.* (quoting 42 U.S.C. § 6972(a)(1)(B); H.R. REP. NO. 98-198, pt. 1, at 19 (1983)).

imminent and substantial endangerment if *possible* contamination may pose a potential future harm, expands that liberal reading further and deserves close attention by all developers and those involved in hazardous waste.

The issues in this case arose from the 1999 expansion project at Lambert St. Louis International Airport where ninety-nine buildings that contained asbestos were demolished.⁷ This note will explore the court's holding and analysis, analyze the court's interpretation of whether a group of single-family residences with the same owner or operator falls under the NESHAP, discuss the expansion of the liberal interpretation of the RCRA's imminent and substantial endangerment test, and comment on the potential environmental and developmental affects of this holding.

II. FACTS AND HOLDING

The 1999 expansion project at Lambert St. Louis International Airport required the demolition of approximately 1,900 parcels of land, some containing buildings contaminated with asbestos.⁸ The pre-demolition process called for a licensed asbestos inspector to take samples and create an inspection form describing the location and amount of asbestos-containing materials in each building.⁹ Asbestos abatement was then performed, and the demolition contractor sent the County Health Department (hereinafter "CHD") a letter listing the remaining material left in the buildings that contained asbestos.¹⁰ After review of the remaining materials, the CHD would either approve or deny the use of a wet demolition process.¹¹

⁷ *Families for Asbestos Compliance, Testing & Safety*, 2008 WL 4279569, at *1, 19.

⁸ *Id.* at *1. The EPA delegated its NESHAP authority to the State of Missouri which delegated its authority to the Department of Natural Resources which delegated its authority to the St. Louis County Health Department. *Id.*

⁹ *Id.* at *5. The airport environmental director reviewed the two forms and the lab results, which was then used to create inventory reports *Id.*

¹⁰ *Id.*

¹¹ *Id.* Wet demolition allowed "water sprays as a 'primary means of emission control' . . . 'for reasons of safety, cost, and/or time.'" *Id.* at *2. "The demolition procedures varied depending on the amount of asbestos-containing material present or assumed to be present in the structure." *Id.*

A letter dated November 13, 2002, written by the Missouri Department of Natural Resources (hereinafter “MDNR”) to the EPA, asked if it was acceptable to remove regulated asbestos containing material (hereinafter “RACM”) by removing the entire structure under wet conditions.¹² In an initial letter, the EPA responded that the scenario described would meet the intent of the regulations.¹³ Thirty-five structures were then demolished using the wet method.¹⁴ However, more than two months later, the EPA sent a second letter stating that wet demolition on a case-by-case determination, as described in the EPA’s first letter, was counter to the NESHAP.¹⁵

Wet demolitions then ceased, and both the EPA and airport executives negotiated procedures to continue the project, ultimately signing an Administrative Order on Consent (hereinafter “AOC”).¹⁶ The AOC provided that the EPA authorized Defendants, the City of St. Louis and the City of St. Louis Airport Authority (hereinafter “City Authority”) to utilize the same basic methods used under the County Guidelines.¹⁷ After the AOC, sixty-four more residential structures were demolished using the wet method.¹⁸

On June 11, 2004, the EPA issued a Desk Statement stating that no wet demolitions were to be done while the EPA investigated recent concerns raised about the method used by City Authority.¹⁹ Plaintiff, Families for Asbestos Compliance, Testing, and Safety (hereinafter “FACTS”), filed suit alleging violations of the RCRA and seeking partial

¹² *Id.* This was subject to the City Authority disposing the waste according to 40 C.F.R. § 61.150 and § 61.154. *Id.* 40 C.F.R. § 61.150 proscribes regulations for the packaging of demolition debris and 40 C.F.R. § 61.154 covers the disposal of asbestos containing waste. *See id.*

¹³ *Id.* The letter was dated November 17, 2002. *Id.*

¹⁴ *Id.* at *21.

¹⁵ *Id.* at *3. The counter-letter was dated January 22, 2003. *Id.*

¹⁶ *Id.* The AOC became effective on May 1, 2003. *Id.*

¹⁷ *See id.* at *3, 13. This included permitting the wet demolition method without first removing wall systems or ceilings containing asbestos, and to determine on a case-by-case basis whether demolition of specific residential buildings without first removing RACM was acceptable. *Id.* at *3.

¹⁸ *Id.* at *4. The AOC remained in effect until March 31, 2004. *Id.*

¹⁹ *Id.* Between then and this suit, no wet demolitions have occurred. *Id.*

summary judgment arguing that City Authority failed to comply with the NESHAP when City Authority demolished buildings containing asbestos, exposing nearby residents to dangerous levels of asbestos.²⁰ City Authority argued that single-family residences do not fall within the regulations of the NESHAP and that, in the alternative, the method was within NESHAP regulations.²¹ City Authority motioned for summary judgment on FACTS' RCRA claim arguing that FACTS had not shown that the demolition caused imminent and substantial endangerment.²²

The court granted FACTS' motion for partial summary judgment holding that single-family residences with the same owner or operator are not exempt from the NESHAP, that City Authority's wet demolition procedures did not meet the standards of the NESHAP, and that the AOC was not an alternative work method because it had not been properly issued since there was no notice or comment and no finding that the method was equivalent to NESHAP requirements.²³ Further, the court denied City Authority's motion for summary judgment holding that FACTS presented a genuine issue of material fact as to whether the demolition process created an imminent endangerment to public health because FACTS showed that a potential contamination may pose a future risk, which was all that was needed to demonstrate an imminent endangerment.²⁴

²⁰ *Id.* at *1.

²¹ *Id.* at *6. City Authority also argued that their good-faith reliance on the County and EPA's procedures exempts it from liability. *Id.*

²² *Id.* at *1, 28.

²³ *Id.* at *31.

²⁴ *Id.* at *30. The three elements of the RCRA are "that the defendant is a person, including, but not limited to, one who was or is a generator or transporter of solid waste or hazardous waste . . . ; 2) that the defendant contributed to or is contributing to the handling, storage, treatment, transportation or disposal of solid or hazardous waste; and 3) that the solid or hazardous waste may present an imminent and substantial endangerment to health or the environment." *Id.* at *28 (quoting *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1014-15 (11th Cir. 2004)). Only the third element is of issue in this note.

GREATER PROTECTION

III. LEGAL BACKGROUND

A. NESHAP and Single-Family Residences

The NESHAP was enacted in 1973 and remained unchanged until 1990, when the method for measuring asbestos content was amended.²⁵ There have been no changes since 1990, although some non-binding clarifications have been released.²⁶ No published case has interpreted single-family residence coverage under the NESHAP.

The EPA, however, has consistently stated that a group of residences that are demolished or renovated and owned or under the control of the same owner is subject to the NESHAP. The NESHAP applies to facilities and specifies procedures for handling asbestos containing material.²⁷ "Facility" is defined as "any institutional, commercial, public, industrial, or residential structure, installation, or building (including any structure, installation, or building containing condominiums . . . , but excluding residential buildings having four or fewer dwelling units)."²⁸ However, the NESHAP defines an installation as "any building or structure or any group of buildings or structures . . . that are under the control of the same owner or operator."²⁹

The 1990 NESHAP revision clearly stated that a project which required the demolition or renovation of single-family residences with the same owner or operator fell within NESHAP regulations.³⁰ The public sent numerous comments for proposed revisions which the EPA then

²⁵ Robert M. Howard et al., *supra* note 2, at 192-93. The 1990 method mandates a multi-step analysis of all layers of the asbestos containing material to generate an average percentage result for the material as a whole to determine if the material is friable or non-friable. *Id.* at 181-82.

²⁶ *See id.* at 174-75.

²⁷ *See* 40 C.F.R. § 61.145(a) (2008).

²⁸ 40 C.F.R. § 61.141.

²⁹ *Id.*

³⁰ National Emission Standards for Hazardous Air Pollutants; Asbestos NESHAP Revision, 55 Fed. Reg. 48,406 (Nov. 20, 1990). Among other things, the 1990 Revision sought to clarify which single family residences were covered under regulations. *See id.* at 48,412.

responded to and incorporated into the 1990 NESHAP revision.³¹ Public comments requested that the exclusion of residential facilities having four or fewer dwelling units be eliminated.³² The EPA responded that it “does not consider residential structures that are demolished or renovated as part of a commercial or public project to be exempt from this rule.”³³ The EPA further clarified that a group of residential buildings under the control of the same owner or operator is considered an installation according to the definition in 40 C.F.R. § 61.141 and is covered by NESHAP regulations.³⁴

In 1995, the EPA issued a notice of clarification that once again, among other things, addressed whether single-family residences were covered under the NESHAP.³⁵ Although the notice of clarification was not binding,³⁶ the EPA reiterated that the demolition of multiple small residential buildings on the same site by the same owner or operator is covered by the NESHAP.³⁷ The clarification explained that the definition of “facility” excluding “residential buildings having four or fewer dwelling units” purposefully leaves out installations and therefore the statutory language on its face includes the demolition of single-family residences at a single site under the control of the same owner or operator.³⁸

The EPA continues to receive similar questions, and, in 2008, clarified for yet another city that single-family residences demolished on the same site for a highway project falls within NESHAP requirements.³⁹

³¹ *Id.*

³² *Id.*

³³ *Id.* The EPA gave an example stating that “the demolition of one or more houses as part of an urban renewal project, a highway construction project, or a project to develop a shopping mall, industrial facility, or other private development, would be subject to.” *Id.*

³⁴ *Id.*

³⁵ Asbestos Clarification of Intent, 60 Fed. Reg. 38,725 (July 28, 1995).

³⁶ Robert M. Howard et al., *supra* note 2, at 186, 206 (stating that EPA’s clarification was not subjected to a public comment period).

³⁷ Asbestos NESHAP Clarification of Intent, 60 Fed. Reg. at 38,725. The clarification clearly stated that this applied to municipalities. *Id.*

³⁸ *Id.* at 38,726 (citing National Emission Standards for Hazardous Air Pollutants; Asbestos NESHAP Revision, 55 Fed. Reg. at 48,415).

³⁹ *EPA Interpretations of NSPS, NESHAP, and MACT Requirements*, 18 AIR POLLUTION CONSULTANT, March 2008, at 2.39. Jefferson City Missouri asked whether single-family

B. *Interpretation of Imminent and Substantial under the RCRA*

Congress enacted the RCRA in 1976 to deal with the expanding consumer and industrial waste in the United States.⁴⁰ Congress had high hopes that this provision would create a way for citizens to address dangerous disposal activities that the EPA or states were unwilling or unable to address.⁴¹ It was not until 1984 that Congress enacted the third category of citizen suit, at issue in this note, which allows citizens to bring suit “against any person for the past or present generation, transport, treatment, storage, or disposal of a solid hazardous waste that ‘may present an imminent and substantial endangerment to health or the environment.’”⁴² Congress enacted this new section due to its frustration with various “loopholes” in RCRA regulations and the slow pace of the EPA and state enforcement actions.⁴³ Over the last few years, the use of the RCRA’s imminent and substantial endangerment citizen suit provision has expanded.⁴⁴ However, the RCRA left imminent and substantial endangerment undefined by statute, leaving courts to create a workable definition.⁴⁵

residences are subject to the asbestos NESHAP if the residences are being demolished as part of a highway expansion, which, of course, the EPA answered in the affirmative. *Id.*

⁴⁰ Rizzo, *supra* note 5, at 50.

⁴¹ *Id.* To prevail under an RCRA claim, a plaintiff must show that “1) the defendant is a person, including but not limited to, one who was or is a generator or transporter of solid or hazardous waste or one who was or is an owner or operator of a solid of hazardous waste treatment, storage, or disposal facility; 2) that the defendant has contributed to or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and 3) that the solid or hazardous waste may present an imminent and substantial endangerment to health or the environment.” 42 U.S.C. § 6972(a)(1)(B) (2006). Only the third element is of concern in this note.

⁴² Rizzo, *supra* note 5, at 50 (citing 42 U.S.C. § 6972(a)(1)(B)). Citizens can also bring suit under § 6972(a)(1)(A) for violation of a permit, standard, regulation, condition, requirement, prohibition, or order of RCRA. Citizens can also bring suit against EPA for failure to perform its nondiscretionary RCRA duties under § 6972(a)(2). *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 51. RCRA citizen suits show an increase from about eight in 1987 to about twenty to twenty-five each year from 2000 to 2007 with citizen suits reaching a peak in 1995 with about twenty-five reported cases. *Id.*

⁴⁵ Raymond K. Hoxsie Real Estate Trust v. Exxon Educ. Found., 81 F. Supp. 2d 359, 365 (D.R.I. 2000).

Despite the lack of a statutory definition, courts' interpretations of imminent and substantial endangerment have been relatively consistent, with a growing trend to ease the burden on plaintiffs to present a cognizable case. As early as 1989, the Eighth Circuit, in *United States v. Aceto Agricultural Chemicals Corp.*, stated that the purpose of the RCRA provision is to "give broad authority to the courts to grant all relief necessary to ensure complete protection of the public health and the environment."⁴⁶ In 1991, in *Dague v. City of Burlington*, the Second Circuit echoed by stating that the RCRA is designed not only to prevent but also mitigate endangerments to the public health and environment, and therefore the statute is "basically a prospective act designed to prevent improper disposal of hazardous wastes in the future."⁴⁷

Some courts have attempted to use a stricter standard for whether an activity poses an imminent and substantial endangerment. For example, the District Court of New Jersey, in *Interfaith Community Organization v. Honeywell International, Inc.*, held that an imminent and substantial endangerment may be found where "1) there is a potential population at risk; 2) the contamination at issue is a RCRA 'solid' or 'hazardous waste'; 3) the contamination is present at levels above which is considered acceptable by the state; and 4) there is a pathway for current and/or future exposure."⁴⁸ However, on appeal, the Third Circuit found this to be too high of a standard, holding that a living population need not be endangered as long as the environment is endangered.⁴⁹ Instead, the court stated that

[P]laintiffs need only demonstrate that the waste... "may present" an imminent and substantial threat... Similarly, the term "endangerment" means a threatened or potential

⁴⁶ 872 F.2d 1373, 1383 (8th Cir. 1989).

⁴⁷ 935 F.2d 1343, 1355 (2d Cir. 1991), *rev'd in part*, 505 U.S. 557 (1992) (citing STAFF OF H. SUBCOMM. ON OVERSIGHT & INVESTIGATION, COMM. ON INTERSTATE & FOREIGN COMMERCE, 96TH CONG., HAZARDOUS WASTE DISPOSAL 32 (Comm. Print 1979) ("the Eckhardt Report")).

⁴⁸ 263 F. Supp. 2d 796, 838 (D.N.J. 2003).

⁴⁹ 399 F.3d 248, 259-60 (3d. Cir. 2005). The court nevertheless affirmed that an imminent and substantial endangerment exists since the contamination levels at the site and surrounding area ranged from 200 to 8,000 times over the state standards. *Id.* at 261.

harm, and does not require proof of actual harm....The endangerment must also be "imminent" [meaning] threatens to occur immediately...Because the operative word is "may," however, the plaintiffs must [only] show that there is a potential for an imminent threat of serious harm...[as] an endangerment is substantial if it is "serious"...to the environment or health.⁵⁰

In *United States v. Northeastern Pharmaceutical and Chemical Co.*, a Western District of Missouri case, the court highlighted situations in which an endangerment may be regarded as substantial, "such as exposure to carcinogenic agents or other hazardous contaminants . . .".⁵¹ The court held that an imminent and substantial endangerment existed because "[t]he quantities of dioxin and other compounds found at the defendant's farm were highly toxic at low dosage levels and given the conditions of the soil and bedrock beneath the site, there was a substantial likelihood of human and environmental exposure."⁵²

The Ninth Circuit, in *Price v. United States Navy*, in 1994, adopted the rule that endangerment means a threatened or potential harm and that imminence refers "to the nature of the threat rather than identification of the time when the endangerment initially arose."⁵³ Therefore, according to the court, the burden is met as long as plaintiff can prove a present threat, even if the impact may not be felt for years.⁵⁴ The court held, however, that plaintiff failed to show the requisite imminent and substantial endangerment where contamination of soil had occurred in

⁵⁰ *Id.* at 258 (quoting *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993 (11th Cir. 2004)); see also *United States v. Price*, 688 F.2d 204, 213-14 (3d Cir.1982) (concluding § 6972(a)(1)(B) contains "expansive language" conferring "upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any* risk posed by toxic wastes") (emphasis added).

⁵¹ 579 F. Supp. 823, 846 (W.D. Mo. 1984), *rev'd in part*, 810 F.2d 726 (8th Cir. 1986).

⁵² *Id.*

⁵³ 39 F.3d 1011, 1019 (9th Cir. 1994) (quoting *U.S. v. Price*, 688 F.2d at 213); see also *Enthyl Corp. v. EPA*, 541 F.2d 1, 13 (D.C. Cir. 1976) (en banc).

⁵⁴ *Price*, 39 F.3d at 1019.

the area of plaintiff's property but plaintiff's house sat on a concrete slab, which protected the house from any soil contamination.⁵⁵

In 1999, the Eighth Circuit, in *Petrovic v. Amoco Oil Co.*, citing the standard in both *Price* and *Aceto Agriculture Chemical Corp.*, held that where the lower courts found that petroleum constituents were located many feet below the ground only in low concentrations, even though residents did not use the underground water for drinking purposes, these facts were enough to hold that the lower court's finding of an imminent and substantial harm was not clearly erroneous.⁵⁶

The District Court of Maryland held in *Two Rivers Terminal, L.P., v. Chevron USA, Inc.*, in 2000, that contamination or just pollution alone does not trigger the RCRA "imminent and substantial endangerment" provision.⁵⁷

As recent as 2007, in *Maine People's Alliance and National Resource Defense Council v. Mallinckrodt, Inc.*, the First Circuit continued its trend to interpret the RCRA broadly.⁵⁸ With a renewed focus on the word "may," the court concluded that "a reasonable prospect of future harm is adequate to engage the gears of RCRA § 7002(a)(B)(1) as long as the threat is near-term and involves potentially serious harm."⁵⁹ The court found an imminent and substantial endangerment where the EPA was already cleaning up of a river that had been contaminated with mercury-containing waste.⁶⁰ *K-7 Enterprise, L.P. v. Jester* also highlights the broad reading of this RCRA standard, where the Eastern District of Texas found that contamination from leaking underground storage tanks occurring over three decades, without substantial change over the last ten years, posed an imminent and substantial endangerment.⁶¹

Clearly, courts have appeared to read the power granted by the RCRA as a broad mandate to protect the environment and public health from hazardous materials.

⁵⁵ *Id.* at 1020.

⁵⁶ 200 F.3d 1140, 1150-52 (8th Cir. 1999).

⁵⁷ 96 F. Supp. 2d 432, 446 (M.D. Penn. 2000).

⁵⁸ 471 F.3d 277, 296 (1st Cir. 2007).

⁵⁹ *Id.*

⁶⁰ *Id.* at 296.

⁶¹ 562 F. Supp. 2d 819, 829 (E.D. Tex. 2007).

GREATER PROTECTION

IV. INSTANT DECISION

A. *Single-Family Residences Owned by City Authority are governed by the NESHAP*

The court first held that the single-family residences are governed by the NESHAP.⁶² City argued that the plain language of the definition of “facility” within the NESHAP exempts single-family residences.⁶³ FACTS relied on clarifications by the EPA indicating that the single-family residences owned by City Authority fell under the NESHAP and the plain language of the statute defining installation.⁶⁴ Although City Authority argued that these clarifications are invalid attempts at rulemaking, the court held that the 1990 clarification was entitled to controlling weight because it was developed after extensive commentary from interested members of the public.⁶⁵ The court concluded that the group of single-family residences demolished in the expansion project fell within the regulations of the NESHAP.⁶⁶

B. *City Authority did not comply with the NESHAP*

The court then considered whether the wet demolition procedures used by City Authority were less stringent than NESHAP regulations.⁶⁷ Due to City Authority’s use of both the County Guidelines and then the

⁶² *Families for Asbestos Compliance, Safety & Testing v. City of St. Louis, Mo.*, No. 4:05-CV-719, 2008 WL 4279569, at *31 (E.D. Mo. Sept. 15, 2008).

⁶³ *Id.* at *8. In order to establish liability for NESHAP violations, FACTS must show that the asbestos NESHAP applies to the City Authority and the contested demolitions did not meet NESHAP requirements. *Id.* at *7.

⁶⁴ *Id.* at *9. The 1990 revision clearly states that “a group of residential buildings under the control of the same owner or operator is considered an installation” and is therefore covered by the NESHAP for asbestos. *Id.* The 1995 clarification similarly supports FACTS’ argument. *Id.* at *10.

⁶⁵ *Id.* at *9. Although the court held that the 1995 clarification did not deserve controlling weight since it had no public comment period before being developed, the court still gave the clarification due respect since it was consistent with the controlling 1990 revision. *Id.* at *10.

⁶⁶ *Id.*

⁶⁷ *Id.* at *11.

AOC during the project, the court broke the analysis into two different discussions.⁶⁸

First, the court examined the County Guidelines as compared to NESHAP regulations.⁶⁹ The County Guidelines called for a case-by-case determination for approval of wet asbestos and required compliance with the St. Louis County Air Pollution Code.⁷⁰ City Authority followed the outdoor abatement section of the code which calls for the use of a water solution containing an effective wetting agent during the removal process.⁷¹

Proper NESHAP requirements and procedures vary depending on whether the material is friable or non-friable asbestos.⁷² The NESHAP requires friable RACM to be removed “before any activity begins that would break up, dislodge, or similarly disturb the material,” unless an exception exists.⁷³ City Authority argued that the material was not friable and therefore it did not need to remove all the RACM before demolition.⁷⁴

⁶⁸ See *infra* text accompanying notes 69-89. The court first considered the period between October 1999 and May 2003 when wet demolitions were being conducted pursuant to County guidelines. *Id.* at *13. The second phase was between May 2003 and mid-June 2004 where the City Authority conducted wet demolitions pursuant to the AOC. *Id.* at *21.

⁶⁹ *Id.* at *13.

⁷⁰ *Id.* at *13-14.

⁷¹ *Id.* at *15 (quoting ST. LOUIS COUNTY, MO., AIR POLLUTION CONTROL CODE § 612.530-7.3.3 (2001)). The outdoor method applies to the removal of asbestos from structural items in and accessible from outdoor areas. *Id.* (quoting § 612.530-7.3). The code further states that compliance does not relieve the duty to comply with other applicable state and federal laws and regulations. *Id.* at *14 (quoting § 612.530-2.7).

⁷² *Id.* at *15. However, the Code makes no distinction between friable and non-friable asbestos but states that during removal all will be considered friable. *Id.* at *14 (quoting § 612.530-7.1.1). Friable is “any material containing more than 1 percent asbestos . . . that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure.” *Id.* at *15 (quoting 40 C.F.R. § 61.141 (2008)). Nonfriable asbestos is “any material containing more than 1 percent asbestos . . . that, when dry, cannot be crumbled, pulverized, or reduced to power using hand pressure.” *Id.* (quoting 40 C.F.R. § 61.141).

⁷³ *Id.* at *16 (quoting 40 C.F.R. § 61.145(c)(1)). FACTS contended that the asbestos can be removed only after demolition has begun unless the material was not discovered until demolition began or the buildings are not structurally sound. *Id.* City Authority did not argue for either of these exceptions. *Id.*

⁷⁴ See *id.* at *17-18.

However, FACTS relied on inventory and inspection reports submitted to the CHD by City Authority that identified certain material as friable.⁷⁵ Although City Authority had two experts testify that since the County treated all material as friable during the removal process, the label friable only meant “treated as friable,” the court found this testimony unconvincing.⁷⁶ Due to that conclusion and the strict liability of the NESHAP, the court held that City Authority failed to meet the requirements of the NESHAP.⁷⁷

The court concluded that friable asbestos was left in ninety-nine buildings that were demolished and, of those ninety-nine, thirty-five were demolished using the above described method. Therefore, City Authority was liable for thirty-five violations of the NESHAP.⁷⁸

The court next explored the requirements under the AOC to determine if the remaining sixty-four demolished structures also violated the NESHAP.⁷⁹ Since the AOC allowed basically the same procedure used under the County Guidelines, the question was whether the AOC was an “alternative work practice” authorized by the EPA.⁸⁰

FACTS argued that the AOC was not an alternative work method because the only available method to issue a binding alternate work practice was through 40 C.F.R. § 61.12 and City Authority did not follow the proper procedure.⁸¹ City Authority argued this was an alternative work practice authorized by the EPA pursuant to 40 C.F.R. § 61.12, § 61.149, § 61.150⁸² or the Clean Air Act.⁸³

⁷⁵ *Id.* at *17.

⁷⁶ *Id.* at *17-19. The court reasoned that the NESHAP did not have a category “treated as friable” but rather that the material be clearly identified as friable or non-friable. *Id.* at *20.

⁷⁷ *Id.*

⁷⁸ *Id.* at *21.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at *23.

⁸² 40 C.F.R. § 61.12 contains the general provisions that apply to the NESHAP for air pollutants. *Id.* at *22. The court held that the AOC cannot be validly issued pursuant to 40 C.F.R. § 61.149 or § 61.150 because § 61.149 only applies to the disposal of asbestos-laden waste the demolition generates and § 61.150 only specifies the proper method for handling the resulting waste materials. *Id.* at *24.

⁸³ *Id.* at *22-24.

The court held that the AOC was not an alternative work practice under the Clean Air Act.⁸⁴ Under 42 U.S.C. § 7412(h)(3), the EPA may provide an alternative work practice so long as the alternative is “equivalent to the reduction in emissions achieved” under NESHAP requirements.⁸⁵ Reasoning that the NESHAP does not allow wet demolition unless the building is unsound, the court concluded that the wet demolition undertaken by City Authority could not be an equivalent work method.⁸⁶ The court found that City Authority also did not comply with 40 C.F.R. § 61.12 since it requires notice and an opportunity to be heard, a written application to be submitted, and to prove that the alternative method is equivalent.⁸⁷ City Authority offered no evidence that the EPA provided a notice and comment period or that the method was equivalent.⁸⁸ Therefore, the court held that the AOC was invalid and City Authority was liable for an additional sixty-four NESHAP violations for the structures demolished pursuant to the invalid AOC.⁸⁹

C. Summary Judgment Denied for FACTS' RCRA Claim

Finally, the court denied City Authority's motion for summary judgment as to FACTS' claim that the waste disposed of during the demolition project fell under the RCRA.⁹⁰ City Authority argued that FACTS failed to show that its conduct created “an imminent and substantial endangerment to health or environment.”⁹¹ The court noted that whether a substantial and imminent danger exists is a question of

⁸⁴ *Id.* at *25. City Authority relied on 42 U.S.C. § 7412(h)(3). *Id.* at *24. An alternative route is through § 7412(h)(1) where the EPA must promulgate numerical emission limitations, which clearly did not occur in this case. *Id.* at *25.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at *23-24.

⁸⁸ *Id.* at *26. City Authority contended that over two hundred monitoring tests were taken during the demolition project but the report relied on had no conclusions confidently drawn concerning the effectiveness of the wetting process compared to the NESHAP's regulations. *Id.* at *27.

⁸⁹ *Id.* at *28.

⁹⁰ *Id.* at *30.

⁹¹ *Id.* (quoting 42 U.S.C. § 6972(a)(1)(B) (2006)).

fact.⁹² The court heavily relied on the EPA's statement that "[s]oil contamination from either airborne or wetborne transport of fibers is always a concern as this could serve as a reservoir for further activity-related releases."⁹³ The question, the court stated, was not whether asbestos was released but rather whether possible asbestos contamination may pose a potential future risk.⁹⁴ The court held that FACTS showed that City Authority's actions caused a potential contamination that could pose a future risk and therefore denied summary judgment.⁹⁵

V. COMMENT

A. *The NESHAP Includes a Group, of four or more, Single-Family Residences with the same Owner or Operator*

The language of the NESHAP concerning a group of single-family residences can be confusing.⁹⁶ The court correctly concluded that the regulatory language is ambiguous since residential buildings with four or fewer units are exempt, but a group of buildings or structures with the same owner or operator within a single site are included.⁹⁷

With no case discussing this interpretation, the court relied solely on the EPA's interpretation and the statutory language.⁹⁸ Considering that the 1990 revision was passed after public notice and comment,⁹⁹ it is irrelevant whether the 1995 clarification is binding since both are consistent. The 1990 revision to further clarify which single-family

⁹² *Id.* at *29.

⁹³ *See id.* at *30.

⁹⁴ *Id.*

⁹⁵ *Id.* at *31.

⁹⁶ *See supra* text accompanying notes 28-29.

⁹⁷ *See Families for Asbestos Compliance, Testing & Safety*, 2008 WL 4279569, at *8.

⁹⁸ *See id.* at *8-10. It is well established that courts give deference to an agency's interpretation of its own regulations. *See Ford Motor Co. v. EPA*, 608 U.S. 555, 556 (1980); *Udal v. Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *Pac. Coast Med. Enter. v. Harris*, 633 F.2d 123, 130-31 (9th Cir. 1980).

⁹⁹ National Emission Standards for Hazardous Air Pollutants; Asbestos NESHAP Revision, 55 Fed. Reg. 48,406 (Nov. 20, 1990).

residences would be included under the NESHAP states, as an example, that "several houses located in highway right-of-way that are all demolished as part of the same highway project would be considered an "installation," even if the houses are not proximate to each other."¹⁰⁰ This example is very similar to the 1999 St. Louis airport expansion project, which makes it hard to argue that City Authority did not know that the NESHAP applied to the ninety-nine residential buildings demolished during the expansion project.

Moreover, it would be against the NESHAP's policy to exclude around ninety-nine residential buildings containing asbestos. The exemption that the NESHAP allows is supported by the rationale that single-family residences, in general, contain only a small amount of asbestos material and, therefore, do not need regulation.¹⁰¹ Clearly, the EPA never envisioned that a group of ninety-nine residential buildings would be exempt because the small amount of asbestos rationale would no longer apply.

Despite the EPA's revision and clarifications, in 2008, before this holding, the EPA addressed yet another question concerning whether a group of residences with the same owner being demolished for a highway project were included under the NESHAP.¹⁰²

Anyone who is involved in any kind of demolition who chooses to continue believing that the NESHAP will not apply to large projects just because the buildings demolished are residential, will pay for such wishful thinking. This holding could be used to argue that anytime a project larger than four single-family residences is undertaken, a danger is present and NESHAP regulations must be followed. This case should serve as a warning to developers and those involved in hazardous waste to err on the safe side and follow NESHAP requirements rather than risk punishment and expensive fines for NESHAP violations. Hopefully, this will, in turn, better protect the public's health and environment.

¹⁰⁰ *Id.* at 48,412.

¹⁰¹ Asbestos NESHAP Clarification of Intent, 60 Fed. Reg. 38,725 (July 28, 1995).

¹⁰² *EPA Interpretations of NSPS, NESHAP, and MACT Requirements*, *supra* note 39, at 2.39.

B. City Authority Did Not Comply with the NESHAP

Since it is undisputed that RACM was left in buildings demolished using the wet method, the main issue became identification of what kind of asbestos was left.¹⁰³ Therefore, the issue was reduced to whether the term “friable” on City Authority’s inventory reports was conclusive evidence that the material left in the buildings was actually friable.

The court rejected the argument that the term “friable” on the inventory reports was merely complying with the County Guidelines and did not mean friable as defined by the NESHAP.¹⁰⁴ However, even if the court accepted that “friable” meant “treated as friable,” City Authority still would not have complied with NESHAP requirements. Because the NESHAP requires categorization of all RACM as friable or non-friable before demolition and because the NESHAP does not recognize a category labeled as “treated as friable,” friable written on the NESHAP’s inventory reports by City Authority could only mean friable, as defined by the NESHAP.¹⁰⁵ Indeed, City Authority would be guilty of false reporting under the NESHAP if the court found that the term “friable” on the inventory reports did not mean friable as defined by the NESHAP.¹⁰⁶

Moreover, regardless of which section that City Authority argued that the AOC was a proper alternative work method, City Authority did not follow the procedure of any of those sections.¹⁰⁷ Under Clean Air Act, City Authority would have had to show that the method resulted in an

¹⁰³ NESHAP clearly states that only non-friable asbestos, and other exemptions that do not exist in this case, must be removed before any activity that dislodges, breaks up, or disturbs the material. 40 C.F.R. § 61.145(a)(1), (c)(1) (2008).

¹⁰⁴ *Families for Asbestos Compliance, Testing & Safety v. City of St. Louis, Mo.*, 2008 WL 4279569, at *19 (E.D. Mo. 2008).

¹⁰⁵ *Id.*

¹⁰⁶ 40 C.F.R. § 61.05(d).

¹⁰⁷ City Authority argued that this was an alternative work method authorized by the EPA pursuant to 40 C.F.R. §§ 61.12, 61.149, 61.150, or the Clean Air Act. *Families for Asbestos Compliance, Testing & Safety*, 2008 WL 4279569, at *22-23. Both 40 C.F.R. §§ 61.149 and 61.150 were quickly dismissed because § 61.149 only applies to disposal of asbestos-laden waste the demolition generates and § 61.150 only specifies the proper method for handling the resulting waste materials. *Id.* at *23-24.

“equivalent” amount of emission reduction.¹⁰⁸ City Authority did not attempt to show this, probably due to the fact that the EPA and City Authority started negotiations in the first place as a result of the EPA’s discovery that City Authority was using an ineffective method.¹⁰⁹ City Authority also did not meet the requirements of 40 C.F.R. § 61.12 because neither City Authority or the EPA issued notice, offered an opportunity for those concerned to be heard, submitted a written application nor proved that the alternative work method was equivalent.¹¹⁰ Moreover, the NESHAP is a strict liability statute which makes good faith reliance only relevant concerning punishment not liability.¹¹¹ Therefore, it appears that City Authority simply did not check the procedures for proper enactment prior to hazardingly relying on the agreement.

From filling out the inventory reports to wet demolishing buildings still containing asbestos, City Authority violated the NESHAP procedures. This case should serve as a warning and reminder for all to check local, state, and federal procedures before and during a construction or demolition project.

C. Liberal Interpretation of the RCRA’s Imminent and Substantial Endangerment Expanded

This holding appears to be a liberal reading of the RCRA since the court expanded the already liberal reading of the imminent and substantial endangerment requirement. The extreme cases relied on by City Authority show that its actions probably did not impose an imminent and substantial endangerment since FACTS failed to show any present soil contamination.¹¹² Cases where the endangerment is not so extreme

¹⁰⁸ See 42 U.S.C. § 7412(h)(3) (2006).

¹⁰⁹ *Families for Asbestos Compliance, Testing & Safety*, 2008 WL 4279569, at * 3.

¹¹⁰ *Id.* at *26. City Authority contended that over two hundred monitoring tests were taken during the demolition project, but the report relied on had no conclusions confidently drawn concerning the effectiveness of the wetting process compared to NESHAP’s regulations. *Id.* at *27.

¹¹¹ *Id.* at *6.

¹¹² It seems clear that when a landfill is currently leaking hazardous chemicals into the soil, groundwater, and surface waters of a wetland, an imminent and substantial endangerment exists as was the case in *Dague v. City of Burlington*, 935 F.2d 1343, 1356

demonstrate that courts were looking for a present threat in order to conclude that an imminent and substantial endangerment exists. In 1984, a Missouri District Court found an imminent and substantial endangerment where, although the dioxin concentration levels were low, the contamination was highly toxic at low doses.¹¹³ Also in Missouri, in 1999, the Eighth Circuit affirmed that an imminent and substantial endangerment existed where the petroleum contamination at issue was located many feet below the ground, existed only in low concentrations, and where the residents did not use that water for drinking.¹¹⁴ However, the Ninth Circuit refused to find an imminent and substantial endangerment where the state had already ordered asbestos cleanup and the plaintiffs' house sat on a concrete slab protecting the house from soil exposure.¹¹⁵

The cases above demonstrate that courts closely examine the type of contamination and the threat the contamination poses considering facts specific to each circumstance. In its holding, the court in the instant decision relied on the fact that the EPA claimed that soil contamination is always a concern and that failure to remove asbestos before demolition could cause soil contamination and pose a risk to the public's health.¹¹⁶ However, FACTS showed no evidence of any contamination. Further, the court dismissed City Authority's expert testimony explaining that the type of asbestos remaining in the residences was short fiber chrysolite to which short-term exposure by nearby residents would not pose a substantial

(2d Cir. 1991), *rev'd in part*, 505 U.S. 557 (1992). More obvious, is where contamination levels of soil were thirty times higher than the state standard, and contamination in the ground water ranged from 200 to 8,000 times higher than acceptable as was the case in *Interfaith Community Organization v. Honeywell International, Inc.*, 399 F.3d 248, 261 (3d Cir. 2005).

¹¹³ *United States v. Ne. Pharm. & Chem. Co.*, 579 F. Supp. 823, 846 (W.D. Mo. 1984), *rev'd in part*, 810 F.2d 726 (8th Cir. 1986).

¹¹⁴ *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1150-51 (8th Cir. 1999).

¹¹⁵ *Price v. U.S. Navy*, 39 F.3d 1011, 1020 (9th Cir. 1994). The court rejects Price's argument that the concrete slab is cracking and that she would have to disturb the soil to replace the slab which could cause migration of the contaminants because no evidence indicated contamination existed beneath Price's house and Price failed to show that she needed to move the concrete slab. *Id.* at 1018, 1021.

¹¹⁶ *Families for Asbestos Compliance, Testing & Safety*, 2008 WL 4279569, at *30.

danger because the NESHAP is a strict liability statute. However, the court fails to explain why this argument lacks relevance for the imminent and substantial endangerment analysis.¹¹⁷

Comparing the cases above with the instant case demonstrates that this particular case is an extension of the RCRA's imminent and substantial endangerment standard. City Authority's actions seem to present less of a risk than in *Price* where the court found a lack of a present threat due to the cracking concrete slab protecting Price's property.¹¹⁸ This case seems more like *Petrovic*, where the court found only low contamination existed¹¹⁹ and can be easily distinguished from the cases where contamination soared¹²⁰ or low doses of the contamination were highly toxic.¹²¹ The instant court is creating an easier standard by stating the question is not whether contamination or asbestos leaking occurred, but, rather, whether possible contamination may pose a potential future risk.¹²² By using the words "possible contamination," "may," and "potential future risk," the instant court makes a standard under which many more situations could now pose an imminent and substantial endangerment.

Although a liberal reading of the RCRA already existed, this holding presents a rule where it is hard to imagine situations that would not meet its requirement. The instant court seems to be allowing FACTS to escape summary judgment merely on the showing of any possible environmental or health risk. The court may be indicating that the frustration of hazardous waste dangers are not being resolved even with the passage of this section of the RCRA; or, the court may merely be taking the RCRA's mission to heart by allowing almost any RCRA environmental or health claim to survive summary judgment. Regardless of the reason why, this holding will please environmentalists and better protect Missouri's environment and public health. Hopefully, this

¹¹⁷ *Id.* at *20. One easy response is the fact that City Authority's brief only discussed the length of the fiber in the NESHAP count.

¹¹⁸ See *supra* text accompanying note 115.

¹¹⁹ See *supra* text accompanying note 114.

¹²⁰ See *supra* note 112.

¹²¹ See *supra* text accompanying note 113.

¹²² See *Families for Asbestos Compliance, Testing & Safety*, 2008 WL 4279569, at *30.

decision will compel developers and those involved in hazardous waste to watch their actions closely.

VI. CONCLUSION

This case should end all questions concerning whether a project demolishing more than four single-family residences with the same owner or operator falls within the NESHAP requirements. This case may also serve as an official judicial recognition that the NESHAP is a broad strict liability statute, which courts will apply narrowly in efforts to best protect the environment and public health against hazardous waste. Since this is the first case interpreting the single-family residence coverage in the NESHAP, it remains to be seen how much impact this holding will truly have. However, it is not far-fetched to conclude that this holding may result in developers and those involved in hazardous waste to err on the side of caution and follow NESHAP regulations protecting the public health and environment rather than risk a finding that the project fell within the NESHAP and face violations.

Further, Missouri is not only opening the door but rather taking the door off the hinges for plaintiffs to successfully plead a RCRA imminent and substantial endangerment claim. It is unclear whether this new test will be followed by other courts, or even upheld on appeal, but what is certain, is that plaintiffs looking to defeat a summary judgment motion, for now in Missouri, must only show that a *possible* contamination *may* pose a *potential future* risk. With this definition, it is hard to imagine any scenario where any defendant will win a summary judgment motion. It appears that the court is continuing to see the ability for a plaintiff to sue for hazardous waste that may result in contamination that may pose any risk to the environment or public health as one of vital importance.

ERIN P. SEELE