

IN THE IOWA DISTRICT COURT FOR JASPER COUNTY

STATE OF IOWA ex rel. IOWA)	
DEPARTMENT OF NATURAL)	NO. <u>EQCV121977</u>
RESOURCES,)	
)	
Plaintiff,)	
)	
vs.)	PETITION IN EQUITY
)	
PHOENIX INVESTORS, LLC,)	
)	
Defendants.)	
)	

COMES NOW Plaintiff State of Iowa ex rel. Iowa Department of Natural Resources (“IDNR”) and for its claims against Defendant states as follows:

INTRODUCTION

1. Asbestos is known to cause disease and can lead to cancer in humans, and there is no known safe level of asbestos exposure. Microscopic fibers of asbestos are released into the air when asbestos-containing material is disturbed during product use, demolition work, building or home maintenance, repair, and remodeling. If inhaled, asbestos fibers can become permanently lodged in lung tissue and cause lung disease such as asbestosis and lead to cancer, including mesothelioma, although symptoms may not appear for up to 20 or more years after exposure.

2. An affiliate of Phoenix Investors, LLC (“Phoenix”) owns an old industrial building known as the “old Maytag boiler building” (“boiler building”) located at 927 North 19th Avenue E., Newton, Iowa 50208. In 2018, as part of a renovation project of the boiler building, Phoenix contracted with JB2 Services, LLC, d/b/a/ JB2 Environmental, LLC (hereafter collectively referred to as “JB2”), to perform all asbestos abatement activities during

the renovation project. JB2 is controlled, owned and operated by Robert Peret. In 2018, both Phoenix and JB2 committed multiple violations of asbestos regulations including, but not limited to, failure to thoroughly inspect for the presence of asbestos prior to renovation activities, failure to submit the required notifications prior to asbestos removal activity, failure to remove all asbestos-containing material before the material was damaged or disturbed, and failure to use proper methods to remove, collect and dispose of asbestos-containing material. The State of Iowa, therefore, seeks the assessment of civil penalties and the issuance of a permanent injunction against Phoenix for the numerous asbestos violations committed at and in relation to the renovation project.

PARTIES

3. The State of Iowa is a sovereign state of the United States of America and brings this action on behalf of the IDNR, a duly constituted agency of the State of Iowa pursuant to Iowa Code section 455A.2.

4. Phoenix Investors, LLC is a Wisconsin limited liability company doing business in Jasper County, Iowa. Phoenix is a real estate company and acquires, manages, and operates commercial real estate properties, including industrial properties, and has a national portfolio of properties. Phoenix's principal office is located at 401 E. Kilbourn Ave, Suite 201, Milwaukee, WI 53202.

DEFINITIONS

5. "Adequately wet means sufficiently mix or penetrate with liquid to prevent the release of particulates." 40 C.F.R. § 61.141.

6. "Category I nonfriable asbestos-containing material (ACM) means asbestos-containing packings, gaskets, resilient floor covering, and asphalt roofing products containing

more than 1 percent asbestos . . . ,” and “Category II nonfriable ACM means any material, excluding Category I nonfriable ACM, containing more than 1 percent asbestos . . . that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.” 40 C.F.R. § 61.141.

7. “Facility means any institutional, commercial, public, industrial, or residential structure, installation, or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having four or fewer dwelling units)” 40 C.F.R. § 61.141.

8. “Facility component means any part of a facility including equipment.” 40 C.F.R. § 61.141.

9. “Friable asbestos material means any material containing more than 1 percent asbestos . . . that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure” 40 C.F.R. § 61.141.

10. “Leak-tight” means “that solids or liquids cannot escape or spill out. It also means dust-tight.” 40 C.F.R. § 61.141.

11. “Owner or operator of a demolition or renovation activity means any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation operation, or both.” 40 C.F.R. § 61.141.

12. “Regulated asbestos-containing material (RACM) means (a) Friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or

reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations” 40 C.F.R. § 61.141.

13. “Renovation means altering a facility or one or more facility components in any way, including the stripping or removal of RACM from a facility component.” 40 C.F.R. § 61.141.

14. “Strip means to take off RACM from any part of a facility or facility components.” 40 C.F.R. § 61.141.

JURISDICTION

15. The United States Environmental Protection Agency has established emission standards for asbestos which is a hazardous air pollutant regulated pursuant to Section 112 of the Clean Air Act. These standards for asbestos and other hazardous air pollutants are called the National Emission Standards for Hazardous Air Pollutants (“NESHAP”). 40 C.F.R. Part 61, Subpart M (40 C.F.R. sections 140-157).

16. Pursuant to Iowa Code section 455B.133, the asbestos NESHAP was adopted by reference by the Iowa Environmental Protection Commission (“EPC”) and is codified at 567 Iowa Admin. Code 23.1(3).

17. Each owner or operator of a demolition or renovation activity shall thoroughly inspect the facility to be demolished or renovated for the presence of asbestos prior to commencement of demolition or renovation activities. 40 C.F.R. § 61.145(a).

18. Each owner or operator of a demolition or renovation activity where the NESHAP would apply must provide proper notice to the DNR ten (10) working days prior to the beginning of the asbestos abatement/renovation. 40 C.F.R. § 61.145(b)(1) and (3)(i).

19. Each owner or operator of a demolition or renovation activity shall remove all RACM 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. 40 C.F.R. § 61.145(c)(1).

20. When RACM is stripped from a facility component while it remains in place in the facility, each owner or operator of a demolition or renovation activity shall adequately wet the RACM during the stripping operation. 40 C.F.R. § 61.145(c)(3).

21. For all RACM, including material that has been removed or stripped, each owner or operator of a demolition or renovation activity shall adequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal. 40 C.F.R. § 61.145(c)(6)(i).

22. Each owner or operator of a demolition or renovation activity shall either discharge no visible emissions to the outside air during the collection, processing, packaging, or transporting of any asbestos-containing waste material generated by the source, or adequately wet the asbestos-containing waste material and, while wet, seal it in leak-tight containers or wrapping. 40 C.F.R. § 61.150(a)(1)(i)-(iii).

23. For ACM that is to be transported off-site, each owner or operator of an asbestos demolition or renovation activity must label the containers or wrapped materials with the name of the waste generator and the location at which the waste was generated. 40 C.F.R. § 61.150(a)(1)(v).

24. The Attorney General, at the request of the IDNR, is authorized to institute a civil action for injunctive relief to prevent any further violation of an order, permit, or rule, or for the assessment of a civil penalty, not to exceed ten thousand dollars (\$10,000.00) per day for each day such violation continues, or both such injunctive relief and civil penalty. Iowa Code § 455B.146.

FACTS

25. An affiliate of Phoenix Investors, LLC (“Phoenix”) owns an old industrial building known as the “old Maytag boiler building” (“boiler building”) located at 927 North 19th Avenue E., Newton, Iowa 50208. The boiler building was built in 1948 and is 17,100 square feet. The building contains at least six (6) boilers that formerly powered the 1.8 million square foot Maytag appliance production facility in Newton, Iowa. The boiler building is located on a large campus and is less than fifty (50) yards from a windmill fabrication facility where workers perform duties outside the building and near other buildings where at least one other company rents office space for its staff.

26. Phoenix intends to demolish the boiler building.

27. In 2018, Phoenix contracted with JB2 Environmental, LLC (“JB2”), for all the asbestos abatement work at the boiler building. JB2 was formed in May of 2017.

28. Although the NESHAP requires an owner or operator of a demolition or renovation activity to thoroughly inspect the facility to be demolished or renovated for the presence of asbestos prior to commencement of demolition or renovation activities, Phoenix and JB2 failed to conduct any such inspection because the surveys they had of the building were at least eight (8) years old.

29. Although the NESHAP requires an owner or operator of a demolition or renovation activity to notify the DNR ten (10) working days prior to the beginning of asbestos abatement/renovation, Phoenix and JB2 failed to perform any such notification. JB2 provided the DNR an Asbestos Notification of Demolition and Renovation on December 8, 2017, which stated the scheduled asbestos removal dates would start on Jan. 15, 2018 and stop on March 5, 2018. JB2 did not commence asbestos removal activities at the boiler building until May 2018 and did not submit an updated or revised notification to the DNR to reflect the change.

30. The DNR received an anonymous complaint about the renovation project at the boiler building on May 23, 2018, stating that the person had worked on asbestos projects before and “nothing was being done correctly at this location.” The complainant further stated they had left the site because they did not want to be exposed to asbestos.

31. The DNR conducted an investigation of the renovation project at the boiler building on May 24, 2018. The DNR began the investigation by first speaking with staff who rent office space at a nearby office building. DNR was then met by the facility manager, Jim Schutte, for the owner of the boiler building, Phoenix. Mr. Schutte took DNR staff to the boiler building and called the site supervisor for the asbestos abatement project, Scott Schneider with JB2.

32. During the May 24, 2018 inspection of the boiler building, the DNR observed gross contamination in large parts of the building and took photographs. The DNR observed a significant amount of dry, suspect ACM outside of containment and numerous broken windows throughout the boiler building, allowing for possible transmission of ACM off-site. There had been various high wind conditions in the weeks prior to the DNR’s inspection.

33. The DNR observed a number of large, black bags containing suspect ACM on the floor in the building. Some of the bags were smashed and/or torn open and appeared to have been dropped from several floors higher. The suspect ACM visible within or outside the bags was not wet.

34. The DNR observed power tools in various areas of the building, indicating they were being used to remove dry, suspect ACM without proper containment.

35. The DNR was informed that a garage door to the boiler building was being opened/closed by JB2 to bring in roll-off dumpster to put the bags of dry, suspect ACM into for disposal, allowing possible transmission of ACM off-site during the disposal process.

36. The DNR collected six (6) samples of dry, suspect material from various areas of the renovation project not within any containment, five (5) of which tested positive for the following amounts of regulated asbestos:

Sample Location	Type of Material Sampled	Laboratory Sample Results
Boiler Insulation #1	Insulation	2% Chrysotile Asbestos 10% Amosite Asbestos 12% Total Asbestos
Boiler Insulation #2	Insulation	2% Chrysotile Asbestos 15% Amosite Asbestos 17% Total Asbestos
Boiler Insulation #3	Insulation	12% Chrysotile Asbestos
Boiler Insulation #4	Insulation	2% Chrysotile Asbestos 10% Amosite Asbestos 12% Total Asbestos

Boiler Insulation #5	Insulation	2% Chrysotile Asbestos 15% Amosite Asbestos 17% Total Asbestos
Pipe Insulation #6	Insulation	No asbestos detected

37. All of the material observed in the boiler building, including the debris, on May 24, 2018, was dry. Upon exiting the boiler building, DNR staff discovered there was no water hooked up to either wet the ACM inside the building or to “shower out” when exiting the building. In addition, only four (4) negative air machines¹ were at the site, leading to a vastly deficient negative air pressure, which is necessary in order to maintain containment of ACM on-site.

38. Mr. Schneider (JB2), along with his assistant asbestos worker, Jorge Licona, arrived onsite during the May 24, 2018 inspection, and admitted that he had not connected the water because there was no water service to the building. JB2 further admitted that they had been working onsite, conducting abatement activities for several weeks. Mr. Schneider had received his license to perform asbestos abatement activities on May 1, 2018, while Mr. Licona received his license on January 5, 2018.

39. Before the DNR left the property on May 24, 2018, agency staff instructed Mr. Schutte (Phoenix) that all the broken windows in the building must be sealed and the entire building must be sealed against entrance by anyone because of the gross dry asbestos contamination observed.

40. On May 25, 2018, the DNR returned to the boiler building property and met with representatives of Iowa Occupational Safety and Health Administration (“OSHA”), Robert Peret,

¹ Eventually, a total of fifteen (15) negative air machines would be used achieve sufficient negative air pressure to comply with OSHA requirements and maintain proper containment.

president and owner of JB2, along with Mr. Schneider and Mr. Licon (JB2), and Mr. Schutte (Phoenix). During the meeting, Iowa OSHA and DNR expressed their concerns about the project as well as how to get the project back on track. The DNR spoke with Mr. Peret (JB2) and explained the agency considered the building a contaminated site that need a qualified crew to decontaminate the building prior to any additional asbestos abatement activities.

41. During the May 25, 2018 meeting, Iowa OSHA discovered that JB2 had been working on abatement activities at the boiler building for approximately three (3) weeks and had already removed approximately 50% of the 9,600 total square feet of boiler insulation. The JB2 employees who had been working the past three weeks admitted that they had been using a Sawzall and angle grinder to remove the asbestos and had not been wetting the asbestos during removal. Although Mr. Peret stated that his employees had worked on other similar jobs where the DNR and OSHA had determined JB2 had followed all guidelines, Mr. Schneider admitted to Iowa OSHA that he had limited asbestos removal experience and had not previously removed asbestos boiler insulation.²

42. After the DNR left the property on May 25, 2018, the DNR proceeded to the Newton Landfill (“Landfill”) to investigate JB2’s asbestos disposal practices and notify the Landfill that bags of dry, suspect ACM may have been deposited without complying with NESHAP requirements. During the inspection of the Landfill, the DNR observed that some of the bags of dry, suspect ACM deposited by JB2 had been broken open and the contents of the bags were scattered on the ground close to the haul road—where loads of solid waste enter/exit the Landfill. The bags had all been clearly labeled with asbestos signage but were not labeled with the name of the waste generator and the location at which the waste was generated.

² Iowa OSHA identified at least thirteen (13) serious violations of OSHA standards, almost all of which dealt with asbestos, and JB2 later paid a \$20,267.00 penalty to OSHA for the violations observed during the investigation.

43. On May 30, 2018, Iowa OSHA inspected the exterior of the boiler building and observed that JB2 employees were attempting to seal up all the openings with poly sheeting to provide containment for the ACM within.

44. On May 31, 2018, the DNR returned to the site in order to inspect the asbestos containment entrance for gross contamination and did not observe any immediately outside containment. DNR did not conduct an inspection of the interior of the building. During the May 31 inspection of the exterior, the DNR learned that on or about May 28, 2018, electricity and water services were re-established to the boiler building.

45. On June 4, 2018, the DNR issued a NOV to Phoenix and JB2 for the following violations: failure to thoroughly inspect for the presence of asbestos prior to renovation activities, failure to submit the required notifications prior to asbestos removal activity, failure to remove all asbestos-containing material, and failure to use proper methods to remove, collect and dispose of asbestos-containing material.

46. The NOV required Phoenix and/or JB2 perform a complete asbestos survey and send a copy to the DNR. The NOV also stated that no cleanup or asbestos abatement activities were to start, or entry made to the building, until the DNR received and approved an asbestos abatement plan.

47. After the NOV was issued, Defendants provided the DNR with several purported asbestos surveys, but some of the “surveys” were not asbestos surveys done in compliance with the asbestos NESHAP survey requirements and nearly all were completed prior to 2010—at least 8 years before the planned renovation work was to occur. The “surveys” completed in January and April 2018 were merely analysis of several samples taken from within the boiler building for the presence of asbestos.

48. On July 6, 2018, Defendants provided the DNR with an asbestos abatement plan, which included, but was not limited to:

- a. Employ experienced, competent asbestos abatement managers/workers;
- b. Secure the perimeter and secure all openings using 6 ply poly;
- c. Wet all ACM using spray pumps, double bag all previously bagged ACM and all loose ACM debris on the floor;
- d. Remove all ACM on pipes using the glove-bag system; and
- e. Design and construct mini containment around boilers as needed to remove ACM.

49. The DNR conducted additional site visits to the boiler building on July 6, 2018, August 8, 2018, August 28, 2018, and September 11, 2018, but did not observe any non-compliance with the NESHAP during those inspections.

50. Phoenix continued to use JB2 to conduct asbestos decontamination work within the interior of the boiler building through at least September 2018. On or about November 1, 2018, Phoenix terminated JB2's contract on the boiler building.

51. During the September 11, 2018 inspection, the DNR observed that the full-boiler building containment had already been removed but there was dry and friable suspect ACM on the ground and in different areas by the boilers.

52. During the September 11, 2018 inspection, the DNR took ten (10) samples, seven of which tested positive for the following amounts of regulated asbestos:

Sample Location	Type of Material Sampled	Laboratory Sample Results
Floor Debris	Insulation	No asbestos detected
SW Air Handler	Insulation	No asbestos detected
Debris Inside Boiler #2	Insulation	8% Chrysotile Asbestos

Boiler Edge	Insulation	5% Chrysotile Asbestos 2% Amosite Asbestos 7% Total Asbestos
Floor #1 N Boiler Corner	Insulation	5% Chrysotile Asbestos 2% Amosite Asbestos 7% Total Asbestos
Floor #1 N Boiler E Tubes	Insulation	2% Crocidolite Asbestos 20% Amosite Asbestos 22% Total Asbestos
North Control Room Wall/Floor	Insulation	5% Chrysotile Asbestos
Pipe Flange	Pipe Flange	60% Chrysotile Asbestos
South Boiler Amosite	Insulation	2% Crocidolite Asbestos 20% Amosite Asbestos 22% Total Asbestos
Window Glazing	Window Glazing	0.22% Chrysotile Asbestos

53. On or about November 20, 2018, Phoenix retained Controlled Asbestos, Inc. (“Controlled Asbestos”), to perform completion of the asbestos abatement work on the interior of the boiler building, including piping that went from the boiler building to other buildings on the former Maytag complex.

54. On or about November 26, 2018, Phoenix informed the DNR that Controlled Asbestos was going to finish the asbestos decontamination work for the interior of the boiler building. JB2 ceased doing asbestos abatement work for Phoenix in approximately September 2018.

55. On or about July 31, 2019, the DNR conducted an inspection of the boiler building and collected five (5) samples, four of which tested positive for the following amounts of regulated asbestos:

Sample Location	Type of Material Sampled	Laboratory Sample Results
1/Floor Debris	Insulation	3% Chrysotile Asbestos
2/Floor Debris	Insulation	3% Chrysotile Asbestos
3/Stair Debris	Insulation	No Asbestos Detected
4/Floor Debris	Insulation	3% Chrysotile Asbestos
5/Dry Debris OC	Insulation	12% Chrysotile Asbestos

56. On October 16, 2019, the DNR conducted an inspection of the boiler building and collected four (4) samples, three of which tested positive for the following amounts of regulated asbestos:

Sample Location	Type of Material Sampled	Laboratory Sample Results
Tank around fitting	Insulation	5% Chrysotile Asbestos
North rear boiler	Insulation	<1% Chrysotile Asbestos 20% Amosite Asbestos 3% Crocidolite Asbestos
Center Boiler	Insulation	10% Amosite Asbestos 5% Crocidolite Asbestos
South Boiler Calcium	Insulation	No asbestos Detected

57. Phoenix has completed abatement of the known ACM in the boiler building. Phoenix intends to demolish the boiler building, and Phoenix or its contractors may encounter

additional areas during demolition and renovation where ACM is not visible until demolition or renovation activities occur.

VIOLATIONS

58. As an owner of a source governed by applicable law, Phoenix is required to comply with applicable laws and regulations pertaining to asbestos abatement, removal, and disposal, and violated the following provisions of those laws and regulations:

- a. Failure to thoroughly inspect the boiler building for the presence of asbestos prior to commencement of demolition or renovation activities in violation of 40 C.F.R. § 61.145(a) as its last asbestos survey was more than eight years old; and
- b. Failure to provide proper notice to the DNR ten (10) working days prior to the beginning of the asbestos abatement/renovation at the boiler building in violation of 40 C.F.R. § 61.145(b)(1) and (3)(i).

59. As an owner of a source governed by applicable law, Phoenix is responsible for operator JB2's violations of applicable laws and regulations pertaining to asbestos abatement, removal, and disposal, and Phoenix is therefore legally responsible for the following violations:

- a. Failure to remove all RACM from the boiler building before activities that would break up, dislodge, or similarly disturb the material in violation of 40 C.F.R. § 61.145(c)(1);
- b. Failure to adequately wet RACM, including material that was removed or stripped, and ensure that it remained wet until collected and contained or treated in preparation for disposal in violation of 40 C.F.R. §§ 61.145(c)(6)(i);
- c. Failure to adequately wet RACM and, while wet, seal it in leak-tight containers or wrapping during the collection, processing, packaging, or transporting of any RACM in violation of 40 C.F.R. § 61.150(a)(i)-(iii); and
- d. Failure to label the ACM containers or wrapped materials intended for disposal with the name of the waste generator and the location at which the waste was generated in violation of 40 C.F.R. § 61.150(a)(1)(v).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff State of Iowa ex rel. Iowa Department of Natural Resources requests the Court:

- a. assess a civil penalty against Phoenix for asbestos regulation violations pursuant to Iowa Code section 455B.146 for each day of violation of 40 C.F.R. sections 61.145(a), 61.145(b)(1) and 3(i), 61.145(c)(1), 61.145(c)(6)(i), and 61.150(a) (i)-(iii) and (iv) adopted by reference in 567 IAC 23.1(3), not to exceed ten thousand dollars (\$10,000.00) per day, per violation, for each day of such violation;
- b. issue a permanent injunction enjoining Phoenix from any violation of 40 C.F.R. sections 61.145(a), 61.145(b)(1) and 3(i), 61.145(c)(1), 61.145(c)(6)(i), and 61.150(a) (i)-(iii) and (iv) adopted by reference in 567 IAC 23.1(3);
- c. enter an order requiring Phoenix have an Iowa-licensed asbestos inspector on staff during any demolition of the interior of the boiler building;
- d. enter an order requiring Phoenix to have a complete asbestos survey done of the interior of the boiler building and provide the survey to the DNR prior to the commencement of any demolition activities;
- e. enter an order requiring Phoenix to ensure that all critical barriers and sufficient negative air (@ -0.020") be maintained at the boiler building at all times when conducting any abatement activity until a third-party asbestos abatement firm can confirm, using visuals, bulk sampling and aggressive air sampling, that the abatement area has been fully abated for all friable asbestos material.
- f. enter an order requiring that Phoenix, prior to any future demolition or renovation activities in the State of Iowa, including at any other building located on the Maytag complex at 927 North 19th Avenue E., Newton, Iowa 50208, conduct a thorough inspection for the presence of asbestos pursuant to 40 C.F.R. § 61.145(a) and such inspection must occur within one (1) year prior to the commencement of the renovation or demolition project.

Plaintiff further requests such other relief the Court may deem just and proper and that the Court tax the costs of this action to Defendant.

Respectfully submitted,

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/s/ Jacob Larson

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