

BEFORE THE  
OHIO ENVIRONMENTAL PROTECTION AGENCY

OHIO E.P.A.

DEC -4 2006

DIRECTOR'S JOURNAL

In the Matter of:

Less Contracting, Inc.  
12420 Washingtonville Road  
Salem, Ohio 44460

Hively Construction Co., Inc.  
5175 Western Reserve Rd.  
Canfield, Ohio 44406

RESPONDENTS

Director's Final Findings  
and Orders

I certify this to be a true and accurate copy of the official documents as filed in the records of the Ohio Environmental Protection Agency.

By:  Date: 12-4-06

**PREAMBLE**

It is agreed by the parties hereto as follows:

**I. JURISDICTION**

These Director's Final Findings and Orders ("Orders") are issued to Hively Construction Co., Inc. and Less Contracting, Inc. ("Respondents") pursuant to the authority vested in the Director of the Ohio Environmental Protection Agency ("Ohio EPA") under Ohio Revised Code ("ORC") §§ 3704.03 and 3745.01.

**II. PARTIES BOUND**

These Orders shall apply to and be binding upon Respondents and successors in interest liable under Ohio law. No change in ownership of the Respondents shall in any way alter Respondents' obligations under these Orders.

**III. DEFINITIONS**

Unless otherwise stated, all terms used in these Orders shall have the same meaning as defined in ORC Chapter 3704 and the rules promulgated thereunder.

**IV. FINDINGS**

The Director of Ohio EPA has determined the following findings:

1. Boardman Township ("Township") was the owner of Fire Station # 4, located 6169 South Avenue, Boardman Township (Mahoning County), Ohio, and an adjacent

single family dwelling ("dwelling"), located at 6171 South Avenue, Boardman Township, Ohio. The Township hired Hively Construction Co., Inc. ("Respondent Hively") as the general contractor for a project to build a new fire station. As part of this project, Fire Station # 4 and the dwelling had to be demolished. Since both buildings were demolished as part of one project, they are a "facility" as defined in Ohio Administrative Code ("OAC") Rule 3745-20-01(B)(18) and are subject to the applicable requirements of OAC Chapter 3745-20 ("Asbestos Emission Control Standards").

2. OAC Rule 3745-20-01(B)(38) defines, in part, the "owner or operator" as any person who owns, leases, operates, controls, or supervises the facility being demolished, or any person who owns leases, operates, controls or supervises the demolition of the facility, or both.

3. Respondent Hively contracted with Less Contracting, Inc. ("Respondent Less"), whose principal place of business is located at 12420 Washingtonville Road, Salem, Ohio, to demolish the facility. Respondents are therefore each an "operator" as defined in OAC Rule 3745-20-01(B)(38).

4. OAC Rule 3745-20-01(B)(20) defines, in part, "friable asbestos material" as any material containing more than one percent asbestos by area, that when dry can be crumbled, pulverized, or reduced to powder by hand pressure.

5. OAC Rule 3745-20-01(B)(41) defines, in part, "regulated asbestos-containing material" ("RACM") as friable asbestos material; Category I nonfriable asbestos-containing material that has become friable; Category I nonfriable asbestos-containing material that will or has been subject to sanding, grinding, cutting or abrading; or Category II nonfriable asbestos-containing material 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 operations.

6. OAC Rule 3745-20-01(B)(9) defines, in part, "Category I nonfriable asbestos-containing material" as asbestos-containing packing, gaskets, resilient floor covering, and asphalt roofing products containing more than one percent asbestos. OAC Rule 3745-20-01(B)(10) defines, in part, "Category II nonfriable asbestos-containing material" as any material containing more than one percent asbestos, excluding Category I nonfriable asbestos-containing material, that when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

7. OAC Rule 3745-20-02(A) requires, in part, the owner and operator of a demolition operation to have the facility thoroughly inspected prior to commencement of demolition for the presence of asbestos. Additionally, OAC Rule 3745-20-02(B)(2) states, in part, that if a facility to be demolished contains a combined amount of RACM less than two hundred sixty linear feet on pipes and less than one hundred sixty square feet on other

facility components, and less than thirty-five cubic feet off facility components where the length or area could not be measured previously, or if there is no asbestos-containing material, the only applicable requirement is the notification requirements specified in OAC Rule 3745-20-03. In other words, if amount of RACM is than less than these thresholds, the owner or operator does not have to comply with specified work practices for the control of asbestos emissions. This includes the removal of all RACM before any demolition activity starts.

8. OAC Rule 3745-20-03(A) requires, in part, the owner or operator of a demolition operation, subject to the provisions of OAC Rule 3745-20-03, to provide Ohio EPA with a written notice of intention to demolish at least 10 days prior to starting any demolition work.

9. ORC § 3704.05(G) prohibits any person from violating any order, rule or determination of the Director issued, adopted, or made under ORC Chapter 3704.

10. In May 2003, Respondent Less submitted a proposal to Respondent Hively to demolish the fire station for \$6,950 and the adjacent dwelling for \$4,800.

11. On August 19, 2003, ms consultants, inc. ("ms") inspected the facility to identify the amount of asbestos and to prepare a demolition/renovation asbestos survey. As part of the survey, ms was to prepare the notice of intention to demolish forms required by OAC Rule 3745-20-03(A). The inspection determined that the fire station contained 120 square feet of floor tile and 1,980 square feet of roofing material, which were classified as Category I nonfriable asbestos-containing material ("ACM"). Additionally, it was determined that the dwelling contained 99 square feet of duct joint wrap coverings that were classified as RACM and 207 square feet of resilient floor covering classified as Category I nonfriable ACM. Therefore, the amount of RACM was less than the work practice thresholds, and the project was only subject to the notification requirements.

12. On October 21, 2003, Mahoning-Trumbull Air Pollution Control Agency ("MTAPCA"), a contractual representative of Ohio EPA for Mahoning County, received a notification of demolition from Environmental Protection Systems, LLC for the removal of the RACM from the dwelling. The notification named Respondent Less as the demolition contractor. Additionally, the notice stated that 99 square feet of the surface area (i.e., RACM) would be removed on November 3, 2003 and the scheduled dates of the demolition were between November 4 and 7, 2003. However, the notice was incomplete because it did not contain any information for the demolition of the fire station.

13. On September 29, 2004, MTAPCA observed that the facility (i.e., the fire station) had been demolished without a complete notice of intention to demolish being submitted, in violation of OAC Rule 3745-20-03(A) and ORC § 3704.05(G). It was

estimated that the demolition of the fire station started on or around September 27, 2004, and that the dwelling was demolished on or around July 25, 2004.

14. On October 1, 2004, Respondent Hively faxed MTAPCA a copy of ms's asbestos survey report. The date on the report was August 2003. Attached to the report were incomplete notifications (i.e., two notices) for the dwelling and the fire station. The notification for the fire station was complete except for the information required for the demolition contractor and the scheduled dates of the demolition. MTAPCA talked with the wife of the owner of Respondent Less via telephone regarding the failure to submit the required notification. She stated that Respondent Hively said it had taken care of everything. Additionally, Respondent Less telephoned MTAPCA later the same day and stated that Respondent Hively told Respondent Less everything was submitted.

15. On October 14, 2004, MTAPCA sent a Notice of Violation ("NOV") to Respondent Less for the failure to submit prior written notification of the intention to demolish before the start of demolition. The NOV requested Respondent Less to submit the required notification form, any documentation identifying Respondent Less as the demolition contractor, and copies of the dump receipts for the demolition debris.

16. On October 21, 2004, MTAPCA received the information requested in Finding 15 from Respondent Less.

17. On May 31, 2006, Ohio EPA issued proposed Findings and Orders to Respondent Less for failure to provide the required demolition notification at least 10 days prior to the beginning of the demolition, in violation of OAC Rule 3745-20-03(A) and ORC § 3704.05(G).

18. On June 8, 2006, Respondent Less sent a letter to Ohio EPA regarding the Findings and Orders issued on May 31, 2006. In this letter Respondent Less stated that it was assured by Respondent Hively, on numerous occasions, that all the required permits and regulatory requirements pertaining to the demolition had been taken care of by Respondent Hively.

19. On June 7, 2006, Ryan J. Hively of Respondent Hively contacted Ohio EPA by telephone. During the telephone conversation Mr. Hively admitted that Respondent Hively had some liability for the failure to timely submit the required notification.

20. Respondents were the "operators" of the facility as defined in OAC Rule 3734-20-01(B)(38). Therefore, Respondents were responsible for submitting a complete and timely written notice of intention to demolish prior to the start of demolition. Respondents failed to comply with this requirement, in violation of OAC Rule 3745-20-03(A) and ORC § 3704.05(G).

21. The Director has given consideration to, and based his determination on, evidence relating to the technical feasibility and economic reasonableness of complying with the following Orders and their relation to benefits to the people of the State to be derived from such compliance.

## V. ORDERS

The Director hereby issues the following Orders:

1. Respondents shall pay the amount of seven thousand dollars (\$7,000) in settlement of Ohio EPA's claim for civil penalties, which may be assessed pursuant to ORC Chapter 3704. Within fourteen (14) days after the effective date of these Orders, payment to Ohio EPA shall be made by an official check made payable to "Treasurer, State of Ohio" for five thousand six hundred dollars (\$5,600) of the total amount. The official check shall be submitted to Brenda Case, or her successor, together with a letter identifying the Respondents, to:

Ohio EPA  
Office of Fiscal Administration  
P.O. Box 1049  
Columbus, Ohio 43216-1049

2. In lieu of paying the remaining one thousand four hundred dollars (\$1,400) of civil penalty, Respondents shall within fourteen(14) days of the effective date of these Orders, fund a Supplemental Environmental Project ("SEP") by making a contribution in the amount of one thousand four hundred dollars (\$1,400) to the Ohio EPA's Clean Diesel School Bus Program Fund (Fund 5CD). Respondents shall tender an official check made payable to "Treasurer, State of Ohio" for \$1,400. The official check shall be submitted to Brenda Case, or her successor, together with a letter identifying the Respondents and Fund 5 CD, to the above-stated address.

3. A copy of each of the above checks shall be sent to James A. Orlemann, Assistant Chief, SIP Development and Enforcement, or his successor, at the following address:

Ohio EPA  
Division of Air Pollution Control  
P.O. Box 1049  
Columbus, Ohio 43216-1049

4. Should Respondents fail to fund the SEP within the required time frame set forth in Order 2, Respondents shall immediately pay to Ohio EPA \$1,400 of the civil penalty in accordance with the procedures in Order 1.

## **VI. TERMINATION**

Respondents' obligations under these Orders shall terminate upon Ohio EPA's receipt of the official checks required by Section V of these Orders.

## **VII. OTHER CLAIMS**

Nothing in these Orders shall constitute or be construed as a release from any claim, cause of action or demand in law or equity against any person, firm, partnership or corporation, not a party to these Orders, for any liability arising from, or related to this demolition operation.

## **VIII. OTHER APPLICABLE LAWS**

All actions required to be taken pursuant to these Orders shall be undertaken in accordance with the requirements of all applicable local, state and federal laws and regulations. These Orders do not waive or compromise the applicability and enforcement of any other statutes or regulations applicable to Respondents.

## **IX. MODIFICATIONS**

These Orders may be modified by agreement of the parties hereto. Modifications shall be in writing and shall be effective on the date entered in the journal of the Director of Ohio EPA.

## **X. NOTICE**

All documents required to be submitted by Respondents pursuant to these Orders shall be addressed to:

Mahoning - Trumbull Air Pollution Control Agency  
Oakhill Renaissance Place  
2<sup>nd</sup> Floor - Room 25  
345 Oak Hill Avenue  
Youngstown, Ohio 44502-1454  
Attn: Larry Himes

and to:

Ohio Environmental Protection Agency  
Division of Air Pollution Control  
Attn: Thomas Kalman  
P.O. Box 1049  
Columbus, Ohio 43216-1049

or to such persons and addresses as may hereafter be otherwise specified in writing by Ohio EPA.

## **XI. RESERVATION OF RIGHTS**

Ohio EPA and Respondents each reserve all rights, privileges and causes of action, except as specifically waived in Section XII of these Orders.

## **XII. WAIVER**

In order to resolve disputed claims, without admission of fact, violation or liability, and in lieu of further enforcement action by Ohio EPA for only the violations specifically cited in these Orders, Respondents consent to the issuance of these Orders and agree to comply with these Orders. Compliance with these Orders shall be a full accord and satisfaction for Respondents' liability for the violations specifically cited herein.

Respondents hereby waive the right to appeal the issuance, terms and conditions and service of these Orders, and Respondents hereby waive any and all rights Respondents may have to seek administrative or judicial review of these Orders either in law or equity.

Notwithstanding the preceding, Ohio EPA and Respondents agree that if these Orders are appealed by any other party to the Environmental Review Appeals Commission, or any court, Respondents retain the right to intervene and participate in such appeal. In such an event, Respondents shall continue to comply with these Orders notwithstanding such appeal and intervention unless these Orders are stayed, vacated, or modified.

## **XIII. EFFECTIVE DATE**

The effective date of these Orders is the date these Orders are entered into the Ohio EPA Director's journal.

## **XIV. SIGNATORY AUTHORITY**

Each undersigned representative of a party to these Orders certifies that he or she is fully authorized to enter into these Orders and to legally bind such party to these Orders.

**IT IS SO ORDERED AND AGREED:**

**Ohio Environmental Protection Agency**

  
\_\_\_\_\_  
Joseph P. Koncelik  
Director

11/30/06  
Date

**IT IS SO AGREED:**

**Hively Construction Co., Inc.**

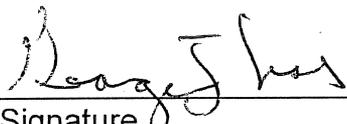
  
\_\_\_\_\_  
Signature

NOVEMBER 24, 2006  
Date

RYAN J HVELY  
\_\_\_\_\_  
Printed or Typed Name

PROJECT MANAGER  
\_\_\_\_\_  
Title

**Less Contracting, Inc.**

  
\_\_\_\_\_  
Signature

Nov 24 2006  
Date

George F Less  
\_\_\_\_\_  
Printed or Typed Name

Pres  
\_\_\_\_\_  
Title