

Clearing the Air on Dust Control

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Maricopa County is pursuing a vigorous enforcement policy for violations of EPA dust control regulations on construction projects. General contractors especially must be aware of these requirements. Maricopa County Department of Environmental Services field inspectors have authority to refer cases directly to the County Attorney's office for prosecution of certain dust control violations. Some of the most common of these violations include:

- Operating a construction site without a permit
- Failing to control dust on unpaved parking lots, haul roads and access roads, and inactive areas of a construction site
- Failing to cover loads on haul trucks
- Failing to control the track out of dirt onto roadways (the most common violation)
- Failing to use water to control dust if that is the method specified in the site's dust control plan

Maricopa County Air Pollution Rules and Regulations require every construction project that must obtain an earthmoving permit (excavations of .1 acre or more) to submit a Dust Control Plan specifying the dust control measures to be implemented. Field inspectors roam construction projects throughout the county looking for violations. Violators are subject to civil penalties of up to \$10,000 *for each day* that a violation occurs. Penalties for first time violations are often \$2,500 or more. Penalties add up very quickly in cases of multi-day violations.

Usually, only permittees are cited for violations of the dust control regulations, and only the property owner, lessee, developer or general/prime contractor can obtain a permit. Typically it is a subcontractor, such as a grader, excavator or hauler, who causes the violation. Nevertheless, it is usually the general contractor, who obtained the permit, who is cited and legally responsible for the violation. General contractors should make certain that their subcontract documents obligate all subcontractors to comply with all dust control rules and regulations, and also provide that the general contractor may backcharge the responsible subcontractor for any penalties and related costs (including attorneys' fees) for violations.

General contractors, however, cannot simply rely on their subcontractors to comply with all dust control requirements, even though that financial responsibility is shifted to them by contract. General contractors should, therefore, have standard procedures in place with their own workforce to ensure compliance. This may include preparing a dust control procedures manual and sending key employees, such as project managers and superintendents, to educational programs. Several times each semester, Paradise Valley Community College offers a class in "Reducing Air Pollution from Construction" for a small fee. The Maricopa County Environmental Services Department has also been offering periodic workshops on dust control issues (call 602-506-5150 to be added to their notification list). Almost all of the information needed to prepare an excellent procedures manual can be found at the Maricopa County "Dust Devil Academy" website, www.maricopa.gov/sbeao/basepage.htm. It is also a good idea to track the costs associated with an internal dust control program--not only the out-of-pocket costs, but also the value of man-hours spent in developing and administering the program. This information may be helpful in negotiating a settlement in case of a violation.

To avoid violations, each subcontractor should be given a copy of the permit, the dust control plan for the project and the general contractor's compliance procedures. As a routine matter, dust control compliance should be covered in a project's preconstruction scheduling and coordination meetings, and well as in weekly project meetings.

If you are cited for a violation, taking those proactive steps should count as mitigating factors in determining any penalty. If you are cited for a violation, the very first thing to do is to correct the problem immediately. Remember, penalties are assessed on a daily basis *for each day* that a violation is found to exist. Typically, a field inspector discovering a violation will obtain photographic evidence supporting the violation, and will then issue a citation and refer the matter to the County Attorney's office. The inspector will make a follow-up inspection to verify that the problem has been corrected. The County Attorney and the Maricopa County Environmental Services Department will schedule an informal settlement conference with the permittee to discuss and attempt to resolve the notice of violation. This usually represents the general contractor's best opportunity to resolve the citation at minimal expense.

You can be represented by legal counsel at the settlement conference, and experienced counsel can help in negotiating a reduced penalty. At the conference, the County's representatives will propose a penalty based on their application of a formula that considers such things as the magnitude of the violation, the level of cooperation and the corrective actions taken by the permittee, the history of prior violations, and the size and sophistication of the permittee. The permittee has the opportunity to submit mitigating information to support a reduction of the penalty. Showing that you took immediate action to correct the violation and to prevent future violations is very important. Showing that you have instituted or will institute company wide procedures to educate personnel about the dust control requirements and to perform oversight to verify that procedures are being followed will be very beneficial in reducing the amount of the penalty.

If the parties reach agreement on the penalty, the County Attorney prepares a settlement agreement whereby the County releases the permittee from any claims arising from the alleged violation, and the permittee pays a settlement amount without admitting liability. If the parties cannot resolve the matter at the settlement meeting, then the County Attorney will likely proceed with the filing of a suit for civil penalties in amounts exceeding those discussed at the settlement meeting, and may even pursue misdemeanor or even felony charges for the violation.

When violations occur, taking advantage of the settlement procedure offered by the County is often preferable to defending a civil penalties suit or even criminal charges. The best course, however, is to implement procedures that will minimize the possibility of a violation in the first place.

ABA LEGAL NOTES

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