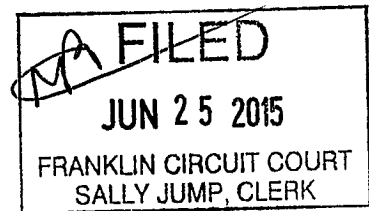


COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION II  
CASE NO. 15-CI-687



INTERNATIONAL ASSOCIATION OF CERTIFIED HOME  
INSPECTORS; AIR SOURCE TECHNOLOGY, INC., Bruce  
Fergusson; ADVANCED RADON SERVICES, INC., Edwin  
Huff; Randy Watson; IPM SERVICES, Dennis Brewer,  
Linda Vittitoe; INSPECTOR USA, INC., D. Michael Green;  
CENTRAL KENTUCKY HOME INSPECTIONS, INC., David  
McLean; ACCUCHECK HOME INSPECTIONS & RADON  
SERVICES, INC., J.B. Langford; B4UCLOSE, Erby  
Crofutt; and RADON SOLUTIONS OF KENTUCKY, INC.,  
Kenny McLaughlin

PLAINTIFFS

v. PETITION FOR DECLARATION OF RIGHTS  
AND TEMPORARY AND PERMANENT INJUNCTIVE RELIEF

COMMONWEALTH OF KENTUCKY, CABINET FOR  
HEALTH AND FAMILY SERVICES

SERVE: c/o Audrey Tayse Haynes, Secretary  
Cabinet for Health and Family Services  
275 E Main ST  
Frankfort KY 40621

and

KENTUCKY RADON PROGRAM ADVISORY COMMITTEE,  
Commonwealth of Kentucky

SERVE: c/o Audrey Tayse Haynes, Secretary  
Cabinet for Health and Family Services  
275 E Main ST  
Frankfort KY 40621

and

AUDREY TAYSE HAYNES, in her official capacity as  
Secretary of the Cabinet for Health and Family Services

SERVE: 275 E Main ST  
Frankfort KY 40621

and

COMMONWEALTH OF KENTUCKY

SERVE: Hon. Jack Conway  
Attorney General  
State Capitol  
Frankfort, Kentucky 40601

DEFENDANTS

\* \* \* \* \*

As permitted by KRS 418.040, and all other applicable law, the Plaintiffs pray for a Declaration of rights and other relief as follows:

1) Eight (8) of the corporate plaintiffs are private for-profit corporations and, along with all of the individual Plaintiffs, are citizens and residents of the Commonwealth of Kentucky and are engaged in the business of radon testing and measurement; laboratory analysis; and mitigation and remediation of residential and commercial real estate in which elevated or toxic levels of radon are detected. In addition, the Plaintiff International Association of Certified Home Inspectors, Inc. ("InterNACHI") is a not-for-profit corporation with its principal offices in Boulder, Colorado, and is an association of private individuals who are engaged in the business of various types of home inspection including, but not limited to, radon testing and measurement; laboratory analysis; and mitigation or remediation of residential real estate in which elevated or toxic radon levels are detected including homes within the Commonwealth of Kentucky. InterNACHI is the largest home inspection association in the world, with more than 13,500 members located in all 50 states, eight Canadian provinces, and 32,400 other members in some 65 other countries.;

2) The defendant, Cabinet for Health and Family Services ("CHFS"), is an agency of the Commonwealth of Kentucky. Pursuant to KRS 211.9101 et seq., CHFS is responsible for the administration of the provisions of KRS 211.9101 et. seq. and Kentucky

Administrative Regulations, 902 KAR 95:040 which regulate radon testing, measurement, laboratory analysis and mitigation.

3) The Defendant Kentucky Radon Program Advisory Committee ("KRPAC") is a statutorily created body under KRS 211.9103 composed primarily of "market participants" who are involved in the business of radon measurement, testing, and mitigation; KRPAC is statutorily authorized to provide advice to the CHFS concerning the review, development, and maintenance of procedures for radon measurement, testing, and mitigation and is further authorized to advise CHFS concerning relevant administrative regulations promulgated pursuant to KRS 211.9101 to 211.9135 and make recommendations concerning the promulgation of such rules;

4) The defendant, Audrey Tayse Haynes, is the Secretary of CHFS and, pursuant to KRS 211.9103 et seq., is the executive officer of, and has sole charge of, the administration of CHFS, and is required to perform all functions of the CHFS including administrative rulemaking and enforcement of regulations governing radon testing and measurement, laboratory analysis and mitigation.

5) Defendants have promulgated administrative regulations which are scheduled to go into effect on July 1, 2015 and which will prohibit defendants from engaging in both measurement and remediation of radon found in any residential or commercial building; establish the American Association of Radon Scientists ("AARST"), and Technologists as the only recognized radon certification body recognized under state law and creating a money making monopoly. A true copy of said proposed regulation is attached hereto and incorporated herein by this reference as Exhibit A.

6) Further, the newly-promulgated regulations will require radon testing contractors, and ultimately consumers, to pay for access to information concerning AARST standards instead of being readily available to the general public and will cause the cost of professional radon testing services to substantially increase;

7) In addition, the newly promulgated regulations unreasonably increase the costs of becoming certified to conduct radon measurement, testing, and remediation by the raising the cost of liability insurance premiums by drastically increasing the required level of liability insurance coverage limits and requiring a \$500,000.00 errors and omissions policy limit contrary to the provisions of KRS 211.9113 (2), which only requires general liability coverage. Further, said regulations contradict or are not authorized by the statutes which they purport to implement, including, but not limited to, imposition of license and permit fees not required by the statute; failure to provide requirements for licenses and permits or "reciprocity;" and failure to provide for procedures or standards by which continuing education requirement will be provided or for certification of providers authorized to deliver continuing education requirements pursuant to KRS 211.9127;

8) Said administrative regulations are therefore *ultra vires* the statutes which the regulations purport to interpret and contravene the Kentucky Constitution because such regulations are an arbitrary, unlawful, and unconstitutional exercise of the legislative power of the General Assembly by an Executive branch agency and are also violative of Plaintiffs rights to due process and equal protection of the law secured to them by the Fourteenth (14<sup>th</sup>) Amendment to the U.S. Constitution and §2, §3, §27, §28 and §29 of the

Kentucky Constitution;

9) On information and belief, Plaintiffs allege that KRC PAC has used its statutory authority to provide advice and guidance to the CHFS concerning the review, development, and maintenance of procedures and the newly promulgated regulations, due to take effect on July 1, 2015 for radon measurement, testing, and mitigation, in such a manner as to provide unfair commercial and competitive advantage to certain radon testing, measurement and remediation contractors as well as the AARST;

10) On information and belief, Plaintiffs allege that the KRC PAC, by and through the newly-promulgated regulations scheduled to take effect on July 1, 2015, intends to unfairly and anti-competitively limit the private corporate entities who are "certified" to perform radon testing and remediation and impose such an increased economic burden on those Plaintiffs and others similarly situated to become "certified" to continue to conduct radon testing, measurement, and mitigation that Plaintiffs and others similarly situated will be unable to compete in the market place.

11) These and other actions or omissions by Defendants are erroneous and illegal in that said actions by Defendants have no legitimate purpose and are not attributable to state policy and serve to reduce the number of contractors available to measure, test and mitigate elevated and toxic levels of radon which are a danger to Kentucky citizens and that Defendants KACPRC and are not subject to active supervision from the Commonwealth of Kentucky;

12) Plaintiffs allege, on the basis of the matters set forth in paragraphs 1-11 hereof, that the Defendants have, with a common design and understanding, attempted

to monopolize or combine or conspire to monopolize trade or commerce in the radon measurement, testing, and mitigation industry and to exclude Plaintiffs and others who choose not to affiliate with the AARST program.

13) Defendants' actions through the promulgated regulations, if allowed to take effect, will injure competition by causing anticompetitive effects within the relevant market for services provided by Plaintiffs, thereby limiting consumers' access to radon contractors;

14) Defendants' agreements and concerted actions resulting in the proffered administrative regulations have imposed and continue to impose an unreasonable restraint of trade;

15) Said actions by the Defendants constitute a violation of KRS 367.175 et seq. and Plaintiffs have been and will be economically and otherwise injured as a result of their actions or omissions if such regulations are permitted to take effect

16) The public will also be injured as a result, in its inability to obtain cost effective access to a sufficient supply of qualified contractors to measure, test and mitigate radon hazards;

17) Plaintiffs seek an injunction ordering that the promulgated regulations set forth in 902 KAR 95:040 not be permitted to take effect on July 1, 2015

WHEREFORE, the Plaintiffs pray that this Court:

1. Adjudicate and determine that the promulgated regulations scheduled to take effect on July 1, 2015 are *ultra vires* and an arbitrary, unlawful, and unconstitutional exercise of the legislative power of the General Assembly by an Executive branch agency

therefore also violative of Plaintiffs' constitutional rights to due process and equal protection of the law secured to them by the Fourteenth (14<sup>th</sup>) Amendment to the U.S. Constitution and further violative of §2, §3, §27, §28 and §29 of the Kentucky Constitution;

2. Adjudicate and determine that the promulgated regulations scheduled to take effect of July 1, 2015 are unlawful, unenforceable, and invalid because they violate the antitrust laws of the Commonwealth of Kentucky as provided in KRS 367.175 et seq.;

3. Grant a temporary and permanent injunction to the Plaintiffs against the Defendants to restrain and enjoin the latter from further attempting to impose said newly promulgated regulations set forth in 902 KAR 95:040;

4. Docket this case for early hearing as in the case of a motion in accordance with KRS 418.050;

5. Grant Plaintiffs their costs herein in accordance with KRS 418.070, including reasonable attorneys' fees; and

6. Grant Plaintiffs such additional relief as to which they may appear entitled under law or equity.

**PETITION FOR TEMPORARY RESTRAINING ORDER**

18) Plaintiffs herewith pray for certain temporary and permanent injunctive relief against the Defendants and further state as follows:

19) Plaintiffs reiterate and reaffirm each and every allegation set forth in paragraphs 1-17 hereof.

20) Plaintiffs will suffer immediate and irreparable harm if the Defendants are

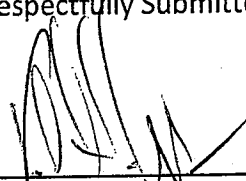
permitted to proceed further with this matter, including implementation, administration, or enforcement of the challenged administrative regulations before this Court can make and determine the rights and duties of the parties as requested hereinabove, including the making of a final and binding decision as to the constitutionality of the challenged regulations as well as whether they are violative of the anti-trust laws of the Commonwealth of Kentucky.

21) There is no other adequate remedy at law available to Plaintiffs.

22) The injunctive relief prayed for herein has not been requested of, or denied by, any other Court.

WHEREFORE, Plaintiffs pray for an order forthwith temporarily restraining the Defendants from proceeding any further with administration or enforcement of the challenged regulations, until a determination by this Court can be made as prayed for herein; and for the granting of such further relief by temporary and permanent injunction at the final judgment as the evidence and law may require.

Respectfully Submitted,



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Richard L. Masters  
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Louisville, KY 40203  
502.582.2900  
Attorney for Plaintiffs



**902 KAR 95:040. Radon Contractor Certification Program.**

RELATES TO: KRS 211.9101 - 211.9135

STATUTORY AUTHORITY: KRS 211.9109, 211.9111, 211.9115, 211.9121, 211.9135(3)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 211.9135(1) and (2) require the Cabinet for Health and Family Services to be the regulatory authority for the control of radon and radon activities in the Commonwealth of Kentucky, including laboratory analysis, mitigation, and measurements. KRS 211.9135(3) requires the cabinet to promulgate administrative regulations to administer, coordinate, and enforce KRS 211.9101 to 211.9135. This administrative regulation establishes general requirements for the certification of individuals who perform radon measurement, radon mitigation, or laboratory analysis.

Section 1. Definitions. (1) "AARST" means the American Association of Radon Scientists and Technologists.

(2) "ANSI" means the American National Standards Institute.

(3) "ANSI-AARST" means those standard operating procedures or practices developed and maintained by the AARST Consortium on National Radon Standards for radon measurement, mitigation, or laboratory analysis.

(4) "Commercial building" is defined by KRS 211.9101(7).

(5) "EPA" means the Environmental Protection Agency.

(6) "Mitigation system" is defined by KRS 211.9101(21).

(7) "Multi-family housing" means a commercial building with attached family dwellings that:

(a) Are occupied by residents who are primarily permanent in nature;

(b) Are greater than four (4) units or three (3) stories in height; and

(c) Contain an independent heating, ventilation, and air conditioning (HVAC) system.

(8) "NRPP" means the National Radon Proficiency Program.

(9) "NRSB" means the National Radon Safety Board.

(10) "Pecuries per liter" or "pCi/L" means a unit of radioactivity corresponding to one (1) decay every twenty-seven (27) seconds in a volume of one (1) liter, or 0.037 decays per second in every liter of air.

(11) "Residential building" is defined by KRS 211.9101(28).

Section 2. Certification Requirements. (1) A person shall be eligible to be certified as a radon measurement contractor or a radon mitigation contractor if the individual:

(a) Submits to the cabinet:

1. An application on cabinet Form DFS-375, Application for Certification for Radon Contractors and Laboratories;

2. A two (2) inch by two (2) inch passport photo;

3. Verification of completion of an AARST-NRPP or NRSB course and exam;

4. The fees established in Section 3 of this administrative regulation;

5. A quality assurance plan that meets the requirements in Section 4(1) and (2) of this administrative regulation; and

6. Evidence of financial responsibility in accordance with KRS 211.9109(1)(f); and

(b) Adheres to the requirements established in KRS 211.9123 if the individual is a non-resident of Kentucky.

(2) A radon laboratory shall be eligible for certification if the entity:

(a) Employs a minimum of one (1) individual who is a Kentucky certified radon measurement contractor;

(b) Submits to the cabinet:

1. An application on cabinet form DFS-375, Application for Certification for Radon Contractors and Laboratories;

2. The fees established in Section 3 of this administrative regulation; and

3. A quality assurance plan as established in Section 4 of this administrative regulation; and

(c) Adheres to the requirements established in KRS 211.9123 if the entity is a non-resident analytical laboratory that is seeking reciprocity.

(3) A contractor with a dual certification as a radon measurement contractor and a radon mitigation contractor shall:

(a) Maintain a separate license for each discipline; and

(b) Adhere to the limitations in KRS 211.9117(1) and (2).

(4) Only radon measurements performed by a certified radon measurement contractor shall be reported or disclosed to another party.

(5) A certified radon measurement contractor working exclusively for a radon laboratory shall not be required to meet the insurance and quality assurance requirements outlined in subsection (1) of this section.

Section 3. Schedule of Fees. (1) The fees required by subsection (2) of this section shall be:

(a) Nonrefundable; and

(b) Submitted with an application for initial certification or certification renewal.

(2)(a) The fee for initial certification shall be \$250.

(b) The annual renewal fee shall be \$250.

(c) The fee for a duplicate certificate shall be twenty (20) dollars.

(d) The fee for late renewal shall be \$100.

Section 4. Quality Assurance Plan and Standard Operating Procedures. (1) A person certified as a measurement contractor shall submit for cabinet approval a quality control program plan that includes:

(a) A quality statement committing to provide quality work;

(b) A description of the management and structure of the organization;

(c) A listing of personnel and personnel qualifications and training;

(d) A description of types of radon measurements performed and other related services offered;

(e) A description of measurement types and devices the measurement contractor will utilize in conducting measurements;

(f) A list of equipment serial numbers, model numbers, and calibration records used in performing analytical analysis;

(g) A list of manufacturers and test types used while conducting measurement for laboratory analysis;

(h) A worker protection program that includes the methods utilized to minimize or reduce the amount of radon or radon progeny exposures in the work area;

(i) Procedures for procuring and storing measurement devices and materials;

(j) Procedures for maintaining documents and records;

(k) Procedures for calibrating and testing instruments;

(l) A corrective action program;

(m) Examples of forms, reports, and correspondence used in communications;

(n) A description of the quality assurance measures including the:

1. Evaluation criteria; and

2. Frequency of the evaluations;

(o) A statement of compliance with ANSI-AARST standard operating procedures; and

(p) The location where records are retained in accordance with KRS 211.9131(3).

(2) A person certified as a radon mitigation contractor shall submit to the cabinet a quality control program plan that includes:

(a) A quality statement committing to provide quality work;

(b) A description of the management and structure of the organization;

(c) A listing of personnel and personnel qualifications and training;

(d) A description of all types of radon mitigation methods performed and other related services offered;

(e) A description of diagnostic testing methods utilized in designing mitigation systems;

(f) A worker protection program that includes the methods utilized to minimize or reduce the amount of radon or radon progeny exposures in the work area;

(g) Procedures for maintaining documents and records;

(h) Procedures for calibrating and testing instruments;

(i) A corrective action program;

(k) Examples of forms, reports, and correspondence used in communications;

(l) A description of the quality assurance measures including the:

1. Evaluation criteria; and

2. Frequency of the evaluations; and

(m) A statement of compliance with ANSI-AARST standard operating procedures.

(3) A person certified as a radon measurement contractor shall conduct measurements in accordance with the following standard operating procedures and quality assurance protocols:

(a) Residential building measurement: ANSI-AARST Protocols for Radon Measurements in Homes (MAH 2005);

(b) Multi-family building measurement: ANSI-AARST Protocol for Conducting Radon and Radon Decay Product Measurements in Multifamily Buildings (MAMF-2012); and

(c) Quality assurance protocols: EPA Protocols for Radon and Radon Decay Product Measurements in Homes (EPA 402-R-92-003).

(4) A person certified as a radon mitigation contractor shall conduct mitigations in accordance with the following standards:

(a) Residential building active mitigation: ANSI-AARST Active Soil Depressurization Radon Mitigation Standards (ASD RMS) for Low Rise Residential Buildings;

(b) Multi-family active mitigation: ANSI-AARST Radon Mitigation Standards for Multifamily Buildings (RMS-MF(PS)-2013); and

(c) Residential building passive mitigation: ANSI-AARST Reducing Radon in New Construction of 1&2 Family Dwellings and Townhouses (CCAH-2013).

(5) All mitigation systems shall:

(a) Be designed to reduce a radon concentration in each area within the footprint of the building as low as reasonably achievable (ALARA); and

(b) Achieve a radon level below the Environmental Protection Agency's action level of four and zero-tenths (4.0) picocuries per liter for all post mitigation testing.

(6) Failure to achieve a reduction below the EPA's action level of four and zero-tenths (4.0) picocuries per liter shall require additional radon mitigation and testing until the level is achieved.

(7) Upon modification to a component of the quality assurance program plan, the radon measurement or mitigation contractor shall resubmit the plan for approval by the cabinet prior to implementation of the modifications.

Section 5. Training and Continuing Education Requirements. (1) Continuing Education.

(a) Measurement contractors shall acquire eight (8) hours of continuing education credits per year.

(b) Mitigation contractors shall acquire eight (8) hours of continuing education credits per year.

(c) A certified person shall be responsible for submitting proof of continuing education in accordance with KRS 211.9109, 211.911,

211.9115, or 211.9127.

(d) A person dually certified as a radon measurement and mitigation contractor shall acquire sixteen (16) hours of continuing educational credits per year.

(e) Continuing education units shall be obtained from NRPP or NRSB approved courses.

(2) Certification Courses.

(a) Measurement contractor certification courses shall be a minimum of sixteen (16) hours of supervised instruction.

(b) Mitigation contractor certification courses shall be:

1. A minimum of sixteen (16) hours of supervised instruction; and

2. Include an additional four (4) hours of hands-on field work at a mitigation site.

(c) Measurement and mitigation contractors shall obtain an additional one (1) hour of course content on the requirements of this administrative regulation and KRS 211.9101 through 211.9135.

Section 6. Renewal of Certification. (1) Each annual certification shall expire on June 30.

(2) A person seeking renewal of certification shall:

(a) Meet the requirements in accordance with Section 2 of this administrative regulation; and

(b) Submit to the cabinet:

1. A renewal application on cabinet Form DFS-375, Application for Certification for Radon Contractors and Laboratories, a minimum of thirty (30) calendar days prior to certification expiration. Form DFS-375 shall be deemed submitted on the date that it is received by the cabinet;

2. The fees established in Section 3 of this administrative regulation;

3. Proof of fulfillment of continuing education requirements as established in Section 5 of this administrative regulation; and

4. An updated quality assurance plan that meets the requirements in Section 4 of this administrative regulation; and

5. Evidence of financial responsibility in accordance with KRS 211.9109(1)(f).

(3) Certifications not renewed within thirty (30) days after the renewal date shall pay a late renewal fee as established in Section 3 of this administrative regulation.

(4) Certifications not renewed within ninety (90) days after the renewal date shall lapse and may only be reinstated in accordance with KRS 211.9121(3).

Section 7. Termination of Certification and Inactive Certification. (1) A certified radon measurement contractor or radon mitigation contractor shall be responsible for notifying the cabinet in writing upon electing to terminate certification.

(2) A person previously certified by the cabinet and not engaged in radon measurement or mitigation in the Commonwealth but desiring to maintain certification may request and be granted inactive status.

(a) If inactive status is granted, the person shall:

1. Pay the certification fee established in Section 3 of this administrative regulation; and

2. Be exempt from continuing education requirements.

(b) A certified radon contractor on inactive status may petition the cabinet for renewal of active certification. If a certified radon contractor on inactive status wishes to renew active certification, the petitioner shall meet the requirements of this administrative regulation.

Section 8. Certification Denial, Suspension, or Revocation. Certifications shall be subject to denial, suspension, or revocation in accordance with KRS 211.9125.

Section 9. Reporting Requirements. (1) A person, business entity, or analytical laboratory shall submit a report to the cabinet on a quarterly basis after a:

(a) Radon or radon progeny test;

(b) Radon mitigation activity;

(c) Modification to any component of the radon contractor's quality assurance program plan; or

(d) Request from the cabinet.

(2) The report shall include the:

(a) Zip code of location of the building;

(b) Name and telephone number of the owner or owners of the building where the radon testing or mitigation activities were conducted;

and

(c) Results of any tests performed.

(3) The results for each measurement conducted shall include the:

(a) Method used for radon or radon decay product testing;

(b) Conditions under which the test or tests were conducted;

(c) Location or locations within the building where the test or tests were conducted;

(d) Results of the test or tests in picocuries per liter (pCi/L) of radon gas;

(e) Date on which the test or tests were conducted; and

(f) Purpose of the test or tests.

(4) The mitigation report shall include the:

(a) Type of structure mitigated;

(b) Type of mitigation system installed;

(c) Location of mitigation system within the structure;

(d) Post-mitigation measurements;

(e) Floor plan of the structure with the location of a mitigation system; and

(f) Diagnostic and communication testing.

Section 10. Administrative Hearings. Persons, business entities, and analytical laboratories shall be afforded an opportunity for an administrative hearing in accordance with KRS Chapter 13B.

Section 11. Penalties. The cabinet may assess civil penalties in accordance with KRS 211.9125 against any individual in violation of any cabinet administrative regulation pertaining to radon measurement, mitigation, or laboratory analysis.

Section 12. Incorporation by Reference. (1) The following material is incorporated by reference:

(a) Form "DFS-375, Application for Certification for Radon Contractors and Laboratories", 9/2012;

(b) "Protocols for Radon Measurements in Homes (MAH 2005)", 9/2005;

(c) "Protocol for Conducting Radon and Radon Decay Product Measurements in Multifamily Buildings (MAMF-2012)", 2012;

- (d) "Protocols for Radon and Radon Decay Products Measurements in Homes (EPA 402-R-92-003)", 5/1993;
  - (e) "Active Soil Depressurization Radon Mitigation Standards (ASD RMS) for Low Rise Residential Buildings", 6/2006;
  - (f) "Radon Mitigation Standards for Multifamily Buildings (RMS-MF(PS)-2013)", 2013; and
  - (g) "Reducing Radon in New Construction of 1&2 Family Dwellings and Townhouses (CCAH-2013)", 12/2013.
- (2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the Department for Public Health, 275 East Main Street, Frankfort, Kentucky 40602, Monday through Friday, 8 a.m. to 4:30 p.m. (41 Ky.R. 219; Am. 469; eff. 9-17-2014.)