IN RE SCHOOLCRAFT CONSTRUCTION, INC.

CAA Appeal No. 97-1

REMAND ORDER

Decided February 9, 1998

Syllabus

U.S. EPA, Region 5 appeals an Initial Decision issued by an EPA administrative law judge ("Presiding Officer") dismissing with prejudice a complaint filed against SchoolCraft Construction Company, Inc. ("SchoolCraft"). In its complaint, the Region had sought a penalty of $20,000 against SchoolCraft for alleged violations of the Clean Air Act § 112, 42 U.S.C. § 7412, and certain regulations appearing at Subpart M (National Emission Standard for Asbestos) of the National Emission Standards for Hazardous Air Pollutants ("NESHAP"), 40 C.F.R. Part 61.

SchoolCraft provided consulting services to the Centerville, Ohio City Schools ("Centerville") in connection with the abatement of asbestos in school buildings. After SchoolCraft identified asbestos-containing materials at the W.O. Cline Elementary School ("Cline"), Centerville hired SchoolCraft to prepare specifications for the abatement of asbestos at Cline. SchoolCraft's specifications identified Centerville as the "Owner" of Cline and SchoolCraft as the "Consultant" to Centerville. The specifications provided SchoolCraft with substantial supervisory authority, including the authority to direct the number of shifts worked during the project, discharge the contractor's employees if found to be incompetent or detrimental to the project, and halt abatement work in the event that the contractor was not complying with contract specifications or applicable regulations.

SchoolCraft assisted Centerville in soliciting and evaluating bids from asbestos abatement contractors. On June 5, 1992, Centerville awarded the contract to Seneca Asbestos Removal and Control, Inc. ("Seneca").

In addition to the asbestos abatement work, there were multiple tasks and multiple contractors involved in the overall renovation, of which the asbestos abatement was a part, and SchoolCraft's responsibilities included coordinating these contractors and the renovation as a whole on behalf of Centerville. SchoolCraft was present at Cline on an almost daily basis during the renovation. Following conclusion of the Cline renovation project, Centerville issued a "purchase order" in the amount of $22,040 to SchoolCraft, referencing payment for SchoolCraft's role in the Cline renovation. The purchase order states that among the services for which payment was made was the "supervision of the work as agent of the owner."

In June 1993, Region 5 filed a complaint against SchoolCraft alleging, *inter alia*, five counts of violating the asbestos NESHAP during the Cline renovation. Following an evidentiary hearing, the Presiding Officer issued an Initial Decision concluding that SchoolCraft could not be held liable as an "operator" under the asbestos NESHAP. In particular, the Presiding Officer concluded that although key documents relied on by the Region (the informal job description, the project specifications, and the purchase order) "technically" provided SchoolCraft with supervisory power over the asbestos abatement at Cline, SchoolCraft did not in fact exercise that

authority to a sufficient extent to establish its liability as an operator. In reaching this conclusion the Presiding Officer relied on the reasoning contained in the case of *United States v. Walsh*, 783 F. Supp. 546 (W.D. Wash. 1991), *aff'd*, 8 F.3d 659 (9th Cir. 1993). That case involved an attempt to impose liability for NESHAP violations at four asbestos abatement projects upon an individual employee of an asbestos abatement contractor (James A. Walsh). The *Walsh* court concluded that in order to impose liability, the employee must have substantial control over the projects in question.

The Presiding Officer concluded that SchoolCraft's presence at Cline was not to supervise the asbestos removal, but to coordinate and act as a liaison between Centerville and the various contractors. The Presiding Officer was also persuaded by the facts that SchoolCraft was not an employee of the asbestos removal company, that Seneca, not SchoolCraft, actually directed most asbestos abatement activities, and that SchoolCraft did not contract with Seneca to perform any work. Region 5 appealed.

Held: (1) In holding that SchoolCraft was not an "operator," the Presiding Officer stated that under the regulatory definition of "owner or operator" a person must have owned, leased, operated, controlled, or supervised the asbestos removal activity. This statement, however, does not accurately reflect the regulatory definition, which defines the owner or operator of a renovation activity as any person who "owns, leases, operates, controls, or supervises the * * * renovation operation." 40 C.F.R. § 61.141. Thus, by holding that SchoolCraft must have supervised the asbestos abatement work rather than the renovation operation, the Presiding Officer applied an overly narrow standard in determining whether SchoolCraft was an "operator" under the NESHAP;

(2) Because the *Walsh* court was dealing with a circumstance in which the government was seeking to impose liability against an individual employee of an asbestos abatement contractor, that case is distinguishable from the one before this Board. In the present case, it is clear from the informal job description, the job specifications prepared by SchoolCraft, the purchase order, and the fact that SchoolCraft was present at the renovation site on a daily basis, that SchoolCraft was given supervisory authority over the renovation operation. Under these circumstances, SchoolCraft had the requisite supervisory authority to be considered an "operator" within the meaning of the asbestos NESHAP; and

(3) Because the Presiding Officer made no explicit findings as to whether the violations alleged in the complaint actually occurred, and because this issue was contested before the Presiding Officer and is disputed before this Board, this matter is remanded to the Presiding Officer. On remand, the Presiding Officer must make explicit findings on whether the Region met its burden of establishing that the violations alleged in the complaint actually occurred, and, if so, consider the appropriate penalty for such violations.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge Reich:

The Director of the Air and Radiation Division, U.S. EPA Region 5 ("Region"), appeals from the Initial Decision of an EPA Administrative Law Judge ("Presiding Officer") dismissing with prejudice an administrative complaint filed against SchoolCraft Construction, Inc. ("SchoolCraft"). *See* Notice of Appeal by the Director of the Air and Radiation Division, Region 5 and Appellant's Brief in Support of Notice of Appeal ("Region's Brief on Appeal") (Feb. 14, 1997).

SchoolCraft filed its reply on March 5, 1997. Respondent SchoolCraft Construction, Inc.'s Reply Brief in Opposition to Appellant's Brief in Support of Notice of Appeal ("SchoolCraft's Reply"). The principal issue on appeal is whether SchoolCraft was an "operator" of a renovation activity within the meaning of 40 C.F.R. § 61.141. The Presiding Officer concluded that SchoolCraft did not meet the definition of an "operator," and thus was not subject to the substantive requirements applicable to operators under 40 C.F.R. § 61.145.

In its complaint, the Region sought a penalty of $20,000 against SchoolCraft for alleged violations of the Clean Air Act ("CAA") § 112, 42 U.S.C. § 7412, and certain regulations appearing at Subpart M (National Emission Standard for Asbestos) of the National Emission Standards for Hazardous Air Pollutants ("NESHAP"), 40 C.F.R. Part 61.[1] For the reasons set forth below, we reverse the Presiding Officer's decision to dismiss the complaint with prejudice. We remand this matter to the Presiding Officer for a determination of whether the violations alleged in the complaint actually occurred and an assessment of an appropriate penalty if the violations are found to have occurred.

I. *BACKGROUND*

A. *Factual Background*

SchoolCraft is a corporation that provided services to the Centerville, Ohio City Schools ("Centerville") in connection with the abatement of asbestos in school buildings. In 1989, SchoolCraft contracted with Centerville to prepare Centerville's asbestos management plan, pursuant to the Asbestos Hazard and Emergency Response Act ("AHERA"), 15 U.S.C. §§ 2641-2656. In the course of preparing the AHERA plan, asbestos-containing materials were identified in the W.O. Cline Elementary School ("Cline"), as well as other Centerville schools. Shortly thereafter, Centerville decided to abate the asbestos condition at Cline, and hired SchoolCraft to prepare specifications for the Cline asbestos abatement project (referred to as the "Cline Elementary renovation" in the parties' stipulations).[2] The specifica-

[1] CAA § 112(b)(1) lists pollutants that Congress has determined present, or may present, a threat of adverse human health or environmental effects. Asbestos is on that list. The Act also requires that EPA promulgate emission standards known as NESHAPs for these pollutants. Violations of the asbestos NESHAP are subject to civil administrative penalties under CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1).

[2] The parties filed joint stipulations of fact and exhibits on October 31, 1995, which were supplemented on September 9, 1996. The joint stipulations will be cited as "J.Stip." along with

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tions prepared by SchoolCraft (JX 695- 825) describe Centerville as the "Owner" of Cline, and SchoolCraft as the "Consultant" to Centerville. JX 707.

In addition to its tasks related to asbestos abatement, SchoolCraft acted as the coordinator of all renovation activities at Cline and was present on a daily basis during the renovation activities, which included painting as well as the installation of new tile, ceilings, and lighting. *See* Hearing Transcript ("H.Tr.")[3] at 42-44, 82 (testimony of Aris V. Jende ("AVJ")).[4] As Mr. Jende stated at the evidentiary hearing, there were multiple tasks and multiple contractors involved in the overall renovation, of which the asbestos abatement was a part, and SchoolCraft's responsibilities included coordinating these contractors and the renovation as a whole on behalf of Centerville. *Id*. at 42-43, 81-82, 90.

The specifications for the asbestos abatement work provided SchoolCraft with substantial supervisory authority. For example, SchoolCraft could direct the number of shifts worked during the project (JX 698), discharge the contractor's employees if found to be incompetent or detrimental to the project (JX 699), and halt abatement work in the event that the contractor was not complying with contract specifications or applicable regulations (JX 809). SchoolCraft's approval was required for the contractor's "detailed construction procedure and schedule." JX 698.

Sometime prior to contracting for preparation of the AHERA plan, Centerville provided SchoolCraft with an informal "Project Manager Job Description Agreement" in which Centerville set forth its expectations for SchoolCraft as a consultant on the Centerville asbestos abatement projects. JX 837. The informal description states, *inter alia*, that "the Consultant will SUPERVISE the abatement work process as agent of the Centerville City Schools." *Id*. (emphasis in original). Among the specific tasks described in the informal job description are "[s]upervise abatement and reconstruction project as agent of Centerville City Schools," and "[s]upervise project on-site on a daily basis." *Id*. at 838. Although

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the appropriate stipulation number. The joint exhibits are consecutively numbered and will be referred to in this decision as "JX" along with the appropriate page number.

[3] The Presiding Officer conducted an evidentiary hearing in this matter on September 24-25, 1996, in Dayton, Ohio.

[4] Aris V. Jende served as the Administrative Assistant for Business for the Centerville City Schools from 1990 to 1995, and represented Centerville during the Cline renovation project. H.Tr. at 35-37.

the job description was not expressly contained in any contract between SchoolCraft and Centerville, Centerville discussed its contents with a representative from SchoolCraft in an attempt to "more specifically outlin[e] the responsibilities of SchoolCraft." Letter from Aris V. Jende, Administrative Assistant for Business Operations, Centerville, to John Shepler, U.S. EPA, Region 5 (May 14, 1993). JX 835.[5]

Based on SchoolCraft's specifications, Centerville solicited bids for the Cline renovation from various asbestos abatement contractors. SchoolCraft, as Centerville's consultant, participated in a pre-bid meeting with prospective contractors, in order to explain the project. Following receipt of bids, SchoolCraft assisted Centerville in selecting an asbestos contractor. H.Tr. at 41-42. On June 5, 1992, Centerville awarded the contract to Seneca Asbestos Removal and Control, Inc. ("Seneca"). SchoolCraft was not a party to the contract. SchoolCraft's asbestos abatement specifications set forth a "description of work" to be performed by the asbestos contractor, detailing the asbestos containing material to be removed. JX 702-703. The specifications required the contractor to perform work "in strict accordance" with applicable regulations. In particular, the specifications required the contractor to undertake NESHAP requirements, including notification and work practice requirements. JX 711.

The Cline renovation took place between June and August 1992. There is no dispute that the project met the threshold for bringing it within the NESHAP, including notification and work practice requirements. *See* 40 C.F.R. § 61.145(a)(4).[6]

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[5] In addition, as discussed further *infra*, a purchase order prepared after the completion of the renovation reflects a payment of $22,040.85 from Centerville to SchoolCraft for "supervision of work as agent of the owner." Region's Brief on Appeal (Attachment 2).

[6] 40 C.F.R. § 61.145(a)(4) states, in part, that:

> In a facility being renovated, * * * all the requirements of paragraphs (b) and (c) of this section [containing applicable notification and work practice requirements] apply if the combined amount of [regulated asbestos-containing material] to be stripped, removed, dislodged, cut, drilled, or similarly disturbed is
>
> > (i) At least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components * * *.

SchoolCraft has conceded that the Cline renovation exceeds this threshold. J.Stips. 15 & 16; Initial Decision at 8-9.

Pursuant to the NESHAP, the renovation project's "owner or operator" was required to notify the Regional Air Pollution Control Agency ("RAPCA") of the Cline renovation work.[7] 40 C.F.R. § 61.145(a). Seneca advised RAPCA that work would begin on June 15, 1992, and end August 7, 1992. J.Stip. 22. On June 16, RAPCA sent an inspector to Cline (Jack D. Hemp), who determined that (contrary to the notice) work had not yet begun. J.Stip. 23. Instead, work began on June 17. J.Stip. 24. On that date, Seneca faxed a revised notice to RAPCA informing RAPCA of the alternate date for commencement of the work. J.Stip. 25. On June 30, another RAPCA inspector (Jeffrey W. Adams) conducted a second inspection at Cline. It was during this inspection that Adams observed the work practice violations alleged in counts III, IV, and V of the complaint. *See* H.Tr. at 120-129.

Log sheets for the project show that SchoolCraft's representative, Jack Bowman, was present in the asbestos abatement enclosure[8] on seven occasions during the abatement work (June 16- 18; June 23, June 25; June 29; July 2). JX 184-195, 875-886. His presence is noted under the "visitors" section of the log sheet. The record also indicates that a SchoolCraft representative was present at the Cline site on an almost daily basis throughout the renovation. H.Tr. at 44 (testimony of AVJ).

Following conclusion of the Cline renovation project, Centerville issued a "purchase order" in the amount of $22,040.85 to SchoolCraft, referencing payment for SchoolCraft's role in the Cline renovation. Region's Brief on Appeal (Attachment 2). The portion of the purchase order concerning SchoolCraft's work at Cline includes the following notation in the "description" section of the order:

> 1. CONFERENCES WITH THE OWNER, BOARD OF HEALTH, HYGIENIST, EPA OFFICIALS, AND CONTRACTORS FOR THE PURPOSE OF JOB COORDINATION AND PREPARATION OF SPECIFICATIONS PURSUANT TO THE BIDDING PROCESS AND SUPERVISION OF THE BIDDING PROCESS FOR THE ASBESTOS REMOVAL AND REPLACEMENT MATERIALS (RETROFIT) OF THE DESIGNATED AREAS OF CLINE.

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[7] EPA has delegated the authority to implement and enforce activities subject to the asbestos NESHAP in Montgomery County, Ohio to RAPCA. J.Stips. 17-19; 40 C.F.R. § 61.04(b)(KK)(vi).

[8] An asbestos abatement enclosure is a sealed area that prevents asbestos fibers from being carried to the outside air. *See* H.Tr. at 121-22 (testimony of RAPCA inspector Jeffrey W. Adams).

2. SUPERVISION OF THE WORK AS AGENT OF THE OWNER.

Id. The text was copied verbatim by Centerville from an invoice it received from SchoolCraft for services rendered. H.Tr. at 50-51 (testimony of AVJ).

In June 1993, EPA Region 5 filed a complaint against Seneca and SchoolCraft alleging, *inter alia*, five counts of violating the asbestos NESHAP during the Cline renovation.[9] The complaint alleged that SchoolCraft and Seneca were both liable as "operators" of the renovation activity at Cline, pursuant to 40 C.F.R. § 61.141. The complaint charged both Seneca and SchoolCraft with the following: Count I — failure to provide notice by telephone before the original starting date for asbestos removal that asbestos removal would begin on a date later than the date specified in the original notice of renovation, in violation of 40 C.F.R. § 61.145(b)(3)(iv)(A)(1); Count II — failure to provide written notice before the original starting date for asbestos removal that asbestos removal would begin on a date later than the start date specified in the original notice of renovation, in violation of 40 C.F.R. § 61.145(b)(3)(iv)(A)(2); Count III — failure to adequately wet regulated asbestos containing material ("RACM")[10] being stripped from the facility, in violation of 40 C.F.R. § 61.145(c)(3); Count IV — failure to adequately wet all RACM and to 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); and Count V — failure to post evidence of on-site representative's training in the asbestos NESHAP, in violation of 40 C.F.R. § 61.145(c)(8).

The Region proposed a civil penalty totaling $62,000, with $42,000 to be assessed against Seneca and $20,000 against SchoolCraft. Prior to the hearing, the action against Seneca was resolved through the filing of a Consent Agreement and Consent Order on September 7, 1994.[11] Thereafter, the action proceeded against SchoolCraft alone.

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[9] The complaint included nine counts, but only the first five concerned the work performed at Cline, and SchoolCraft had no connection with the other counts. Centerville was not charged in this complaint, having previously reached a consent agreement with the Region whereby Centerville paid no fine but agreed to certain ongoing monitoring activities.

[10] RACM is defined, in part, as "friable asbestos material." 40 C.F.R. § 61.141 (Definitions). "Friable asbestos material" is defined, in part, as "any material containing more than 1 percent asbestos * * * that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure." *Id*.

[11] Seneca reached an agreement with the Region resolving the complaint against it and agreeing to pay a civil penalty of $55,000, part of which related to violations occurring at locations other than Cline.

B. *The Initial Decision*

Following the evidentiary hearing, the Presiding Officer issued an Initial Decision concluding, as a dispositive threshold matter, that SchoolCraft could not be held liable as an "operator" under the asbestos NESHAP. In particular, the Presiding Officer concluded that although key documents relied on by the Region (the informal job description, the project specifications, and the purchase order) "technically" provided SchoolCraft with supervisory power over the asbestos abatement at Cline, SchoolCraft did not in fact exercise that authority to a sufficient extent to establish its liability as an operator. *See* Initial Decision at 19, 28.

In analyzing SchoolCraft's potential liability, the Presiding Officer first posited that according to the regulatory definition of "owner or operator":

> [F]or liability to attach, the person involved must either own, lease, operate, control or supervise the facility or own, lease, operate, control or supervise the *asbestos removal activity*. The key question in the case at bar is, therefore, whether SchoolCraft exercised control or supervision *over the asbestos removal activity* at Cline Elementary.

Initial Decision at 18-19 (emphasis added). Because there was no case directly on point that mirrored SchoolCraft's circumstances, the Presiding Officer relied on the reasoning contained in the case of *United States v. Walsh*, 783 F. Supp. 546 (W.D. Wash. 1991), *aff'd*, 8 F.3d 659 (9th Cir. 1993). That case involved an attempt to impose liability for NESHAP violations at four asbestos abatement projects upon an individual employee of an asbestos abatement contractor (James A. Walsh). Walsh was found liable for violations at two of the projects, based upon his degree of involvement with those projects.

The Presiding Officer focused on the following language in *Walsh*:

> [B]ecause the statute and the regulations in question impose strict liability, the Court would be reluctant to impose liability unless it was clear that Mr. Walsh was *substantially in control or substantially supervised the various projects in question*.
>
> I recognize the government contends that there is nothing that has to be substantial about the supervi-

> sion, but *I believe that what was intended here was a person having significant or substantial or real control and supervision over a project before he or she could be found liable under these regulations if they were not an owner. And it is my intention to apply that test in determining the liability of this defendant.*

Walsh, 783 F. Supp. at 548 (quoted in Initial Decision at 20) (emphasis in Initial Decision). The Presiding Officer then proceeded to "assess what type of substantial control is needed to hold someone liable as an operator of an asbestos removal activity," in light of *Walsh*. Initial Decision at 20-21.

The Presiding Officer concluded that SchoolCraft must have exercised "real control" and "hands-on supervision" of the Cline asbestos abatement in order to be found liable. Initial Decision at 23 (citing *Walsh*, 783 F. Supp. at 548). The Presiding Officer stated that "[t]he fact that SchoolCraft had the supervisory authority over the asbestos removal at Cline is not the issue in the substantial control test. The real question is whether the Respondent exercised that power." *Id*. The Presiding Officer concluded that SchoolCraft had not exercised "any real control over the actual asbestos removal activity at Cline Elementary." *Id*. at 23-24. The Presiding Officer stated that the project specifications plainly required *Seneca* to control and perform the asbestos removal at Cline. Although acknowledging that "[SchoolCraft's representative] Mr. Bowman was at the general Cline Elementary renovation site on an almost daily basis, he was only present in the asbestos abatement enclosure" on seven occasions and "Mr. Bowman's almost daily on-site presence was for the purpose of coordinating the work of the various contractors on the general renovation * * *." *Id*. at 25.

The Presiding Officer concluded that "SchoolCraft's presence at Cline was not to supervise the asbestos removal but to coordinate and act as a liaison between Centerville and the various contractors." *Id*. at 26. The Presiding Officer was also persuaded by the facts that SchoolCraft was not an employee of the asbestos removal company, that Seneca, not SchoolCraft, actually directed most asbestos abatement activities, and that SchoolCraft did not contract with Seneca to perform any work. *Id*. at 26-27.[12]

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[12] For these reasons, the Presiding Officer concluded that even if SchoolCraft could be considered an operator, any penalty assessment would be unwarranted. Initial Decision at 29-31. The Presiding Officer also questioned the equity of "assess[ing] a $20,000 penalty against SchoolCraft, who had collected about $22,000 under its contract, when Centerville, the owner, paid no penalty and Seneca had settled for a $55,000 penalty * * * but had collected over $300,000 for its asbestos removal work * * *." *Id*. at 30.

In its appeal, the Region contends that the Presiding Officer applied an incorrect legal standard when he determined that SchoolCraft was not an "operator" of the asbestos abatement at Cline, and, alternatively, even if the standard relied on by the Presiding Officer was correct, the facts showed that SchoolCraft met the standard.

In response, SchoolCraft argues that the Region has identified no cases or examples in which a "consultant" such as SchoolCraft was held liable for NESHAP violations. According to SchoolCraft, under the "substantial control" test utilized by the Presiding Officer, the Region failed to establish by a preponderance of the evidence that SchoolCraft exercised sufficient control over the asbestos removal project to render it an "operator."

SchoolCraft further states that Seneca alone performed and supervised the asbestos abatement at Cline and that SchoolCraft's representative was present in the abatement enclosure only 7 out of the 33 days that the abatement took place. The specifications, although prepared by SchoolCraft, put all responsibility for the abatement (and for complying with the NESHAP) in the hands of the asbestos contractor. SchoolCraft concludes that the Presiding Officer's decision was correct and urges this Board to uphold that decision.

On July 9, 1997, the Board held oral argument on the following issue:

> Whether, under the facts of this case, SchoolCraft should be deemed an "operator" within the meaning of 40 C.F.R. § 61.141 of the activity undertaken at W.O. Cline Elementary School, such that SchoolCraft may be held liable for violations of the asbestos NESHAP that allegedly occurred in connection with the renovation.

Order Scheduling Oral Argument at 3 (April 23, 1997).

II. *ANALYSIS*

A. *Whether SchoolCraft is an "Operator"*

To establish SchoolCraft's liability in this case, the Region was required to show by a preponderance of the evidence that: 1) SchoolCraft was an "owner or operator of a demolition or renovation activity" as defined by the asbestos NESHAP (40 C.F.R. § 61.141); 2) the amount of the RACM involved in the Cline renovation met or exceeded

the regulatory threshold (40 C.F.R. § 61.145(a)(4); and 3) the alleged violations of the renovation standard actually occurred. *See United States v. Tzavah Urban Renewal Corp.*, 696 F. Supp. 1013, 1021 (D.N.J. 1988). Because the Presiding Officer dismissed the complaint on the ground that the Region failed to establish that SchoolCraft was an "operator," it is on this element of liability that we focus our analysis.

In determining whether a person is an "operator of a demolition or renovation activity" within the meaning of the asbestos NESHAP, we start with the definition of that term. Under 40 C.F.R. § 61.141, "[o]wner 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." (Emphasis added).[13] The Region has asserted that SchoolCraft falls within this definition as a "person who owns, leases, operates, controls, or supervises the demolition or renovation operation * * *." To evaluate this assertion, we must address two issues. First, we must determine what constitutes the "renovation operation." Specifically, does this "operation" encompass all renovation activity taking place at a facility or only the actual asbestos removal?[14] Second, we must analyze SchoolCraft's role during the Cline renovation to determine whether it owned, leased, operated, controlled, or supervised the renovation operation.

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[13] Because many of the cases interpreting the term "owner and operator" were decided before 1990, it is important to note that the definition in 40 C.F.R. § 61.141 of "owner or operator of a demolition or renovation activity" was added to the NESHAP in 1990. Prior to that time, the general definition of "owner or operator" applied to the renovation and demolition standard (as well as to the other NESHAPs). Under this general definition: "*[o]wner or operator* means any person who owns, leases, operates, controls, or supervises a stationary source." 40 C.F.R. § 61.02. The more specific definition contained in 40 C.F.R. § 61.141 was added to Subpart M when the renovation and demolition standard was revised in 1990. However, the definition is fully consistent with the Agency's earlier interpretation that "stationary source" includes demolition or renovation operations, and with cases interpreting the general definition of § 61.02 to apply to owners and operators of demolition or renovation operations. *See* 49 Fed. Reg. 13,658 (Apr. 5, 1984) (response to comments, stating that "[t]he stationary source in this case is the demolition or renovation operation. The demolition or renovation contractor would clearly be considered an owner or operator by 'operating' the stationary source. The facility owner or operator, by purchasing the services of the demolition or renovation contractor, acquires ownership and control of the operation * * *."); *see also United States v. Hugo Key and Son, Inc.*, 731 F.Supp. 1135, 1141 (D.R.I. 1989) ("The stationary source of emissions in a demolition or renovation operation is, by definition, the operation itself.").

[14] The asbestos NESHAP defines the term "facility" broadly to include "any institutional, commercial, public, industrial, or residential structure, installation, or building * * *." 40 C.F.R. § 61.141. Centerville was clearly the owner and operator of the facility.

1. *Scope of the Renovation Operation*

"Renovation" is defined in the regulations as "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.

In determining that SchoolCraft was not an "operator," the Presiding Officer stated that under the regulatory definition of "owner or operator":

> [F]or liability to attach, the person involved must either own, lease, operate, control or supervise the facility or own, lease, operate, control or supervise the *asbestos removal activity*. The key question in the case at bar is, therefore, whether SchoolCraft exercised control or supervision *over the asbestos removal activity* at Cline Elementary.

Initial Decision at 18-19 (emphasis added). As can be seen, in discussing the regulatory definition of "owner or operator" the Presiding Officer substituted the term "asbestos removal activity" for "demolition or renovation operation." The Region objects to this alteration in terminology as unduly restrictive. Region's Brief on Appeal at 37. It is the Region's position that it should prevail if it proves, by a preponderance of the evidence, that SchoolCraft operated, controlled, or supervised the overall renovation operation. *Id*. at 38. According to the Region:

> By demonstrating that a person "operated," "controlled" or "supervised" a demolition or renovation operation, U.S. EPA will necessarily establish that the person at issue bears a sufficient relationship to the facility and/or the demolition or renovation operation such that it should be held liable as an "owner or operator" for any violations of the asbestos NESHAP.

Id. at 18 (citation omitted). A person can be considered an "operator," according to the Region, "regardless of that person's particular relationship to the asbestos abatement portion of th[e] renovation." Region's Brief on Appeal at 11.

We agree with the Region that the Presiding Officer's statement of the issue, as quoted above, does not accurately reflect the regulatory definition. The definition of an "owner or operator" is not restricted to an owner or operator of an asbestos removal activity, although lia-

bility certainly attaches to such persons. Rather, an "owner or operator" of a renovation activity is any person who owns or operates a facility being renovated or who "owns, leases, controls or supervises the * * * renovation operation." 40 C.F.R. § 61.141. Further, as noted above, "renovation" means "altering a facility * * * *in any way*, including the stripping or removal of RACM." *Id*. (emphasis added). The preamble makes clear that the term "renovation" "should be defined to describe the type of activity that is being carried out at a facility, regardless of the presence or absence of asbestos material * * *." 49 Fed. Reg. 13,658 (Apr. 5, 1984).[15] The term "renovation" was written to refer to the activity of altering a facility or one of its components; it was intended to be distinguished from the term "demolition," defined as "the wrecking or taking out of any load-supporting structural member of a facility * * *." 40 C.F.R. § 61.141; 49 Fed. Reg. 13,658. Both activities only become subject to the asbestos NESHAP if they meet the threshold requirements of 40 C.F.R. § 61.145 regarding the amount of asbestos involved. *See supra* n.6 and accompanying text. In other words, in determining whether a "person" is subject to the asbestos NESHAP for demolition and renovation, it is necessary to determine whether the facility is being renovated (or demolished), and, if so, whether the amount of the asbestos involved meets the applicable threshold. The Presiding Officer's focus on SchoolCraft's responsibilities only as to the asbestos removal activity is inconsistent with the regulatory language. Thus, by holding that in order to be an "operator," SchoolCraft must have supervised the asbestos abatement work as opposed to the entire renovation activity, the Presiding Officer applied an overly narrow standard in determining whether SchoolCraft is an "operator" under the NESHAP.

2. *Whether SchoolCraft's Role Constituted Controlling or Supervising the Renovation Operation*

Having determined that SchoolCraft's role must be evaluated relative to the overall renovation activity, we must still determine whether SchoolCraft owned, leased, controlled or supervised that activity. As previously stated, the Presiding Officer, relying on *United States v. Walsh*, concluded that in order to be considered an "operator," SchoolCraft must have exercised "substantial," *i.e.*, actual or "hands-on," control over the asbestos removal at Cline. Initial Decision at 23. In our evaluation of SchoolCraft's role relative to the overall renovation operation, we decline to adopt a "substantial control" test.

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[15] That the appropriate focus of the analysis is on the owner or operator of the renovation activity is further reinforced by 40 C.F.R. § 61.145(a), which specifies which of the requirements of that section apply to the owner or operator of a "demolition or renovation activity."

The "substantial control" test as articulated and applied by the court in *Walsh*, on which the Presiding Officer relied, arose in a factual context so dissimilar from the case before us that we have no reservations in finding that case distinguishable.[16] Indeed, School-Craft itself has acknowledged that *Walsh* is "not exactly on point by any means * * *." Oral Argument Transcript ("O.Tr.") at 50.

In *Walsh*, the defendant (an individual) had acted in various capacities for the small company that employed him, including as estimator, vice-president, and president. The court observed that "although those titles and his signing of various documents is some indication of his responsibilities and authority, I believe a job by job analysis is necessary * * *." *United States v. Walsh*, 783 F. Supp. 546, 548-49 (W.D. Wash. 1991). The court also observed that it is sometimes difficult with small companies to analyze which employees bear responsibility for particular activities, and that "the title given to a person is not necessarily indicative of a person's authority or lack of authority." *Id*. at 549. Upon analyzing each job, the court concluded that Walsh could be liable as an "operator" at two. In one instance, although Walsh bore the title of "estimator," the facts showed that he was responsible for the overall supervision and control of the project, including having the ability to correct work. Mr. Walsh directed the manner of asbestos removal, and signed notices of intent to remove. He directed the project foreman, was the primary contact with inspectors, and responded to the Notices of Violation issued in connection with the work. *Id*. As to the second project for which he was found liable, Walsh had "overall supervision" of the project, including contractual aspects. He was responsible for dealing with any problems that arose, dealt with inspectors as a supervisor of the project, and generally held himself out as a supervisor. *Id*. at 551.

The *Walsh* court was dealing with a circumstance in which the government was seeking to impose liability against an *individual* employee of an *asbestos abatement contractor*. As the Region points out:

> The Courts' analyses necessarily focused upon the defendant's physical actions because, as an individual employee of the asbestos abatement contractor, the Defendant did not maintain any privity of contract with the owner or general contractor; therefore, his relationship to the renovation operation cannot be

[16] Because we conclude that *Walsh* is distinguishable and therefore does not apply to the facts of this case, we do not address the Region's assertion that *Walsh* was wrongly decided.

> inferred from contract documents or project specifications. Ultimately, however, the defendant's actions were analyzed strictly as evidence of the **theoretical** authority and responsibility the defendant maintained at each project.

Region's Brief on Appeal at 41-42 (emphasis in original). We doubt that the *Walsh* court would have resorted to a job-by-job analysis of the degree of Walsh's control where, as here, documentation was available that specified the scope of SchoolCraft's authority.

The applicable case law makes clear that facility owners and others with control over a demolition/renovation may be liable for violations of the NESHAP, and that such liability is strict, *i.e.*, without regard to the person's knowledge of the violation. *See, e.g.*, *United States v. Hugo Key and Son, Inc.*, 731 F. Supp. 1135, 1141 (D.R.I. 1989) (demolition contractor is an "owner or operator" of demolition operation); *United States v. Tzavah Urban Renewal Corp.*, 696 F. Supp. 1013, 1021 (D.N.J. 1988) (holding that agents of owners as well as owners themselves may be liable for NESHAP violations); *United States v. Geppert Bros. and Amstar Corp.*, 638 F. Supp. 996, 999-1000 (E.D. Pa. 1986) ("owner or operator" defined broadly under NESHAP, owner of building can be liable as "owner of a demolition operation" even though it contracted with another party to do the demolition work). It is also clear that because the renovation regulations at issue in this case apply to "*each* owner or operator of a demolition or renovation operation," 40 C.F.R. § 65.145(a) (emphasis added), the regulations contemplate that liability can be imposed on more than one party at a demolition/renovation site. *See Geppert Bros.*, 638 F. Supp. at 999. Indeed, during oral argument before this Board, SchoolCraft itself recognized that, under the regulations, more than one person could be considered an "operator." O.Tr. at 31-32. As the Presiding Officer and the parties point out, however, there is no case directly on point that has addressed whether an entity styled as only a "consultant" may be liable as an "owner or operator" of a renovation activity. Nevertheless, we conclude that where, as here, a person has been given supervisory authority over a renovation, that person may be considered an "operator" notwithstanding how that person has chosen to style itself.[17]

The Presiding Officer in this case, relying on *Walsh*, concluded that in order to meet the regulatory definition of an "operator," a per-

[17] We do note that the court in *Walsh* concluded that a person's title, by itself, is not determinative on the issue of whether the person is an "operator."

son must not only have supervisory authority over the abatement work, but also must have actually exercised that authority. As the Ninth Circuit stated, however, liability as an owner or operator under the asbestos NESHAP may attach to "'a person having significant or substantial or real control and supervision over a project.'" *Walsh*, 8 F.3d 659, 662 (quoting *United States v. Walsh*, 783 F. Supp. at 548). There is no requirement that control be *exercised* in a particular way. *See id*. Thus, we do not read the *Walsh* decision as requiring that a person actually *exercise* supervision or control where, as here, the person clearly has the *authority* necessary to exercise that supervision or control. Indeed, to require the actual exercise of control would create the anomalous result of allowing those with supervisory authority over a renovation to avoid liability for violations of the asbestos NESHAP by failing to exercise that authority. Such a result would reward irresponsible behavior and be contrary to the purposes of the Act. *Cf. Geppert Bros.*, 638 F. Supp. at 1000 ("Interpreting the asbestos regulation to apply to the owner of a building being demolished * * * furthers the purposes of the Clean Air Act by insuring that owners of property act responsibly in disposing of their building.").

It is clear from the job specifications prepared by SchoolCraft, the purchase order prepared from language supplied by SchoolCraft, and the fact that SchoolCraft was present at the renovation site on a daily basis, that SchoolCraft was given supervisory authority over the renovation as a whole (including, but not limited to, the asbestos removal activity).[18]

As previously stated, the specifications provided SchoolCraft with significant supervisory authority over the asbestos removal activities. For example, under the specifications, SchoolCraft could direct the number of shifts worked during the project (JX 698); SchoolCraft had to approve, in writing, Seneca's "detailed construction procedure and schedule" (*id*.); SchoolCraft's approval was required before change orders could be issued (*id*. at 699); SchoolCraft had authority to dis-

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[18] In addition, the informal job description mentioned in section I.A. *supra* states that SchoolCraft "will SUPERVISE the abatement work process as agent of the Centerville City Schools."

The informal job description, the project specifications, and the purchase order are the only documents cited by the parties that shed light on the nature of the relationship between SchoolCraft and Centerville regarding the Cline renovation. Apparently, there is no separate "contract" document. In responding to a request from the Region for a copy of any contract between Centerville and SchoolCraft, Centerville supplied the Region with the informal job description and the purchase order. Letter from Aris V. Jende, Administrative Assistant for Business Operations, Centerville, to John Shepler, U.S. EPA, Region 5 (May 14, 1993). JX 835.

charge Seneca's employees if found to be incompetent or detrimental to the project (*id*.); and, before Seneca could be paid for its work, SchoolCraft had to verify that the work had been "satisfactorily completed" (*id*. at 708). Further, in a paragraph entitled "SUSPENSION OF ABATEMENT WORK," SchoolCraft was given broad authority to halt the abatement:

> The CONSULTANTS DESIGNATED REPRESENTATIVE shall have the authority to stop work in the event that the contractor is not utilizing acceptable work practices or protective equipment complying with contract specifications or applicable regulations or when an emergency situation arises that may cause fiber release to unprotected areas. The CONSULTANT be [sic] notified immediately in writing of the stoppage, reasoning, and recommendations for corrective action. The CONSULTANT shall then review the suspension and determine what corrective [sic] is appropriate to allow work to proceed.

JX 809. Given the scope of SchoolCraft's authority, we find ourselves in complete agreement with the Region's assertion at oral argument before this Board that SchoolCraft had the authority to affect Seneca's compliance with the asbestos NESHAP:

> [SchoolCraft] had the authority to take proactive steps against the contractor to issue a stop work order and corrective action orders. If SchoolCraft felt that there was not enough water being used at the facility, they could have ordered [Seneca] to use more water. If they thought that the on-site representative's training certificate was not posted, they could have ordered them to post that. If the notice [regarding a change in the work date] was not submitted, they could have ordered [Seneca] to submit that notice * * *.

O.Tr. at 14.[19]

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[19] In its brief, SchoolCraft states that:

> Pursuant to the project specifications, Seneca clearly had the responsibility to perform and control the asbestos removal at Cline. Seneca was responsible for obtaining all necessary permits and arranging for all necessary inspections, was
> Continued

In addition to its authority over the asbestos abatement, the record shows that SchoolCraft supervised the renovation operation as a whole. As the Presiding Officer found:

> [SchoolCraft's] almost daily on-site presence was for the purpose of coordinating the work of the various contractors on the general renovation, who were performing such tasks as painting and installing tile, ceilings and lighting, in addition to the asbestos removal activity. SchoolCraft's job was to coordinate all the different contractors according to the timelines Centerville had, to make sure the work on the entire renovation was done in time for the students to return to school in the Fall.

Initial Decision at 25-26. At oral argument before the Board, SchoolCraft conceded that this was an accurate statement of SchoolCraft's responsibilities.[20] O.Tr. at 28.

Further, the language of the purchase order, incorporating the description of SchoolCraft's responsibilities drafted by SchoolCraft itself, stated explicitly that the work SchoolCraft performed for Centerville involved the "supervision of work as agent of the owner." Region's Brief on Appeal (Attachment 2). In addition, the purchase order indicates that SchoolCraft was paid $22,040 for this work. This

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> responsible for all notifications to governing bodies, was responsible for performing all work in compliance with EPA and OSHA guidelines and with the project specifications, and was responsible for employing a competent superintendent who was certified as an asbestos hazard abatement specialist and is certified by EPA as a contractor/supervisor and who must remain on the job during the progress of the work.

SchoolCraft's Reply at 5. We agree that the project specifications prepared by SchoolCraft required Seneca to comply with applicable regulations and that Seneca was an "operator" at the Cline site. However, the fact that Seneca was an operator does not mean that SchoolCraft could not be one as well. As previously stated, and as conceded by SchoolCraft, more than one person may be considered an "operator" at any given facility under the asbestos NESHAP.

[20] Although the Presiding Officer stated that SchoolCraft's role in the renovation was to "coordinate" the work of the various contractors and ensure that the work was completed on time, the term "coordinate" fits within the common definition of the term "supervision." As the Region states in brief, the American Heritage dictionary defines the term "supervise" as: "To direct and inspect the performance of (workers or work); *oversee*; superintend." Region's Brief on Appeal at 18 n.13 (quoting, The American Heritage Dictionary (New College Edition)) (emphasis added).

purchase order covered the asbestos removal activity as well as SchoolCraft's other responsibilities.

Under these circumstances, we conclude that SchoolCraft had the requisite supervisory authority over the renovation operation to be considered an "operator" within the meaning of the asbestos NESHAP. Accordingly, the Presiding Officer's conclusion that SchoolCraft was not liable as an "operator" of the Cline renovation project is reversed and the Region's complaint is reinstated.

B. *Whether the Violations Occurred*

Because he found SchoolCraft not to be an operator subject to the NESHAP regulations, the Presiding Officer did not address the merits of whether the Region had met its burden of demonstrating that the violations alleged in the complaint actually occurred. The Region requests that the Board "undertake a *de novo* review of the record to determine whether the alleged violations of the renovation standard were adequately demonstrated." Region's Brief on Appeal at 48. In support of its assertion that the violations occurred, the Region incorporates by reference the arguments set forth in its post-hearing briefs filed with the Presiding Officer (Complainant's Post-Hearing Brief (Nov. 1, 1996) and Complainant's Response to Respondent's Post-Hearing Brief (Nov. 20, 1996)). *Id*. at 48-49. SchoolCraft disputes that the Region met its burden of establishing that the violations alleged in the complaint occurred and directs the Board's attention to its post-hearing briefs as well (Post Hearing Brief (Nov. 4, 1996) and Reply Brief (Nov. 21, 1996)). SchoolCraft's Reply at 9.

Because the Presiding Officer made no explicit findings as to whether the violations alleged in the complaint actually occurred, and because this issue was contested before the Presiding Officer and is disputed before this Board, we are remanding this matter to the Presiding Officer for specific findings of fact and conclusions on this issue. *See* 40 C.F.R. § 22.27(a) ("The initial decision shall contain [the Presiding Officer's] findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefore * * *.").

C. *Penalty*

On the issue of an appropriate penalty, the Presiding Officer stated, in part, as follows:

> Even if an opposite result were to be reached * * * on the dispositive issue of SchoolCraft as an oper-

> ator of the Cline Elementary asbestos removal project, certain comments are warranted on the appropriateness of any penalty sought in this case against Respondent. Section 113(e)(1) of the CAA, 42 U.S.C. § 7413(e)(1), requires that in assessing a civil penalty for violations of the CAA, there shall be taken into account, *inter alia*, such other factors as justice may require. Moreover, under Section 22.27(b) of the EPA Rules of Practice, 40 C.F.R. § 22.27(b), the applicable penalty guidelines are not binding on the Presiding Judge as long as reasons are given for deviating from them * * *.

Initial Decision at 29. The Presiding Officer concluded that even if SchoolCraft's liability had been established, a penalty would not be appropriate. According to the Presiding Officer, it was Seneca who "was responsible on a substantive basis for the violations charged against SchoolCraft. * * * Moreover, Seneca's greater role and responsibility for these violations is further reflected in its compensation of $338,510 * * * in comparison to the [$22,040] received by SchoolCraft for its work in connection with the Cline Elementary renovation." *Id*. at 30-31. The Presiding Officer concluded that under these circumstances, it would be inequitable to assess any penalty against SchoolCraft.

While there may be some merit to the Presiding Officer's conclusion that the Region's proposed penalty assessment against SchoolCraft appears high when compared to the amount ultimately assessed against Seneca, we have serious doubts about the Presiding Officer's decision that no penalty at all would be warranted if SchoolCraft is found liable. However, as we are remanding this matter to the Presiding Officer for a determination of whether the Region met its burden of establishing that the violations alleged in the complaint occurred, we need not reach the penalty issue at this time.

III. *CONCLUSION*

The Presiding Officer's determination that SchoolCraft is not an "operator" as defined by the asbestos NESHAP renovation standard at 40 C.F.R. § 61.141, is reversed. For the reasons stated above, we conclude that SchoolCraft is an "operator" within the meaning of the regulations. The Board further concludes that because the Presiding Officer did not explicitly reach the issue of whether the violations alleged in the complaint actually occurred, and because this issue was contested before the Presiding Officer and in this appeal, this matter

must be remanded to the Presiding Officer. On remand, the Presiding Officer must make explicit findings on whether the Region met its burden of establishing that the violations alleged in the complaint actually occurred, and, if so, consider the appropriate penalty for such violations.

So ordered.