IN RE ALLEGHENY POWER SERVICE CORP. AND CHOICE INSULATION, INC.

CAA Appeal No. 99-4

FINAL DECISION

Decided February 15, 2001

Syllabus

Choice Insulation, Inc. ("Choice") and Allegheny Power Service Corp. ("Allegheny") (collectively "Respondents") appeal an Initial Decision of the presiding Administrative Law Judge ("Presiding Officer"), holding Respondents liable for violations of the Clean Air Act and its National Emissions Standards for Hazardous Air Pollutants: National Emission Standard for Asbestos regulations found at 40 C.F.R. § 61.145(c)(3), (6)(i).

The United States Environmental Protection Agency Region III (the " Region") filed a complaint alleging that Allegheny was the owner and Choice was the operator of a renovation activity that involved the abatement of regulated asbestos containing material ("RACM"). Count I of the Region's Complaint asserts that, in violation of 40 C.F.R. § 61.145(c)(3), Respondents failed to adequately wet the RACM while it was stripped from the facility. Count II asserts that, in violation of 40 C.F.R. § 61.145(c)(6)(i), RACM that was transported and collected in an outdoor waste storage dumpster was not adequately wet and therefore, failed to remain wet until collected and contained or treated in preparation for disposal.

In the Initial Decision, the Presiding Officer held that the testimony of an EPA inspector who was not present during the actual stripping or removing of the RACM, statements made by Respondents regarding the ineffectiveness of airless sprayers used by Respondents at the site, and air monitoring data supported the conclusion that the material being removed from the facility had not been adequately wet during the stripping operation. The Presiding Officer further held that the inspector's observations that RACM inside leak-tight bags had not been adequately wetted supported the conclusion that Respondents failed to keep the RACM adequately wet until disposal. Accordingly, the Presiding Officer assessed a civil penalty of $32,000.

With regard to liability, Respondents argue on appeal that the Presiding Officer made errors of fact and law and assert that Choice was in full compliance with the applicable regulations on the day at issue. They further assert that the Presiding Officer failed to consider the Clean Air Act's penalty factors in making his penalty determination.

Held: The Presiding Officer's determinations regarding liability are upheld. The penalty, however, is reduced to $20,000.

The Board finds that the evidence in the record, especially the testimony of the inspector and statements made by Respondents regarding the adequacy of the water pressure at the site on the day of the inspection, adequately supports the Presiding Officer's conclusion that Respondents violated 40 C.F.R. § 61.145(c)(3) by failing to adequately wet the RACM during the stripping operation. The Board finds that there is no legal requirement that an inspection of a facility take place during the stripping operation. The appropriate analysis in circumstances where the inspector did not observe the stripping operation examines whether inferences can properly be drawn from an inspector's observations or from other evidence which would be sufficient to establish that RACM was not adequately wet when it was stripped.

The Board also affirms the Presiding Officer's determination that, based upon the fact that the materials in the leak-tight bags were not adequately wet as observed by the inspector, Respondents failed to keep the RACM adequately wet until disposal in accordance with 40 C.F.R. § 61.145(c)(6)(i). If the RACM was wet when it was placed in the leak-tight bags, it still would have been wet at the time the bags were opened by the inspector during the inspection.

Because the Board determines that the penalty assessed by the Presiding Officer was consistent with the Clean Air Act, its implementing regulations, and the applicable penalty policy, the Board finds that Respondents' challenge to the Presiding Officer's penalty assessment is without merit. The Board, however, reduces the penalty on other grounds. Because a penalty is already being assessed for failure to wet the asbestos materials during stripping and because the period of time between the stripping of the asbestos materials and their placement in the bags was relatively short the penalty assessed against Respondents is reduced to $20,000.

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

Opinion of the Board by Judge Stein:

This matter is before us pursuant to a Notice of Appeal and Appellate Brief filed by Choice Insulation, Inc. ("Choice") and Allegheny Power Service Corp. ("Allegheny") (collectively referred to as "Respondents"), challenging Administrative Law Judge Charles E. Bullock's ("Judge Bullock") Initial Decision which held that Respondents failed to comply with the wetting requirements of the Clean Air Act's asbestos regulations found at 40 C.F.R. § 61.145(c)(3), (6)(i). Judge Bullock assessed a penalty in the amount of $32,000 jointly and severally against Respondents. Respondents assert that in reaching his determination, Judge Bullock made errors of both fact and law. Choice contends that it was in full compliance with the applicable regulations on the day at issue.

For the following reasons, we uphold Respondents' liability for violation of 40 C.F.R. § 61.145(c)(3), (6)(i) and assess a penalty of $20,000 jointly and severally against Respondents.

I. *FACTUAL AND PROCEDURAL BACKGROUND*

The following statement of facts is based on the parties' Joint Stipulations — Exhibit 1 ("Joint Stip."), filed with the Regional Hearing Clerk on November 12, 1998, as well as the record established before Judge Bullock and the parties' briefs filed with the Board.

Allegheny hired Choice to remove asbestos-containing material ("ACM") from the Fort Martin Power Station in Maidsville, West Virginia. Joint Stip. ¶ 8. Removal work took place from March 29, 1995, until May 5, 1995. *Id.* ¶ 24. During this time period, Choice removed approximately 2,300 linear feet of asbestos-containing pipe insulation from the first through seventh floors of the power station. *Id.*

At approximately 9:30 a.m. on April 12, 1995, Mr. Douglas Foster, an EPA inspector, arrived at the Fort Martin Power Station to conduct an inspection of Choice's abatement project. *See id.*; *see also* Appellate Brief of Respondents Choice Insulation, Inc. and Allegheny Power Service Corp. ("Resp. Brief") at 3; Reply of Complainant to the Notice of Appeal and Appellate Brief from Respondents Choice Insulation, Inc. and Allegheny Power Service Corp. ("Compl. Reply") at 3. During his inspection, Inspector Foster examined asbestos-containing waste bags that were being stored in one of two 40-yard roll-off dumpsters at the power station. Joint Stip. ¶¶ 26, 27. The dumpster he inspected contained a total of 325 yellow waste bags. *Id.* ¶ 26.

Inspector Foster lifted and felt the exterior of approximately eight bags from the front of the dumpster. Resp. Brief at 3; Compl. Reply at 3. He also picked up approximately 15-20 bags in the rear of the dumpster. Resp. Brief at 3-4; Compl. Reply at 4. Inspector Foster then removed samples of insulation material from four of the bags he selected from the dumpster. Joint Stip. ¶ 27; Resp. Brief at 4; Compl. Reply at 4. Tests performed on the samples indicated that the materials tested constituted ACM as defined by 40 C.F.R. § 61.141.[1] Joint Stip. ¶ 30.

---

[1] The parties agree that the ACM Choice removed from the Allegheny facility from March 29, 1995 until May 5, 1995, was "friable asbestos material" and "regulated asbestos-containing material" ("RACM") as those terms are defined at 40 C.F.R. § 61.141. Joint Stip. ¶ 32. RACM is defined by the regulation as:

> (a) Friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart.

40 C.F.R. § 61.141. Both 40 C.F.R. § 61.145(c)(3) and § 61.145(c)(6)(1) regulate RACM.

After the inspection was complete, Inspector Foster met with representatives of Choice and Allegheny. Resp. Brief at 6; Compl. Reply at 5. At the hearing before Judge Bullock, Inspector Foster testified that he informed those representatives that the asbestos he examined in the bags obtained from the dumpster were dry. Transcript of Oral Argument on Nov. 18-19, 1998 ("Trans.") at 63.

On February 9, 1996, United States Environmental Protection Agency Region III (the "Region") filed a complaint in this matter. In Count I of its Complaint, the Region asserted that when Inspector Foster conducted his inspection of the bagged RACM on April 12, 1995, he determined that beginning with the inception of the stripping process on March 29, 1995, regulated asbestos-containing material ("RACM") was not adequately wetted during removal as required by 40 C.F.R. § 61.145(c)(3). Complaint ¶ 27. In Count II, the Region asserted that, based upon Inspector Foster's observation of the dry, bagged material, Respondents failed to keep RACM adequately wet until collected for disposal as required by 40 C.F.R. § 61.145(c)(6)(i). *Id.* ¶ 31. The Region further stated that such failure to adequately wet RACM during the stripping process and the subsequent failure to keep RACM wet until collected for disposal constituted violations of the Clean Air Act, 42 U.S.C. § 7412. *Id.* ¶¶ 28, 32. The Region sought a proposed civil penalty in the amount of $74,000. *Id.* at 9.

On October 30, 1998, the Region filed a Motion to Amend the Proposed Penalty and Memorandum in Support Thereof ("Motion to Amend Penalty"). The Region cited new information obtained from Respondents regarding disposition of RACM in support of its request for a downward adjustment in the amount of the penalty sought from $74,000 to $32,000. Motion to Amend Penalty ¶¶ 2, 6. The Region stated that if ACMs were disposed of prior to the inspection, the additional days of violation it alleged had occurred prior to the inspection would not be supported by the evidence.[2] *Id.* ¶ 3. Because waste disposal records Respondents produced did in fact indicate that some RACM was disposed of prior to Inspector Foster's inspection on April 12, 1995, the Region sought to reduce the penalty proposed in the Complaint by that portion of the total penalty that represented additional days of violation.[3] *Id.* ¶¶ 3-4. With the proposed adjustment, the Region sought only a single day of violation for the counts in the Complaint. *Id.* ¶¶ 3, 6. In addition, an examination of Dun and Bradstreet reports on Respondents led the Region to conclude that the original "size of violator" component of the penalty should be adjusted downward to reflect the combined net worth of Re-

[2] The penalty proposed by the Region in the Complaint included a penalty both for the day of the inspection as well as violations for the 13 days prior to the inspection. *See* Complaint at 9-10.

[3] At the hearing before Judge Bullock, Inspector Foster testified that Respondents' waste shipment records indicated that material had been shipped from the site two days prior to his inspection. *See* Trans. at 127.

spondents. *Id.* ¶ 5; *see infra*, part II.C. On November 6, 1998, Judge Bullock granted the Region's motion.

An administrative hearing in this matter was held before Judge Bullock on November 18 and 19, 1998. Ten witnesses testified and 20 exhibits were introduced into evidence.

On December 14, 1999, Judge Bullock issued a determination which held that Respondents failed to comply with the wetting requirements of the Clean Air Act's National Emissions Standards for Hazardous Air Pollutants: National Emission Standard for Asbestos ("asbestos NESHAP regulations") found at 40 C.F.R. § 61.145(c)(3), (6)(i), and assessed a penalty in the amount of $32,000 jointly and severally against Respondents.

Respondents appeal from Judge Bullock's decision. In their Appellate Brief, Respondents assert that, based upon the facts of the case and the applicable law, Judge Bullock's determination of the matter was flawed. Resp. Brief at 11. Respondents identify what they purport to be facts that contradict Judge Bullock's factual findings in the Initial Decision. *Id.* 11-15, 20-22. Furthermore, Respondents identify case law that they believe is sufficiently analogous to the matter now before us to warrant a finding that Respondents did not violate 40 C.F.R. § 61.145(c)(3) or (6)(i). *Id.* 15-21. Finally, Respondents contend that even if Judge Bullock's determinations regarding liability were correct, he erred in assessing a penalty in the amount of $32,000. *Id.* at 22-23. Respondents identify several considerations, including full compliance history and duration of the violation, that they allege Judge Bullock failed to consider when making his penalty determination. *Id.*

II. *DISCUSSION*

The Complaint alleges violations of section 112 of the Clean Air Act, 42 U.S.C. § 7412, and its implementing regulations. Clean Air Act section 112(b) lists hazardous air pollutants which Congress has determined present, or may present, a threat of adverse human health or environmental effects. *See* 42 U.S.C. § 7412(b)(1), (2). Asbestos is included on that list.[4] *See* 42 U.S.C. § 7412(b)(1).

---

[4] There are many health risks associated with exposure to asbestos. Asbestosis, mesothelioma, cancer of the lung and cancer of the gastrointestinal tract are included among the diseases linked to asbestos exposure. *See* Asbestos NESHAP Revision, Including Disposal of Asbestos Containing Materials Removed from Schools, 54 Fed. Reg. 912, 913 (Jan. 10, 1989); *see also In re Ocean State Asbestos Removal, Inc.*, Dkt. No. CAA-I-93-1054, slip op. at 4 (ALJ, Jan. 24, 1997), *aff'd*, 7 E.A.D. 522 (EAB 1998).

Where the Administrator determines that emission standards are not feasible, the Clean Air Act authorizes the Administrator to promulgate work practice standards for control of a hazardous air pollutant or pollutants, in lieu of emission standards that would otherwise be required. *See* 42 U.S.C. § 7412(h)(1). NESHAP standards, including work practice standards, for asbestos are located at title 40, part 61, subpart M of the Code of Federal Regulations. *See* National Emission Standard for Asbestos, 40 C.F.R. §§ 61.140-61.157.

The asbestos NESHAP regulations impose strict liability notice and work practice standards with which owners and operators of demolition or renovation activities must comply.[5] *See* 40 C.F.R. § 61.145; *see also United States v. MPM Contractors, Inc.*, 767 F. Supp. 231, 232-33 (D. Kan. 1990); *United States v. Sealtite Corp.*, 739 F. Supp. 464, 468 (E.D. Ark. 1990); *In re Echevarria*, 5 E.A.D. 626, 633 (EAB 1994), *aff'g* Dkt. No. [CAA X]-1091-06-13-113 (ALJ, Dec. 22, 1993). Section 61.145(c) provides in pertinent part:

> (c) *Procedures for asbestos emission control*. Each owner or operator of a demolition or renovation activity to whom this paragraph applies, according to paragraph (a) of this section, shall comply with the following procedures:
>
> * * * * * * *
>
> (3) When RACM is stripped from a facility component while it remains in place in the facility, adequately wet the RACM during the stripping operation.
>
> * * * * * * *
>
> (6) For all RACM, including material that has been removed or stripped:
>
> (i) Adequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with § 61.150.

40 C.F.R. § 61.145(c). "*Adequately wet* means sufficiently mix or penetrate with liquid to prevent the release of particulates. If visible emissions are observed coming from asbestos-containing material, then that material has not been adequately

---

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

wetted. However, the absence of visible emissions is not sufficient evidence of being adequately wet." *Id.* § 61.141.

In order to establish liability under the asbestos NESHAP regulations, a two-part test must be met. First, the Region must show that the asbestos NESHAP regulations apply. *See* MPM *Contractors*, 767 F. Supp. at 233; *accord Echevarria*, 5 E.A.D. at 633. Second, it must be proved that the work practice standards have not been met. *See MPM Contractors*, 767 F. Supp. at 233; *accord* Echevarria, 5 E.A.D. at 633. In order to establish its case under the regulations, the Region is required to prove by a preponderance of the evidence that a violation of the asbestos NESHAP regulations occurred. *See* 40 C.F.R. § 22.24. Neither party disputes that the asbestos NESHAP regulations apply to the abatement activity conducted by Respondents. *See* Joint Stip. ¶¶ 17, 20, 22, 34. Whether or not Respondents violated the asbestos NESHAP regulations, however, is at the core of the present dispute.

Judge Bullock found that Respondents had failed to adequately wet the RACM during the stripping operation. Initial Decision ("Init. Dec.") at 12. Judge Bullock also determined that Respondents failed to keep the RACM adequately wet until collected for disposal. *Id.* at 14. Judge Bullock's determinations were based largely on the testimony of Inspector Foster.[6] Based on the testimony in the record, as well as the other evidence presented, Judge Bullock concluded that the Agency satisfied its burden of establishing the asbestos NESHAP violations by a preponderance of the evidence.

A. *Count I*

Count I of the Region's Complaint alleged that the "RACM from facility components which remained in place in the Facility had been stripped dry or otherwise not adequately wetted, as evidenced by [Inspector Foster's] inspection of the bagged RACM as well as statements made by Respondent Choice Insulation." Complaint ¶ 27. The Region alleged that this failure to comply with asbestos NESHAP regulation, 40 C.F.R. § 61.145(c)(3), constituted a violation of section 112 of the Clean Air Act, 42 U.S.C. § 7412. *See id.* ¶ 28.

Judge Bullock determined that "the evidence and testimony on the record indicate that the material being removed from the Facility had not been adequately wetted during the stripping operation." Init. Dec. at 12. In reaching his

---

[6] Although we generally review a presiding officer's determination de novo, 40 C.F.R. § 22.30(f), we generally defer to the presiding officer's factual findings where the credibility of witnesses is at issue, "because the presiding officer had the opportunity to observe the witnesses testifying and to evaluate their credibility." *Ocean State*, 7 E.A.D. at 530; *see also Echevarria*, 5 E.A.D. at 639.

conclusion on this issue, Judge Bullock relied heavily on the testimony of Inspector Foster. *See id.* at 7-9, 13. He also considered two letters written by Mr. Dave Hefner, the superintendent in charge of the Fort Martin Power Station project; one to Inspector Foster and the other to Mr. John Daley, an Asbestos/NESHAP coordinator in Region III. *See id.* at 10-12. Judge Bullock concluded that the text of these letters, viewed in the light of the surrounding circumstances, supports the inference that the airless sprayers used by the abatement workers on the morning of April 12, 1995, were ineffective in adequately wetting the RACM. *See id.* at 11-12. Judge Bullock also evaluated air monitoring data and Choice's Daily Progress Log, which Respondents introduced as evidence. *See id.* at 12.

In the following sections, we address the challenges Respondents raise to Judge Bullock's findings, beginning with their challenge to Judge Bullock's reliance on the testimony of Inspector Foster. Thereafter we consider Superintendent Hefner's letters, Respondents' challenge to the time of the inspection, and the air monitoring data presented at the hearing.

1. *Credibility of Inspector Foster*

Respondents assert that Inspector Foster's job at the site was to determine if Choice was following required asbestos removal and storage procedures. Resp. Brief at 10. Respondents assert that Inspector Foster's findings are not credible because he failed to follow "procedural requirements that applied to the way he did his job." *Id.* Respondents allege, and the Region does not dispute, that Inspector Foster did not enter the containment area. *Id.* at 5, 14. Respondents assert that if Inspector Foster had entered the containment area, as allegedly required by the asbestos removal guidelines published by EPA, he would have witnessed the asbestos removal process and seen that the RACM was adequately wetted during removal. *See id.* at 14-15.

As correctly stated by Judge Bullock, the observations made by Inspector Foster are not controverted by his alleged failure to strictly follow the Asbestos NESHAP Adequately Wet Guidance ("Guidance"). *See* Init. Dec. at 6-7. The procedures in the guidance manual are not mandatory. The introduction to the Guidance provides, "The recommendations made in this guidance are solely recommendations. * * * Determinations of whether asbestos materials are adequately wetted are made by EPA inspectors on site." Exhibit ("Ex.") C-12, § 1.[7]

Regardless of whether the procedures in the Guidance are mandatory, we find that Inspector Foster did not violate the Guidance's inspection procedures.

[7] Section Eight of the Guidance states, "The intent of the following guidelines is to provide GUIDANCE ONLY, to the regulated community regarding the inspection procedures recommended to Asbestos NESHAP inspectors * * *." Ex. C-12, § 8.

The procedures state that "[t]he determination of whether RACM or ACWM has been adequately wetted is generally based on observations made by the inspector at the time of inspection." *Id.* at § 8. The Guidance then lists observations that may be probative of whether a material is adequately wet. *Id.* Contrary to Respondents' assertions, none of the requirements in the Guidance specify that an inspector's failure to enter a containment area constitutes a "failure to follow procedures or to perform a complete inspection." Resp. Brief at 18. In fact, most of the recommended inspection procedures listed in the Guidance involve an examination of stripped or removed ACMs, not the actual removal process.[8] Ex. C-12, § 8. Moreover, the Board has held that there is not a requirement that an inspector observe removal activities. *See Ocean State*, 7 E.A.D. at 532; *Echevarria*, 5 E.A.D. at 643.[9]

Respondents fail to present any evidence to support their challenge to the credibility of Inspector Foster. At the hearing, Inspector Foster testified about his credentials, stating that during his tenure with EPA he conducted approximately 1,000 inspections. *See* Trans. at 15-16. In addition, with respect to his training, Inspector Foster stated that he had taken a building inspectors course, a supervisor contractors course, the EPA fundamental training course, and field safety and environmental safety and health training. *See id.* at 16-17.

With respect to the inspection itself, Inspector Foster testified that he lifted between 23 and 28 bags in an on-site dumpster and determined that they felt "very light in weight." Trans. at 27; Init. Dec. at 9. Inspector Foster further testified that the material inside the bags felt "stiff." Trans. at 27; Init. Dec. at 9. He stated that if the material had been adequately wetted, the bags would have weighed two or three times more than what they did. Trans. at 27-28; Init. Dec. at 9. After lifting the bags, Inspector Foster selected four of the bags (two from the rear of the

---

[8] The only procedures that refer to the actual removal process ask whether, during stripping or removal, a wetting agent is observed being sprayed onto the RACM. Ex. C-12, § 8. The relevant procedures state:

> 2. Is water or a wetting agent observed being sprayed onto the RACM or ACWM both during stripping or removal and afterwards while the material awaits proper disposal? If yes, carefully note the method of application used (e.g., misting, fogging, spraying of surface area only or drenching to penetrate the ACM throughout).
>
> 3. If water or a wetting agent is being used, what equipment is used to apply it (e.g., garden hose, plant mister)?
>
> 4. If water or a wetting agent is not being used, determine why it is not and document the reason. * * *

Ex. C-12, § 8.

[9] In so holding, we emphasized that "[i]f an inspector was required to observe the stripping operation, regulated entities could effectively halt any enforcement activity by stopping work whenever an inspector appears on site." *Echevarria*, 5 E.A.D. at 643.

dumpster and two from the front) and took photographs and samples of the materials inside. Trans. at 29-30. After sampling, he "immediately sealed [each] bag up with duck [sic] tape." *Id.* at 30.

> In their Appellate Brief, Respondents state:
>
> Mr. Foster did not use any instrumentation, nor did he follow any scientific protocol in his sampling or in his perfunctory evaluation of moisture content. Mr. Foster made a determination that the ACM in the bags did not contain enough water, in his opinion, based on observation alone. Mr. Foster felt the material, visually examined it, lifted a few bags, and then estimated that the material was not adequately wet in the bags.

Resp. Brief at 4 (citations omitted). Contrary to Respondents' criticisms of Inspector Foster's observation methods, the inspection procedures performed by Inspector Foster are clearly consistent with the recommendations set forth in the Guidance.[10]

---

[10] The recommended procedures state:

8. Examine ACWM in bags or other containers using the procedures that follow, to determine if the material has been adequately wetted?

1. Randomly select bags or the containers for inspection.

2. Lift the bag and assess its overall weight. (A bag of dry ACWM can generally be lifted easily by one hand. A bag filled with well-wetted material would be substantially heavier.)

3. If the bag or other container is transparent:

* Visually inspect the contents of the unopened bag for evidence of moisture (e.g., water droplets, water in the bottom of the bag, a change in the color of the material due to water).

* Without opening the bag, squeeze chunks of debris to ascertain whether moisture droplets are emitted.

* If the material appears dry or not penetrated with liquid or a wetting agent, open the bag using the additional steps described in step 9 below, and collect a bulk sample of each type of material in the bag ascertaining variations in size, patterns, color and textures.

9. If the waste material is contained in an opaque bag or other container, or if the material is in a transparent bag which appears to be inadequately wetted:

* Carefully open the bag (in the containment area, if possible). If there is no containment area at the site, a glove bag may be used to enclose the container prior to opening it to minimize the risk of any fiber release.

Continued

Moreover, as discussed below, it was eminently reasonable for Judge Bullock to rely on the observations of Inspector Foster to determine whether the RACM had been adequately wetted. *See United States v. MPM Contractors, Inc.*, 767 F. Supp. 231, 233 (D. Kan. 1990); *Ocean State*, 7 E.A.D. at 530 (finding that Respondent failed to demonstrate that any factual findings made by the Presiding Officer were not supported by a preponderance of the evidence once due deference was given to the Presiding Officer's observation of the witnesses). We articulated our position with respect to relying on the testimony of inspectors in determining liability under the asbestos NESHAP regulations in *Echevarria*. *See Echevarria*, 5 E.A.D. at 639-40. We stated:

> It is difficult to imagine how the asbestos NESHAP enforcement program, or many of the other enforcement programs conducted by the Agency, could be of any effect if an inspector's credible observations were not probative evidence of a violation. When an inspector trained to determine compliance with the applicable regulations reasonably determines that a violation has occurred and provides a rational basis for that determination, liability should follow, absent proof that the inspector's testimony lacks credibility.

Id. Consistent with the supporting evidence presented in *Echevarria*, Inspector Foster's testimony was corroborated by his inspection report and photographs,[11] which were admitted into evidence. *See Echevarria*, 5 E.A.D. at 640. None of the issues raised by Respondents persuade us that it was erroneous for Judge Bullock to rely on the observations made by Inspector Foster.

2. *Superintendent Hefner's Letters*

Respondents also dispute Judge Bullock's conclusions with respect to the letters Superintendent Dave Hefner sent to Inspector Foster and Region III's Mr. John Daley. Superintendent Hefner's letter to the Region's Mr. John Daley states in pertinent part:

> After [Inspector Foster's] inspection of the asbestos in the bags located in the dumpsters, it was evident that we had a problem with the

---

(continued)

> * Examine the contents of the bag for evidence of moisture as in 8 above, and if the material appears dry or it is not fully penetrated with water or a wetting agent, collect a bulk sample.
>
> * Reseal the bag immediately after evaluating and sampling its contents.

Ex. C-12, §§ 8-9.

[11] The photographs taken by Inspector Foster reveal that the ACMs inside the bags he examined were dry. *See* Init. Dec. at 13; *see also* Ex. C-15, photos 1-7.

> quantity of water in the bags. After the inspection, we investigated the situation and found that the water pressure coming from the 3rd floor up to the 5th floor was greatly reduced and ineffective for proper wetting of the materials. We had just begun bulk removal in this containment and unfortunately [sic] the men had not informed us of the problem. The workers made an attempt to wet the materials with the airless sprayers, this was not effective. After notifying the Fort Martin Power Station of the problem they immediately gave permission to utilize the fire main. This corrected the problem immediately.

Ex C-16.[12]

Judge Bullock found that these letters indicate that the materials in the bags were not adequately wet at the time of stripping. *See* Init. Dec. at 10-12. Respondents disagree, and attempt to characterize the letters as responses to comments made by Inspector Foster following the investigation. *See* Resp. Brief at 6. They assert that the letters were not an admission of violation of any of the asbestos NESHAP regulations. *See id.* at 6-7. Rather, the letters were simply meant to inform the recipients that Mr. Hefner was acting based on Inspector Foster's statements at the post-inspection meeting. *Id.* at 7.

The letters refer to the problems with the water supply on the morning of April 12, 1995. With respect to the statement made in the letters regarding the inadequacy of the airless sprayers in wetting the material, Superintendent Hefner stated at the hearing that he made that statement based entirely on Inspector Foster's judgment about the amount of water that needed to be put in the bags, not his own. Trans. at 291-301. After considering the testimony of Superintendent Hefner, Judge Bullock determined that the language of the letters does not support Superintendent Hefner's assertion, but instead "support[s] the inference that the material was not adequately wet during stripping." Init. Dec. at 11-12.

In addition to the language of the letters, Judge Bullock based his conclusion regarding their meaning on the context of the surrounding circumstances. *Id.* As further evidence that the materials were not adequately wet during stripping, Judge Bullock relied on statements made by Choice and Allegheny representatives during a post-inspection meeting that they were having trouble with the water supply; the fact that after Inspector Foster's inspection, Respondents obtained permission from the fire chief to use the fire main; and the failure of Respondents to present any witnesses who had directly observed the use of airless

---

[12] Similarly, the letter to Inspector Foster detailed the problems with the water supply and further stated that "Choice Insulation has stepped up every effort to inspect all phases of the asbestos removal process to prevent any further incident." *See* Ex. C-5.

sprayers during the stripping operation on the morning of the inspection and could testify that they were effective in adequately wetting the materials. *Id.*

We agree with Judge Bullock's conclusions that the letters and other evidence support the inference that the RACM was not adequately wet during stripping and find no clear error in his determinations regarding the credibility of Superintendent Hefner. *Cf. supra* note 6.

3. *Challenge to Time of Inspection*

In their Appellate Brief, Respondents assert that EPA decisions demonstrate that in order to find a violation of 40 C.F.R. § 61.145(c)(3), an inspector must observe and test asbestos materials that were "removed" (stripped) on the *date* of the inspection. Resp. Brief at 15. Respondents further assert that a preponderance of the evidence does not support Judge Bullock's conclusion that the bags Inspector Foster examined contained RACM that was stripped on April 12, 1995. *Id.* at 11-12. They allege that the only bag that definitely contained material that was removed on the morning of April 12 was located outside the containment area and was described by Inspector Foster to be "heavy laden with water." *Id.* at 12.

According to Respondents, "Inspecting ACM that was removed before the day of the inspection is not sufficient to establish a violation of 40 C.F.R. § 61.145(c)(3)." *Id.* at 15-16 (emphasis omitted). Respondents contend that to find otherwise violates EPA precedent set forth in *In re D & H Contractors, Inc.*, Dkt. No. CAA-III-022 (ALJ, Dec. 22, 1993) and *In re Ace Environmental, Inc.*, Dkt. No. CAA-III-093 (ALJ, June 24, 1999). *Id.* at 16-17.

Respondents mischaracterize the holding of *D & H Contractors*. In *D & H Contractors*, the inspector was not present at the site while stripping was occurring. He arrived at the abatement site on a morning before the day's stripping operations commenced and observed ACMs on the roof of and lying on the ground around the facility from which they were being removed. *See D & H Contractors*, ALJ slip op. at 3. In his decision, the Presiding Officer stated that the words "during the stripping operation" should be given their plain meaning. *Id.* at 15. The Presiding Officer, therefore, first found that the inspector was not there "during the stripping operation" in accordance with 40 C.F.R. § 61.145(c)(3). *Id.* at 15-16. Contrary to Respondents' view, this does not, however, conclude the analysis. As the Presiding Officer made clear in *D & H Contractors*, the next question to ask when an inspector is not actually present "during the stripping operation" is "whether inferences may be drawn from [an inspector's] observations * * * which would be sufficient to establish that the RACM was not adequately wet when it was being stripped on a previous day." *Id.* at 16.

Respondents also cite *Ace Environmental* in support of their contention that "finding that a violation of § 61.145(c)(3) of NESHAP has occurred can only be

based on an inspection of a facility if the inspection was made during the stripping operations." Resp. Brief at 17 (quoting *Ace Envtl.*, ALJ slip op. at 5-6 (following the rationale in *D & H Contractors*, and stating, with respect to asbestos materials left out in the open, that the discovery of dry asbestos materials the day after stripping occurred is not enough to establish that the asbestos materials were not adequately wet when stripped)). In *Ace Environmental*, the asbestos materials observed by the inspector were found exposed to the open air at various locations on the premises. *See Ace Envtl.*, ALJ slip op. at 3-4. The Presiding Officer determined that a preponderance of the evidence, based on the inspector's observations alone, failed to establish that Ace Environmental failed to adequately wet the RACM during the stripping operation in violation of 40 C.F.R. § 61.145(c)(3). *See id.* at 6.

While Respondents argue that as a matter of law a finding of violation of § 61.145(c)(3) cannot be made unless an inspection took place during the stripping operation, we disagree. As the Presiding Officer made clear in *D & H Contractors*, there is no such legal requirement. *See D & H Contractors*, ALJ slip op. at 16. Rather, in *D & H Contractors*, the Presiding Officer based his conclusion as to whether the RACM at the site was wetted during the stripping activities on the weight of the testimony and evidence presented. *See id.* at 17-18 (finding that evidence was insufficient to establish that the RACM was not adequately wet during the stripping operation in light of the inspector's testimony that he did not know whether water was used during stripping, along with the testimony of workers from the site who stated that the materials were wetted during stripping).

Unlike the RACM in *D & H Contractors* and *Ace Environmental*, which was left out in the open air overnight, the RACM Inspector Foster examined was in gooseneck, air-tight bags.[13] At the hearing Superintendent Hefner provided testimony regarding the manner in which the RACM was removed from the facility. *See* Trans. at 334-36. Superintendent Hefner stated:

> The procedures were to remove the metal jacketing on the pipes inside the containment to expose the asbestos-containing material. The workers would use the airless sprayer to apply water to the exterior of that covering, then they would cut the wires that hold the covering on the pipe and then spray any areas that had not contacted water which would be the inside layer of the material that touched the pipe. And that piece would then be handed down to another individual that would place it in a bag and continue wetting that material, and then

[13] At the hearing before Judge Bullock, Inspector Foster stated that the bags were leak tight, made of yellow poly, and sealed with duct tape. Trans. at 42. Inspector Foster stated that the "duck [sic] tape was wrapped around them in a gooseneck style, was turned back over and then wrapped again." *Id.* at 42-43.

> * * * it would go to the bag out area. And they would give it an additional shot of water on the tape, and then that bag would then be handed out into the actual bag out room and placed into another bag that has not been inside the containment and is not contaminated, and then that bag is sealed with duck [sic] tape and then taken out for disposal.

Trans. at 334-35. If, as stated by Superintendent Hefner, the material that was stripped was *promptly* bagged, if properly wetted it should have still been wet at the time of Inspector Foster's inspection. *See Ocean State,* 7 E.A.D. at 533; *see also* Init. Dec. at 9. Given the manner in which the RACM was contained it could not have dried as the result of evaporation. The RACM in the air-tight bags, therefore, must have been inadequately wet during stripping.

4. *Air Monitoring Data*

Respondents also allege that Judge Bullock incorrectly weighed the air monitoring data presented by Respondents, as well as the testimony of Mr. James Prettyman, an employee of Allegheny who provided air monitoring services for Choice, regarding the meaning of that data. *See Resp. Brief* at 13. Respondents assert that, contrary to legal authority, Judge Bullock gave the air monitoring data no weight. *See id.* They also assert that Judge Bullock misinterpreted the testimony of Mr. Prettyman regarding the data, thereby ignoring Respondents' key point that "very low" asbestos levels were evidence that the RACM was adequately wetted during stripping. *See id.*

Regardless of Judge Bullock's interpretation of Mr. Prettyman's testimony, Judge Bullock was correct in pointing out that "case law indicates that air monitoring data is not determinative in assessing whether asbestos material has been adequately wet." Init. Dec. at 12 (citing *In re Schoolcraft Constr., Inc.*, 8 E.A.D. 476, 468-88 (EAB 1999)). There is no requirement that the Region prove that asbestos actually became airborne to show a violation of the asbestos NESHAP regulations. Case law provides that it is the failure to follow asbestos NESHAP work practice standards that creates liability. *See United States v. Ben's Truck and Equip., Inc.*, Civ. No. S-84-1672-MLS, 1986 WL 15402, at *4 (E.D. Cal. May 12, 1986) (stating that the failure to follow the work practice standards, rather than the release of visible emissions, creates liability). *Accord Schoolcraft,* 8 E.A.D. at 487.

For the foregoing reasons, we affirm Judge Bullock's finding that Respondents violated 40 C.F.R. § 61.145(c)(3) by failing to adequately wet the RACM during the stripping operation. *See* Init. Dec. at 9 (stating that "the discovery at the Facility of dry RACM in leak tight bags supports the inference that the RACM had not been adequately wet during stripping"). The evidence in the record, espe-

cially the testimony of Inspector Foster and the letters of Superintendent Hefner, adequately supports Judge Bullock's conclusions.

B. *Count II*

In Count II of its Complaint, the Region asserts that dry RACM which was collected and stored in an outdoor storage dumpster was not adequately wetted in compliance with asbestos NESHAP regulation, 40 C.F.R. § 61.145(c)(6)(i). Complaint ¶¶ 30, 31. That regulation states that "[f]or all RACM, including material that has been removed or stripped," the owner or operator of a demolition or renovation activity must "[a]dequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with § 61.150." 40 C.F.R. § 61.145(c)(6)(i). Judge Bullock determined that Respondents had indeed violated this regulatory requirement. In an effort to demonstrate that Judge Bullock's conclusions are not supported by a preponderance of the evidence, Respondents contend that once RACM is bagged, 40 C.F.R. § 61.150(a)[14] applies, not § 61.145(c)(6)(i). *See* Resp. Brief at 21. The Region here did not allege an independent violation of 40 C.F.R. § 61.150.

Respondents identify two sources of legal authority that they claim state that 40 C.F.R. § 61.145(c)(6)(i) does not apply to RACM that has already been bagged. Respondents cite to a Federal Register final rule which provides an interpretation of 40 C.F.R. § 61.147(e)(1) (now § 61.145(c)(6)(i)). The interpretation states:

> The intent of the requirement to keep friable asbestos materials wet during all remaining stages of demolition was to ensure that the asbestos materials that have been removed or stripped but not yet disposed of are not allowed to dry out so that asbestos fibers become airborne. If they are properly sealed in leak-tight containers or bags while wet, they should not dry out before they can be transferred to an acceptable disposal site. In any case, after they are bagged, the waste disposal requirements in § 61.152 [now § 61.150] (and not § 61.147) would apply to the handling of the asbestos materials. To clarify the meaning

---

[14] Section 61.150 provides in part that each owner or operator shall:

> (a) Discharge no visible emissions to the outside air during the collection, processing (including incineration), packaging, or transporting of any asbestos-containing waste material generated by the source, or use one of the emission control and waste treatment methods specified in paragraphs (a)(1) through (4) of this section.
>
> * * * * * * *
>
> (iii) After wetting, seal all asbestos-containing waste material in leak-tight containers while wet; or, for materials that will not fit into containers without additional breaking, put materials into leak-tight wrapping * * *.

> of this portion of the standard, the wording of § 61.147(e)(1) has been revised to indicate that the asbestos materials must be kept wet until they are collected for disposal in accordance with § 61.152. They would be considered "collected" when they are properly bagged.

National Emission Standards for Hazardous Air Pollutants; Amendments to Asbestos Standard, 49 Fed. Reg. 13,658, 13,659 (Apr. 5, 1984) (codified at 40 C.F.R. pt. 61).

Respondents also assert that the Presiding Officer's decision in *In re Echevarria*, Dkt. No. [CAA X]-1091-06-13-113 (ALJ, Dec. 22, 1993), *aff'd*, 5 E.A.D. 626 (EAB 1994) supports its position that RACM contained in leak-tight bags[15] is not subject to 40 C.F.R. § 61.145(c)(6)(i). Resp. Br. at 19-21. The Initial Decision in *Echevarria* examined § 61.145(c) with respect to both bagged and unbagged RACM. With regard to the unbagged RACM, the Presiding Officer determined that Respondents had a responsibility to adequately wet the RACM until it was "collected and contained." *Echevarria*, ALJ slip. op. at 30. Relying on the language of the portion of the Federal Register quoted above, the Presiding Officer in *Echevarria* determined that while the requirements of § 61.145(c) did apply to the stripped pipe insulation that was lying on the floor, it did not apply to the "wet magnesium block RACM which was found sealed in a leak tight bag." *Id.* at 30-31.

In response to Respondents' arguments, the Region states that the Presiding Officer's decision in *Echevarria* hinged on the words "properly bagged" as used in the Federal Register statement quoted above. *See* Compl. Reply at 36-37. The Region asserts that it was because the RACM observed in the leak-tight bags was *wet* that it was considered "properly bagged" and therefore outside the scope of 40 C.F.R. § 61.145(c)(6)(i). *Id.* at 37.[16] In this case, however, liability does not turn on the point in dispute between the parties. Reliance on the Region's interpretation of the relationship between §§ 61.145(c)(6)(i) and 61.150 is unnecessary to uphold Judge Bullock's determination of liability in this matter.

---

[15] Under the asbestos NESHAP regulations, "*[l]eak-tight* means that solids or liquids cannot escape or spill out. It also means dust-tight." 40 C.F.R. § 61.141.

[16] The appeal to the Board from the Presiding Officer's Initial Decision in *Echevarria* was limited to the Presiding Officer's determinations regarding the ACMs that were found unbagged and lying on the ground. *See Echevarria*, 5 E.A.D. at 631 n.4, 644. Addressing a factual situation much different than the one currently before us, we stated in *Echevarria* that "[t]he requirements in § 61.145(c)(6)(i) apply to asbestos-containing material that has been stripped or removed *before* it is collected or contained for disposal. 49 Fed. Reg. 13,659 (Apr. 5, 1984). The requirements of § 61.150 apply to the material only *after* it has been collected or contained for disposal. *Id.*" *Echevarria*, 5 E.A.D. at 644. Accordingly, our Final Decision in *Echevarria* did not decide when materials have been "collected or contained for disposal."

Regardless of whether the RACM in the bags in the dumpster was covered under 40 C.F.R. § 61.145(c)(6)(i) or § 61.150 at the time of Inspector Foster's inspection, the evidence in this case establishes that Respondents violated the wetting requirement contained in § 61.145(c)(6)(i).[17] Because the materials examined by Inspector Foster in the dumpster were not adequately wet and were sealed in leak-tight bags, we conclude that there is a reasonable inference that before they were placed in the bags they also had not been adequately wetted. *See In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 532-33 (EAB 1998). Accordingly, the materials were not adequately wetted "until collected and contained or treated in preparation for disposal in accordance with § 61.150." 40 C.F.R. § 61.145(c)(6)(i).

In re Ocean State Asbestos Removal, Inc., Dkt. No. CAA-I-93-1054 (ALJ, Jan. 24, 1997), *aff'd*, 7 E.A.D. 522 (EAB 1998) directly addresses the issue currently before us. The Respondent in *Ocean State* was charged with a violation of 40 C.F.R. § 61.145(c)(6)(i). The RACM at issue in *Ocean State* was contained in airtight bags that were located in a dumpster, as well as in the project's containment area. *See Ocean State*, 7 E.A.D. at 525. There was no evidence that the material in the bags had been adequately wet. *Id.* at 530-33. In determining whether a violation of the regulation had occurred, the Presiding Officer first stated that if the material had been wet when bagged it would still have been wet when the inspector opened the bags. *See Ocean State*, ALJ slip. op at 5. The Presiding Officer further stated:

> [I]t is enough to find a violation if the material is dry at any time before it is transported from the facility for disposal. The intent of these NESHAP provisions is to ensure that RACM is wetted when placed in leak-tight bags, and that it remains wet until disposal. The final collection for disposal had yet to take place so long as the bags remained on site. In addition, if the material had been wet when bagged, it could only dry out if the bag was not airtight. That itself would be a violation of § 61.150, which is incorporated into § 61.145.

Id. In upholding the Presiding Officer's decision, we stated:

> Because the evidence showed that RACM in two poly bags was not adequately wet at the time of the inspection * * *, the Region sustained its burden of proof that Ocean State II violated its duty to assure that the RACM remained wet until disposal. While the Presiding Officer's finding that the RACM was not adequately wet at the time

[17] Although we do find that Respondents committed a violation of the work practice standard contained in 40 C.F.R. § 61.145(c)(6)(i), we further find that a reduction in the penalty assessed for this violation is appropriate. *See infra* part II.C.

> of the inspection is sufficient, standing alone, to support the Presiding Officer's determination of liability, the Presiding Officer made additional, alternative findings of fact that the RACM was not adequately wet when bagged. We review these findings as alternative grounds for the Presiding Officer's determination that Ocean State violated the work practice standards of the Asbestos NESHAP, and we find there is no error in the Presiding Officer's alternative factual findings.

Ocean State, 7 E.A.D. at 532-33 (citation omitted).

For the same reasons articulated in our Final Decision in *Ocean State*, we now uphold Judge Bullock's determination that Respondents failed to keep the RACM adequately wet pursuant to § 61.145(c)(6)(i), based upon the fact that the materials in the leak-tight bags were not adequately wet as observed by Inspector Foster.[18] If the RACM was wet when it was placed in the airtight bags, it still would have been wet at the time the bags were opened during Inspector Foster's inspection. Accordingly, Judge Bullock was correct in determining that Respondents failed to keep the RACM adequately wet until disposal in accordance with 40 C.F.R. § 61.145(c)(6)(i). *See* Init. Dec. at 14.

C. *Penalty*

Under section 113(d)(1) of the Clean Air Act, 42 U.S.C. § 7413(d)(1), the Administrator is authorized to assess civil penalties against violators of the Clean Air Act. Clean Air Act section 113(d) provides in pertinent part:

> (1) The Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to $25,000, per day of violation, whenever, on the basis of any available information, the Administrator finds that such person -
>
> * * * * * * *

---

[18] Based upon the Board's decision in *Ocean State*, Judge Bullock found that Respondents violated 40 C.F.R. § 61.145(c)(6)(i). In this regard, Judge Bullock stated:

> [O]nce it has been established that RACM was not adequately wet at the time of the inspection, the Region has sustained its burden of proof regarding an alleged failure to keep RACM adequately wet until disposal. The asbestos material discovered by Mr. Foster was not adequately wet as demonstrated by his photographs and testimony in the record. In addition, it is clear from Mr. Hefner's letters * * * that the RACM had not been adequately wet at any point in the stripping operation at the Facility----from the time the material was actually being stripped from the Facility components until the point when the bagged material left the containment area to be stored for disposal.

Init. Dec. at 14 (citation omitted).

> (B) has violated or is violating any other requirement or prohibition of this subchapter * * *.
>
> * * * * * * *
>
> (e)(1) In determining the amount of any penalty to be assessed under this section * * *, the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence * * *, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C. § 7413(d)-(e). The implementing regulation for Clean Air Act section 113 states:

> (b) *Amount of civil penalty*. If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act.

40 C.F.R. § 22.27(b).

Agency-issued penalty policies provide a framework that allows a presiding officer to apply his or her discretion to statutory penalty factors, thereby facilitating a uniform application of the factors. *See In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 374 (EAB 1994) (citing *In re ALM Corp.*, TSCA Appeal No. 90-4 (CJO, Oct. 11, 1991)). The Agency has developed penalty guidelines for Clean Air Act violations. They are contained in the Clean Air Act Stationary Source Civil Penalty Policy and Appendices ("CAA Penalty Policy"). *See* Ex. C-11. Appendix III of the CAA Penalty Policy is entitled Asbestos Demolition and Renovation Civil Penalty Policy ("Asbestos Penalty Policy"). To determine an appropriate penalty, the Asbestos Penalty Policy states:

> [T]he Region should determine a "preliminary deterrence amount" by assessing an economic benefit component and a gravity component. This amount may then be adjusted upward or downward by consideration of other factors, such as degree of willfulness and/or negligence, history of noncompliance, ability to pay, and litigation risk.

Id.

In determining an appropriate penalty, we have held that a presiding officer must consider the Agency's applicable penalty policy. *See In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 535 (EAB 1998); *see also Great Lakes*, 7 E.A.D. at 374. The presiding officer is not, however, required to adhere to the penalty policy as long as the reasons for the departure are explained. *See Ocean State*, 7 E.A.D. at 535. Moreover, the applicable regulations grant us the authority to either increase or decrease a penalty assessed by the presiding officer. *See* 40 C.F.R. § 22.30(f) ("The Environmental Appeals Board may assess a penalty that is higher or lower than the amount recommended to be assessed in the decision or order being reviewed or from the amount sought in the complaint * * *.").

As stated previously, the penalty requested in the Region's Complaint was $74,000. Because Respondents produced waste disposal records which indicated that RACM was disposed of prior to Inspector Foster's April 12, 1995 inspection, the Region requested a reduction in the penalty to $32,000. *See* Motion to Amend Penalty ¶¶ 2, 3, 6. Judge Bullock granted the Region's request on November 6, 1998.

At the hearing, the Region described the factors it considered in determining the amount of the penalty sought. Mr. Richard Ponak, an environmental scientist with EPA who has been calculating penalties under the Clean Air Act since 1991, stated that in determining the amount of the proposed penalty for Count I in this matter he first calculated and considered "the number of units of asbestos involved in the violation." Trans. at 188. Using Dun and Bradstreet reports,[19] he then considered the size of the business. *See id.* at 191. Finally, he considered the prior compliance history of the parties in determining a penalty of $15,000 for Count I. *See id.* at 191-202. A similar analysis was used in determining the proposed penalty amount of $15,000 for Count II. *See id.* at 206. Based on the size of Choice, the Respondent considered by the Region to be more culpable, an upward adjustment of $2,000 was added. *See id*. at 212-13. Judge Bullock determined that the proposed penalty amounts were consistent with the violations committed by Respondents and assessed a penalty of $32,000 jointly and severally against Respondents. *See* Init. Dec. at 18.

In their Appellate Brief, Respondents assert that Judge Bullock violated Clean Air Act § 113(e) by failing to consider the economic impact of the penalty on their respective businesses, full compliance history, good faith efforts to comply, duration of the violation, payment of penalties previously assessed for the

---

[19] The Dun & Bradstreet report is a public report generally consulted by the Agency when examining a size of violator penalty. *See* Trans. at 209-10. The report can sometimes show the potential net worth of a company. *See id*. Mr. Ponak testified that the Dun & Bradstreet report's information regarding Choice's net worth was "inconclusive." *See id.* at 211.

same violation, and the economic benefit of non-compliance. Resp. Br. at 22-23. Respondents' brief lists these statutory criteria without providing support or explanation for their assertion that Judge Bullock failed to consider these factors. *Id.* We shall examine the Initial Decision and the record in this matter to determine whether Judge Bullock adequately considered the statutory penalty factors in making his penalty determination.

Respondents' allegation regarding Judge Bullock's failure to take these factors into account fails to refute the testimony of Mr. Ponak. At the hearing, Mr. Ponak clearly stated that the Region took all of these factors into consideration in determining an appropriate penalty in this matter. *See* Trans. at 214-17. For example, as stated previously, after reviewing waste manifest records produced by Respondents, the Region reduced the number of days of violation sought to one.[20] *See id.* at 202-03. Mr. Ponak stated that, after consideration of the issue, no adjustment was made to the amount of the penalty based upon the Region's consideration of the economic benefit of noncompliance. *See id.* at 207. Mr. Ponak further testified that neither Choice nor Allegheny had already paid any fines for the violations alleged in the Complaint. *See id.* at 214. Mr. Ponak also stated that the Region relied on sales information obtained from Dun & Bradstreet to assist in the Region's consideration of the economic impact of the penalty on Choice. *See id.* at 215-16.

With respect to Choice's alleged good faith efforts to comply with the asbestos NESHAP regulations, the Region speculated that had Inspector Foster not visited the site, Choice would have continued its abatement work in violation of the asbestos NESHAP regulations. *See id.* at 214. As evidenced by the hearing testimony, as well as Judge Bullock's Initial Decision, it is clear that Respondents' full compliance history, which included a consent agreement that resulted from alleged violations in 1992 of the same asbestos NESHAP regulations at issue here, was taken into account in determining the penalty in this matter.[21] *See id.* at 191 and Ex. C-7; *see also* Init. Dec. at 16-17.

---

[20] More specifically, Mr. Ponak stated that the 24 hour time period prior to Inspector Foster's inspection served as the basis for the Region's assessment of a single day of violation. *See* Trans. at 203, 206. At the hearing, Mr. Ponak testified that he considered the day before the inspection "because there was 325 bags there at 9:25 in the morning when Mr. Foster was there, and all that could not have been done that morning." Trans. at 203-04.

[21] The Joint Stipulations filed by the parties on November 12, 1998, reference the 1992 consent agreement. *See* Joint Stip. ¶¶ 35-37. The details of that matter are as follows:

> 35. Choice was a Respondent in an administrative action brought by EPA on August 14, 1992 * * * involving alleged violations of the asbestos NESHAP work practice regulations which occurred during an asbestos abatement project at the Willow Island Power Station, Willow Island, West Virginia. That action involved, among other alleged violations, failure to adequately wet RACM during stripping operations in viola-

Continued

Given the testimony regarding the inclusion of these factors in arriving at the proposed penalty amounts, we determine that the penalty assessed by Judge Bullock is consistent with Clean Air Act § 113, its implementing regulations, the CAA Penalty Policy, and the Asbestos Penalty Policy. Accordingly, we reject Respondents' challenge to the penalty assessed.

We do, however, reduce the penalty on other grounds. While we determine that Respondents violated 40 C.F.R. § 61.145(c)(6)(i), our review of the record compels us to reduce the penalty for Count II. Judge Bullock assessed a penalty of $15,000 for Respondents' violation of Count II. Because a penalty is already being assessed for failure to wet the asbestos materials during stripping and because the period of time between the stripping of the asbestos materials and their placement in the bags was relatively short,[22] we find that a departure from the CAA Penalty Policy and a reduction in the penalty to $3,000, consistent with a consideration of the statutory penalty factors set forth in 42 U.S.C. § 7413(d)-(e), is appropriate. *See also In re Employers Ins. Group of Wausau and Group Eight Tech., Inc.*, 6 E.A.D. 735, 759 (EAB 1997) ("ALJ could * * * have rejected an 'appropriate' penalty generated in accordance with the Penalty Policy, in favor of another 'appropriate' penalty better suited to the circumstances of this particular case"); *In re Rybond, Inc.*, 6 E.A.D. 614, 639 (EAB 1996) ("Under the circumstances of a given violation, reduction of a penalty assesment [sic] may be appropriate even if the penalty has been properly calculated in accordance with the Penalty Policy.")

We find that Respondents committed a clear violation of the asbestos NESHAP work practice standards by their failure to "adequately wet the RACM during the stripping operation." 40 C.F.R. § 61.145(c)(3). We also find that Respondents failed to ensure that the RACM remained "wet until collected and contained or treated in preparation for disposal." *Id.* § 61.145(c)(6). However, because the amount of time between stripping the RACM and placing it in the bags

---

(continued)

> tion of 40 C.F.R. Section 61.145(c)(3) and failure to keep stripped RACM adequately wet until collected for disposal in violation of 40 C.F.R. Section 61.145(c)(6)(i).
>
> 36. The other Respondent named in th[at] [matter] * * * was Monongahela Power Company. Monongahela Power Company is a subsidiary of Allegheny Energy, Inc. like Allegheny. Monongahela Power Company is one of the owners of the Facility.
>
> 37. EPA, Choice, and Monongahela Power Company settled the Monongahela matter in a Consent Agreement and Consent Order involving the payment of a civil penalty.

Id. ¶¶ 35-37.

[22] *See supra* part II.A.3 (quoting testimony of Superintendent Hefner). Superintendent Hefner testified that after the stripping was completed, the asbestos was promptly placed in leak-tight bags. Thus, unlike some other cases where materials were left laying around for long periods of time, the interval in this case was brief.

was so short, we find that the circumstances of this case warrant a reduction in the penalty for Count II. We do not find that a complete elimination of the penalty for Count II is appropriate.

The importance of the requirement to follow the asbestos NESHAP regulations' work practice standards was explained when work practice standards were reinstated by EPA in 1983.[23] As explanation for the proposed rule reinstating the requirement that asbestos removed during demolition or renovation be kept wet until disposal is completed, EPA stated:

> In order to meet no visible emissions during the collecting and transporting activities, [contractors] keep the asbestos wet until it is placed into containers and trucks, and they place it into containers as soon as possible to keep it from drying out and unnecessarily exposing workers to asbestos fibers. * * * EPA believes it is necessary * * * to ensure that effective asbestos emission control techniques are followed after the asbestos is stripped or removed and before it is taken away to a waste disposal site.

48 Fed. Reg. 32,126, 32,127 (July 13, 1983).[24]

Accordingly, based upon the importance of this requirement to the asbestos NESHAP regulatory scheme, we find that a penalty for violation of Count II is appropriate. Although the time period was short, Respondents could have taken steps following stripping to ensure the wetness of the RACM before it was placed in the bags. Therefore, pursuant to 40 C.F.R. § 22.30(f), we hereby assess a penalty for Count II of $3,000.

---

[23] On April 6, 1973, EPA promulgated the asbestos NESHAP regulations pursuant to Clean Air Act § 112. *See* 38 Fed. Reg. 8,826 (Apr. 6, 1973). Between 1974 and 1977 several amendments to these regulations were promulgated. *See* 39 Fed. Reg. 15,398 (May 3, 1974); 40 Fed. Reg. 48,299 (Oct. 14, 1975); 42 Fed. Reg. 12,127 (Mar. 2, 1977). Parts of the asbestos NESHAP regulations were in the form of work practice standards, which were held by the Supreme Court not to be emission standards within the meaning of § 112. *See Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978). On August 7, 1977, Clean Air Act § 112 was amended to specifically authorize work practice standards. *See* 43 Fed. Reg. 26,372 (June 19, 1978). *See also* 42 U.S.C. § 7412(h)(1) (stating that "if it is not feasible in the judgment of the Administrator to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants, the Administrator may, in lieu thereof, promulgate a design, equipment, work practice, or operational standard").

[24] The language of the demolition and renovations regulations to which the quote refers is slightly different than the language of the current regulations. The regulations as they currently exist provide more detail regarding the procedures to be used for demolition and renovation than the previous regulations.

III. *CONCLUSION*

For the foregoing reasons, we hereby uphold Respondents' liability for violation of the asbestos NESHAP regulations. A penalty of $20,000 is assessed jointly and severally against Respondents, Allegheny Power Service Corp. and Choice Insulation, Inc. Respondents shall pay the full amount of the civil penalty within 60 days of the date of service of this order. Payment shall be made by forwarding a cashier's check, or certified check payable to the Treasurer, United States of America, at the following address:

Mellon Bank
EPA Region 3
P.O. Box 360515
Pittsburgh, PA 15251-6515

So ordered.