UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Matter of:

Lyon County Landfill
Lynd, Minnesota

ORDER
Civ. No. 02-907 (JNE/JGL)

Jay D. Carlson, Esq., Ohnstad Twichell, P.C., and Richard Maes, Esq., Lyon County Attorney, appeared for Petitioner Lyon County Board of Commissioners.

Daniel R. Dertke, Esq., United States Department of Justice, appeared for Respondent United States Environmental Protection Agency.

The Lyon County Board of Commissioners petitions for review of a decision by the United States Environmental Protection Agency (EPA) to assess a civil penalty in the amount of $18,800 against Lyon County (County) for violations of section 112 of the Clean Air Act (CAA), 42 U.S.C. § 7412 (2000). For the reasons set forth below, the Court affirms the decision to penalize the County in the amount of $18,800.

I. BACKGROUND

On July 20 and 21, 1994, inspectors from the Minnesota Pollution Control Agency (MPCA) inspected the Lyon County Landfill (Landfill) in Lynd, Minnesota. Based on the inspection, the EPA initiated an administrative enforcement action in August 1996. In a six-count complaint, the EPA charged that Lyon County had violated section 112 of the CAA by failing to comply with the National Emission Standards for Hazardous Air Pollutants for Asbestos (asbestos NESHAP), 40 C.F.R. pt. 61, subpt. M (2003). In Counts I and II, the EPA alleges that the County allowed visible emissions to the outside air from an active waste disposal site where asbestos-containing waste material (ACWM) had been deposited and that the County failed to adequately cover ACWM on July 20 and 21, 1994, in violation of 40 C.F.R.

§ 61.154(a). Count III asserts that the County failed to maintain waste shipment records in violation of 40 C.F.R. § 61.154(e)(1)(iii). Count IV charges the County with failing to furnish upon request, and make available during normal business hours, a map or diagram showing the location, depth and area, and quantity of ACWM in violation of 40 C.F.R. § 61.154(i). Count V asserts that the County violated 40 C.F.R. § 61.154(f) by failing to maintain an updated map or diagram recording the location, depth and area, and quantity of ACWM. In Count VI, the EPA asserts that the County violated 40 C.F.R. § 61.154(j) by failing to notify the Administrator of the EPA (Administrator) at least 45 days prior to excavating or otherwise disturbing any ACWM that had been deposited. The EPA sought a civil penalty in the amount of $58,000.

After a two-day evidentiary hearing, an administrative law judge (ALJ) dismissed the case for lack of jurisdiction. The ALJ relied on 42 U.S.C. § 7413(d)(1), which provides in part:

> The Administrator's authority under this paragraph shall be limited to matters where the total penalty sought does not exceed $200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review.

In this case, the penalty sought did not exceed $200,000, the EPA initiated the administrative action more than 12 months after the alleged dates of violation, and the Administrator and the Attorney General determined that the case was appropriate for administrative penalty action. Notwithstanding the Administrator and Attorney General's joint determination, Lyon County asserted that the EPA lacked authority to issue an administrative order because the case did not involve a "longer period of violation." The ALJ interpreted the phrase to refer to the duration of an alleged violation rather than the time between the first date of a violation and the filing of a complaint. Because the violations at issue in this case did not continue for more than 12 months,

the ALJ concluded that the EPA lacked authority to issue an administrative order. Accordingly, the ALJ dismissed the complaint for lack of jurisdiction.

The EPA appealed and the Environmental Appeals Board (EAB) reversed the ALJ's interpretation of "longer period of violation." The EAB read the phrase to refer to a period of time greater than 12 months between the first date of a violation and the date of a complaint. The EAB remanded the case to the ALJ for consideration on the merits. On remand, the ALJ found Lyon County liable on all counts and imposed a penalty in the amount of $45,800. Lyon County appealed. The EAB affirmed the ALJ's findings of liability with respect to Counts I, II, III, and VI, reversed the ALJ's findings of liability with respect to Counts IV and V, and reduced the penalty to $18,800. The County sought review in this Court. *See* 42 U.S.C. § 7413(d)(4).

II. DISCUSSION

Lyon County identifies four issues in its petition for review of the EPA's decision: (1) whether 42 U.S.C. § 7413(d)(1) divested the EPA of administrative jurisdiction; (2) whether a public landfill is required to cover non-friable asbestos material received in less than threshold amounts from non-regulated sources; (3) whether the record supports the findings of fact and conclusions of law set forth in the EAB's decision for Counts I, II, and VI; and (4) whether a civil penalty assessment based on all alleged asbestos containing material received on the waste shipment manifests absent any evidence of work practice or emission violations, violates the due process of law rights of Lyon County and is an abuse of discretion. A court reviewing an administrative penalty order issued under section 7413(d)(1) shall not set aside or remand such order "unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the order . . . constitutes an abuse of discretion." 42 U.S.C. § 7413(d)(4).

A. Administrative jurisdiction

Lyon County argues that the EPA did not have jurisdiction to issue an administrative penalty order because the case does not involve a "longer period of violation" within the meaning of section 7413(d)(1). In response, the EPA raises three arguments. The EPA first argues that the CAA precludes judicial review of the decision to proceed administratively against the County. Judicial review of an administrative action is presumed to be available unless a statute evinces congressional intent to preclude such review:

> As a general rule, only a showing of "clear and convincing evidence" is sufficient to support a finding that Congress intended to preclude judicial review of an administrative action. This standard is not a rigid evidentiary test, however, but rather "a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative actions is controlling." This presumption does not control, however, where congressional intent to preclude judicial review is "fairly discernible" in the detail of the particular legislative scheme. Stated otherwise, the presumption may be rebutted by specific language that is a reliable indicator of congressional intent to preclude judicial review.

Ismailov v. Reno, 263 F.3d 851, 854-55 (8th Cir. 2001) (citations omitted). Here, the EPA relies on the following statutory text to support its argument: "Any such determination by the Administrator and the Attorney General shall not be subject to judicial review." 42 U.S.C. § 7413(d)(1). The determination referred to in that sentence is "that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action." *Id.* The Court readily discerns a congressional intent to preclude judicial review of the Administrator and the Attorney General's joint determination that a case involving a "larger penalty amount or longer period of violation" is appropriate for administrative penalty action. The Court does not, however, discern a congressional intent to preclude judicial review of whether an action involves a "longer period of violation." Section 7413(d)(1) circumscribes the EPA's authority to act under it. It does not preclude judicial review of whether the EPA acts

ultra vires. Accordingly, the Court rejects the EPA's contention that section 7413(d)(1) bars any judicial review of the EPA's assertion of authority under that paragraph. *Cf. Amgen, Inc. v. Smith*, 357 F.3d 103, 111 (D.C. Cir. 2004) ("The presumption is particularly strong that Congress intends judicial review of agency action taken in excess of delegated authority.").

The EPA next asserts that judicial review, if available, should be limited to whether the Administrator and Attorney General determined that the case was appropriate for administrative penalty action. Section 7413(d)(1) conditions the ability of the Administrator and the Attorney General to make such a determination on a case involving a "larger penalty amount or longer period of violation." As set forth above, the Court does not discern a congressional intent to preclude judicial review of whether the EPA acts beyond the scope of authority granted in section 7413(d)(1). Accordingly, the Court rejects the EPA's contention that the Court should not review whether the case against Lyon County involved a "longer period of violation."

Finally, the EPA maintains that if the Court considers whether the determination was properly made, then the Court should uphold the EAB's interpretation of "longer period of violation." Lyon County contends that the ALJ's initial decision properly construed the phrase. Resolution of this dispute involves two inquiries:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken on the issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (footnotes omitted). Administrative implementation of a statute qualifies for deference under *Chevron* "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Delegation of such authority may be shown by, for example, an agency's power to engage in adjudication. *Id.* at 227.

Statutory interpretation begins with the language of the statute itself. *Nordgren v. Burlington N. R.R.*, 101 F.3d 1246, 1250 (8th Cir. 1996). Statutory phrases are not read in isolation; statutes are read as a whole. *Id.* Here, section 7413(d)(1) limits the EPA's authority to act under it: (1) the total penalty sought must not exceed $200,000; and (2) the first alleged date of violation must have occurred no more than 12 months prior to the initiation of the administrative action. Section 7413(d)(1) also provides exceptions to the limitations imposed on the EPA's authority. Authority to act under section 7413(d)(1) may be extended to cases "involving a larger penalty amount or longer period of violation." The exceptions clause depends on the limitations initially imposed. A case involving a "larger penalty amount" is obviously one for which the EPA seeks a total penalty in excess of $200,000. A case involving a "longer period of violation" is plainly one whose period of violation exceeds 12 months. The issue remains: what constitutes a "period of violation" within the meaning of section 7413(d)(1)?

The Court discerns two permissible interpretations of "period of violation." The first provides a relatively narrow exception to the 12-month limitation. The Oxford English Dictionary (2d ed. 1989) defines "period" as a "course of extent of time." Accordingly, a

"period of violation" could be interpreted as the extent of time of violation—that is, a violation's duration. Under this interpretation, remote-in-time violations, violations whose first alleged date of violation took place more than 12 months prior to the administrative action's administration, could be pursued administratively only if they continued for more than 12 months. The other permissible interpretation of "period of violation" is that the phrase refers to the time period specified in the 12-month limitation. Again, the EPA's authority to act under section 7413(d)(1) is limited to cases where the first alleged date of violation took place no more than 12 months before the administrative action's commencement. The phrase "period of violation" appears in an exception to this limitation. Its qualification by the word "longer" indicates that the period of time specified in the limitation may be expanded. Accordingly, "period of violation" could reasonably be interpreted to be the time between the first alleged date of violation and the administrative action's commencement. Under this interpretation, the 12-month limitation imposed on the EPA's authority to act under section 7413(d)(1) could be waived without regard to the violation's duration.

Having discerned multiple, permissible interpretations of "period of violation" as used in section 7413(d)(1), the Court concludes that the statute is ambiguous with respect to the meaning of the phrase. The EAB interpreted "longer period of violation" to refer to a period of time greater than 12 months between the first date of a violation and the administrative action's commencement. Thus, its construction is permissible and the Court defers to it. *See Alaska Dep't of Envtl. Conservation v. EPA*, 124 S. Ct. 983, 1001 (2004) ("We have previously accorded dispositive effect to EPA's interpretation of an ambiguous CAA provision."). Because the case against Lyon County involved a "longer period of violation" and the Administrator and Attorney General jointly determined that the case was appropriate for administrative action, the

Court rejects the County's assertion that the EPA could not proceed administratively against the County. *See* 42 U.S.C. § 7413(d)(1).

B. Liability

1. Counts I and II

Under the asbestos NESHAP, an owner or operator of an active waste disposal site that receives ACWM from regulated sources must comply with 40 C.F.R. § 61.154. Here, the parties do not dispute that the Landfill is an active waste disposal site that received ACWM from regulated sources. Section 61.154 requires that there be "no visible emissions to the outside air from any active waste disposal site where [ACWM] has been deposited," compliance with the requirements of section 61.154(c), or satisfaction of section 61.154(d). 40 C.F.R. § 61.154(a). The asbestos NESHAP defines visible emissions in relevant part as "any emissions, which are visually detectable without the aid of instruments, coming from RACM [regulated asbestos-containing material] or [ACWM]." *Id.* § 61.141. Instead of meeting the no-visible-emission requirement, section 61.154(c) provides that ACWM shall be covered with certain materials. Section 61.154(d) allows for use of an alternative emission control method in place of meeting the no-visible-emission requirement.

In Counts I and II, the EPA charged that Lyon County had violated section 61.154(a) on July 20 and 21, 1994, by allowing visible emissions to the outside air from the Landfill where ACWM had been deposited without covering the ACWM in accordance with section 61.154(c). The ALJ's Findings of Fact provide in relevant part:

> 8. While inspecting the asbestos disposal area on July 20, 1994, the two [MPCA] inspectors observed ripped plastic bags, some with asbestos warning labels, and dry suspect ACWM on the surface of the asbestos disposal area and roadway leading to the disposal area. The inspectors also observed that when there were wind gusts in the asbestos disposal area, dust and particulate matter

> which was gray-brown, emanated from the area around the suspect ACWM, the broken bags, and the asbestos disposal area. . . .
>
> 9. The inspectors returned to inspect the Landfill on July 21, 1994, at approximately 11:20 a.m. While inspecting the asbestos disposal area on July 21, 1994, the two [MPCA] inspectors noted that since the previous day some of the disposal area and the suspect ACWM had been covered with dirt but that again they observed ripped plastic bags, some with asbestos warning labels, and dry suspect ACWM on the surface of the disposal area. During the July 21, 1994, inspection, the inspectors observed that when there were wind gusts in the asbestos disposal area, dust and particulate matter which was gray-brown, emanated from the area around the suspect ACWM, the broken bags, and asbestos disposal area. . . .
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> . . . .
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> 11. During their inspections on July 20 and 21, 1994, the two MPCA inspectors collected a total of six samples of suspect ACWM and took twenty-two photographs of the material they had observed at the Landfill. The samples were analyzed via polar light microscopy for asbestos content by the Braun Intertec Corporation. Each sample was found to contain asbestos. The total asbestos content for each of the samples ranged from five the thirty percent with at least one sample from each day of inspection containing ten percent or more asbestos.
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> 12. The Category I nonfriable asbestos-containing material ("ACM"), vinyl asbestos tile ("VAT"), observed and sampled by the inspectors on July 20, and 21, 1994, inspections was VAT or a part of VAT that had been subjected to grinding or cutting. The Category II nonfriable ACM, transite, observed and sampled by the inspectors on the July 20, and 21, 1994, inspections was transite or a part of transite that had become crumbled. This Category I nonfriable ACM and Category II nonfriable ACM were regulated asbestos-containing materials ("RACM(s)") as defined in 40 C.F.R. § 61.141.

Based on these findings, the ALJ concluded that Lyon County had violated section 61.154(a) on July 20 and 21, 1994, by allowing visible emissions to the outside air from ACWM without adequately covering the ACWM or using an approved emission control system. The EAB affirmed the ALJ's findings of liability on Counts I and II.

Lyon County contends that the findings of liability on Counts I and II should be reversed. It argues that the EAB misinterpreted the asbestos NESHAP and challenges the record's sufficiency. An agency's interpretation of its own regulation must be given controlling weight

unless it is plainly erroneous or inconsistent with the regulation. *Shalala v. St. Paul-Ramsey Med. Ctr.*, 50 F.3d 522, 527-28 (8th Cir. 1995).

Lyon County first argues that nonfriable ACM cannot constitute RACM. The asbestos NESHAP defines RACM as follows:

> [RACM] means (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. As the EAB observed, the definition of RACM clearly includes certain types of nonfriable ACM. Accordingly, the Court rejects the County's argument that nonfriable ACM cannot constitute RACM.

Even if the material observed by the inspectors was RACM, Lyon County argues that the inspectors did not observe ACWM because RACM at an active waste disposal site is not ACWM. The asbestos NESHAP defines ACWM:

> [ACWM] means mill tailings or any waste that contains commercial asbestos and is generated by a source subject to the provisions of this subpart. This term includes filters from control devices, friable asbestos waste material, and bags or similar packaging contaminated with commercial asbestos. As applied to demolition and renovation operations, this term also includes regulated asbestos-containing material waste and materials contaminated with asbestos including disposable equipment and clothing.

Id. According to the County, RACM is omitted by definition from ACWM with respect to an active waste disposal site. The EAB rejected the County's interpretation of ACWM:

> We reject the County's interpretation, which divorces the disposal site from its logical nexus to sources that generate asbestos-containing waste. Acceptance of the County's argument would create an enormous loophole in the asbestos NESHAP and potentially exempt a significant portion of asbestos waste from requirements for proper disposal. The Agency did not intend this result. To the contrary, . . . a principal reason that the Agency promulgated the active waste disposal site standard was to ensure the proper disposal of asbestos waste

> generated by demolition and renovation operations. Consistent with the regulatory scheme, which links generators of asbestos waste with owners or operators of active waste disposal sites, RACM continues to be regulated under the asbestos NESHAP at the disposal site as well. Therefore, in keeping with the Agency's intent at the time it drafted the revised definition of ACWM, we interpret the part of the ACWM referring to RACM as clarifying what kind of asbestos waste generated by demolition and renovation operations is subject to the asbestos NESHAP generally.

The EAB's interpretation of ACWM is neither plainly erroneous nor inconsistent with the asbestos NESHAP. Accordingly, the Court rejects the County's argument that RACM at an active waste disposal site does not constitute ACWM.

Lyon County also argues that a certain amount of ACWM must be present to establish a violation of section 61.154. Because the amount of ACWM observed by the inspectors did not exceed the threshold amount, Lyon County argues that the findings of liability on Counts I and II must be reversed. The EPA asserts that the standards for active waste disposal facilities do not incorporate any threshold. The EAB rejected Lyon County's argument: "We find the County's argument unpersuasive because such a threshold requirement is simply not provided for in [section 61.154]." The Court's review of section 61.154 reveals no threshold requirement in it.

Next, Lyon County contends that the EPA must trace the ACWM to a particular shipment from a regulated source. The EPA maintains it does not have to do so to establish a violation of section 61.154. The EAB held that section 61.154 does not require the EPA to trace ACWM to a particular regulated source:

> Again, we can find no reference to such a requirement in [section 61.154]. Indeed, the only applicability requirement is stated in the first part of the standard, and [Lyon County] has not contested that such an applicability showing was made. Moreover, while we agree with the County that certain asbestos waste is not regulated under the asbestos NESHAP, we hold that the County's choice to commingle its regulated asbestos waste with its non-regulated asbestos waste does not exempt the County from the asbestos NESHAP requirements.

(Citations omitted.) The Court's review of section 61.154 reveals no requirement to trace ACWM to a particular shipment from a regulated source.

As to Lyon County's challenge to the record's sufficiency, the record contains substantial evidence to establish the presence of "visible emissions to the outside air from any active waste disposal site where [ACWM] has been deposited." The inspectors testified at length about their observations of ACWM on the surface of the Landfill on July 20 and 21, 1994. Dust and debris emanated from areas where they observed ACWM. Emissions from the ACWM were described as "puffs of gray-brown kind of dust swirling around in the [asbestos disposal] area" and as a "brownish-gray type of swirling kind of cloud" that appeared to contain dust. The inspectors' observations provide substantial evidence of visible emissions. As noted above, the presence of visible emissions does not necessarily render Lyon County liable on Counts I and II. The County can avoid liability by complying with the coverage requirements set forth in section 61.154(c) or using an alternative emission control method under section 61.154(d). The inspectors testified at length about their observations of ACWM on the surface of the Landfill on July 20 and 21, 1994. The County did not use an alternative emission control method. In short, there is substantial evidence in the record to support the findings of liability on Counts I and II. Accordingly, the Court affirms the EAB's decision with respect to the findings of liability on Counts I and II.

2. Count VI

In Count VI, the EPA charged Lyon County with violating section 61.154(j) because the County allegedly failed to notify the Administrator at least 45 days prior to excavating or otherwise disturbing any ACWM that had been deposited at the Landfill. Section 61.154(j) requires an owner or operator of an active waste disposal site that receives ACWM from a

regulated source to "[n]otify the Administrator in writing at least 45 days prior to excavating or otherwise disturbing any [ACWM] that has been deposited at a waste disposal site and is covered." The definition of ACWM includes "bags or other similar packaging contaminated with commercial asbestos." 40 C.F.R. § 61.141. Commercial asbestos is defined as "any material containing asbestos that is extracted from ore and has value because of its asbestos content." *Id.* The ALJ's Findings of Fact provide in relevant part:

> 10. During the inspection on July 21, 1994, the inspectors observed exposed suspect ACWM that was not present at the asbestos disposal area on the previous inspection on July 20, 1994. In particular, the inspectors noted an ACWM disposal bag with an asbestos waste generator label from Tyler High School that was ripped open and lying exposed on the surface of the disposal area. This bag from Tyler High School was not observed on inspection of the asbestos waste disposal area on the July 20, 1994, inspection.

Because Lyon County excavated ACWM that had been covered without submitting the requisite notification to the Administrator, the ALJ concluded that the County had violated section 61.154(j).

On appeal to the EAB, the County argued that the record did not support such a finding. Based on the inspectors' observation of the bag that was ripped and no longer had a bottom, the presence of an asbestos generator label on the bag, and the existence of ACWM surrounding the bag, the EAB concluded that the bag contained ACWM and was contaminated with commercial asbestos. Because the inspectors had not seen the bag during the inspection of July 20, 1994, the EAB found that the bag had been buried and subsequently disturbed. The EAB noted that the Landfill did not receive any shipments of asbestos between July 20 and 21, 1994. For these reasons, the EAB affirmed the ALJ's finding of liability on Count VI.

Lyon County argues that it should not be held liable for violating section 61.154(j) because the bag was empty, was not introduced into evidence, and was not subjected to any

testing. Lyon County's argument ignores the other evidence in the record. As stated by the EAB, the EPA "did not need to enter the bag into evidence, since the record included testimony from the inspectors, an inspection report, and a photograph, all of which provide evidence to support the [EPA's] *prima facie* case." The bag's condition, the label on the bag, the existence of ACWM surrounding the bag, and the bag's appearance between the inspections on July 20 and 21, 1994, provide substantial evidence to support a finding that Lyon County violated section 61.154(j). Accordingly, the Court affirms the EAB's decision with regard to the issue of liability on Count VI.

C. Penalty

The CAA sets forth criteria that must be considered in the assessment of a penalty under section 7413:

> 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(e)(1). The EPA developed the Clean Air Act Stationary Source Civil Penalty Policy and Appendices (CAA Penalty Policy) to provide guidance in calculating penalties for violations of the CAA. Among the attachments to the CAA Penalty Policy is the Asbestos Demolition and Renovation Civil Penalty Policy, which applies the CAA's statutory factors to violations of the asbestos NESHAP by demolition and renovation operations. In this case, the ALJ looked to the Asbestos Demolition and Renovation Civil Penalty Policy to determine an appropriate penalty. Acknowledging that the policy is not expressly applicable to violations at

an active waste disposal site, the ALJ found its rationale and guidance to be "most useful and helpful" in determining a penalty. The EAB affirmed the ALJ's use of the policy.

Lyon County contends that the use of the policy to calculate the penalty is inappropriate. As noted by the EPA, the CAA Penalty Policy does not contain a separate policy applicable to active waste disposal sites. Having found that use of the CAA Penalty Policy resulted in a penalty that was too harsh, the ALJ consulted the Asbestos Demolition and Renovation Civil Penalty Policy for guidance. Under these circumstances, the Court concludes that the ALJ's use of the Asbestos Demolition and Renovation Civil Penalty Policy does not constitute an abuse of discretion.

1. Counts I and II

The ALJ considered the violations set forth in Counts I and II as work practice violations under the Asbestos Demolition and Renovation Civil Penalty Policy. Under the policy, a work practice violation may be classified as a first violation, a continuing violation of the first violation, a second violation, a continuing violation of the second violation, a subsequent violation, or a continuing violation of the subsequent violation. The ALJ concluded that the violation set forth in Count I was a first-time violation that continued for a second day. Based on the total amount of known ACWM received by the Landfill from May 2, 1994, the date of the most recent shipment of transite to the Landfill before the inspections, to July 21, 1994, the ALJ assessed a penalty in the amount of $16,500 for Count I. That amount consists of a penalty in the amount of $15,000 for a first-time violation and $1,500 for the continuation of the violation into a second day. As to Count II, the ALJ treated it as a first-time violation and imposed a penalty in the amount of $15,000. The EAB agreed with the ALJ's assessment of a penalty in the amount of $15,000 for a first-time violation on Count I, found that the findings of fact and

conclusions of law did not support the assessment of an additional first-time violation for Count II, and assessed a continuing violation penalty in the amount of $1,500 for Count II.

Lyon County objects to the assessment of a penalty based on the total amount of ACWM received by the Landfill from May 2, 1994 to July 21, 1994. According to the County, the penalty calculation is flawed because it is not based on the actual amount of ACWM that was improperly handled. Under the Asbestos Demolition and Renovation Civil Penalty Policy, the penalty "depends on the amount of asbestos involved in the operation, which relates to the potential for environmental harm associated with improper removal and disposal." The policy also provides that the penalty can be based on the amount of asbestos reasonably related to the improper practice where there is evidence that only part of a demolition or renovation project involved improper disposal or handling. In this case, the ALJ acknowledged that "the amount of asbestos involved in the operation" did not correlate directly to an active waste disposal site. The ALJ nevertheless considered the quantity factor to be particularly applicable by analogy. Waste shipment records revealed that the most recent shipment of transite to the Landfill before the inspections took place on May 2, 1994. The Landfill received shipments of VAT on July 1 and 8, 1994. In the absence of evidence demonstrating that some of the ACWM was properly handled, the Court finds no abuse of discretion in the assessment of a penalty based on the total amount of ACWM received by the Landfill from May 2, 1994 to July 21, 1994. Accordingly, the Court affirms the EAB's decision with regard to the penalties for Counts I and II.

2. Count III

The ALJ looked to the Asbestos Demolition and Renovation Policy to determine a penalty for Count III.[1] The policy suggests a penalty in the amount of $1,000 for waste shipment violations that involve failure to maintain records where other information regarding waste disposal is available. In cases where the missing information is not available from other sources, the policy suggests a penalty in the amount of $2,000. Although the waste shipment record for ACWM received from the Church of St. Michael did not include the quantity of ACWM in cubic yards, information about the quantity of ACWM was available from other sources other available. Accordingly, the ALJ concluded that a penalty in the amount of $1,000 was appropriate. The EAB agreed with the ALJ. The Court finds no abuse of discretion in the assessment of this penalty. The Court therefore affirms the penalty with respect to Count III.

3. Count VI

Using the Asbestos Demolition and Renovation Policy, the ALJ found that penalty in the amount of $15,000 was appropriate for Count VI. The ALJ reasoned that a significant penalty for a notification violation is warranted because notification is essential to the EPA's enforcement of the asbestos NESHAP. Although the EAB agreed with the ALJ that the violation charged in Count VI was significant, the EAB found that a penalty in the amount of $5,000 was more appropriate given the significant penalty assessed in Counts I and II. The Court finds no abuse of discretion in the EAB's decision to assess such a penalty. Accordingly, the Court affirms the EAB's decision with respect to the penalty for Count VI.

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[1] In Count III, the EPA alleged that Lyon County had violated section 61.154(e)(1)(iii) by failing to maintain waste shipment records. Specifically, the EPA asserted that a waste shipment record for ACWM received from the Church of St. Michael on May 19, 1994, did not include the quantity of ACWM in cubic yards. The ALJ found the County liable and the EAB affirmed. In its petition for review, Lyon County does not contest the finding of liability with respect to Count III.

4. Adjustment

After determining the penalty amounts for the individual counts, the ALJ considered adjustment factors set forth in the general CAA Penalty Policy. The ALJ determined that a reduction in the amount of $3,700 was appropriate. The parties did not appeal this determination to the EAB and do not contest the application of the reduction.

III. CONCLUSION

In short, the record contains substantial evidence to support the findings of liability and the assessment of a penalty in the amount of $18,800 is appropriate. Accordingly, IT IS ORDERED THAT:

1. The EAB's Final Decision and Order dated April 1, 2002, is AFFIRMED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: June 7, 2004

S/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge