

EPA alleges a violation of 40 C.F.R. 61.145(c)(6)(i) for failing to ensure that the removed RACM was kept adequately wet until it was collected for disposal. EPA seeks civil penalties totaling \$50,000 for these Clean Air Act violations. Coleman denies that it committed the violations and alternatively argues that the proposed penalty is excessive. A hearing was held on this matter in Cleveland, Ohio, on April 22-24, 1997.

For the reasons that follow, it is held that Coleman violated 40 C.F.R. 61.145(c)(3) and 61.145(c)(6)(i) as alleged. Furthermore, Coleman is assessed a civil penalty in the amount of \$30,000. 42 U.S.C. § 7413(d)(2)(A).

II. Facts

Coleman Trucking, Inc., is a small family-owned business engaged in asbestos abatement, lead abatement, and mechanical dismantling. The company's primary business, however, involves asbestos removal. Tr. 513. Coleman typically maintains a workforce of 15 to 20 employees, although it has had as many as 50 to 60 employees. Tr. 514.

The Heminger Job

This case involves the company's asbestos abatement work. On May 15, 1995, Coleman submitted a Notification of Demolition and Renovation to the Ohio Environmental Protection Agency. Compl. Ex. 13. In this notification of demolition and renovation, Coleman informed the Ohio EPA that it would be removing "regulated asbestos-containing material" from the boiler room of the Heminger Elementary School.⁽¹⁾ The Heminger School is located in Akron, Ohio. Specifically, Coleman stated that it would be removing approximately 60 linear feet of regulated asbestos-containing material, or RACM, from pipe fittings and 300 square feet of RACM insulation.⁽²⁾

The Heminger School job consisted of two phases. The first phase involved the removal of the RACM. The second phase involved the dismantling and removal of the boiler. Tr. 538. This case involves the first phase only. Coleman's asbestos removal work was monitored by the firm of Gandee and Associates ("Gandee"). Gandee was hired by the Akron City School District to oversee this asbestos removal project. Tr. 43, 537, 574. In fact, Gandee provided Coleman with written guidelines that the respondent was required to follow in its asbestos abatement work. Tr. 571; Compl. Ex. 49.

Coleman began work at the Heminger School on May 31, 1995. Tr. 569. Randall Bass, an asbestos abatement specialist, was in charge of Coleman's day-to-day operations at the Heminger site. Tr. 566-68. Bass began the site preparation on May 31 by setting up a negative air machine in the boiler room. Tr. 569. This negative air machine was designed to pull in and filter the air in the containment area. Tr. 573. In addition, Bass sealed the floor drains and all joints in the boiler room, as well as placing two layers of plastic, or "poly," on the walls and floor. Tr. 570-71.

After Coleman finished its pre-removal preparations, the boiler room containment area was inspected by Jarret Hightower, Gandee's on-site representative. Following his inspection, Hightower gave Bass the okay to proceed with the asbestos removal. Tr. 574.

Bass, along with two other Coleman workers, began to remove the asbestos from the boiler room on, or about, June 1, 1995. Tr. 575. While in containment, these employees wore Tyvex protective suits and full-face respirators. Tr. 576. They were also equipped with a hand pump sprayer and an airless sprayer. The airless sprayer is a low-pressure, high-volume, wetting apparatus. Tr. 198. It was described as a spray paint-like device which mists water into the air. According to Bass, this mist was intended to wet the containment area, including the asbestos-containing insulation. Tr. 577-78. Bass testified that the airless sprayer was used with Gandee's permission. Tr. 579.

The Inspection

On June 1, 1995, Mark Davis, an inspector with the Akron Regional Air Quality Management Division ("ARAQMD"), conducted an inspection of Coleman's Heminger School asbestos removal operation. (3) Tr. 182. This was an unannounced inspection precipitated by ARAQMD's receipt from the Ohio EPA of the Notice of Demolition and Renovation submitted by Coleman. Tr. 183, 254.

During this June 1 inspection, Davis was accompanied by Hightower, Gandee's on-site representative. Tr. 185, 375. Bass, Coleman's man-in-charge, joined Davis and Hightower approximately midway through the inspection. Tr. 396.

Davis testified that upon entering the boiler room containment area, he observed two Coleman workers removing insulation from a tank. One of the workers was prying off thermal block insulation with a crow bar, while the other worker was pulling on "mudded" insulation. Tr. 187. Thermal block insulation is a white, chalky material also known as "mag" insulation. The mudded insulation is insulation that is troweled on chicken wire type material. Mudded insulation holds in the heat from the boiler, as well as holding the thermal blocks in place. Tr. 189-90, 193.

Inspector Davis described the condition of the boiler room on June 1, as being dry, and that there was no sign of water being present. Tr. 187-88. In fact, there was no wetting equipment in the general area of the two Coleman workers. Tr. 189. Davis further testified that he felt the thermal and mudded insulation and that it was dry to the touch. Indeed, when Davis touched the thermal block, he got powder on his fingers. *Id.* Being able to crumble this insulation by hand, Davis concluded that both the thermal block and mud insulation were not only dry, but they also were "friable." Tr. 191, 196.

Inspector Davis then instructed the two workers to get their wetting apparatus and to properly wet the insulation. He told the workers that they needed to wet the material so that fibers would not be released during removal. Tr. 197. Before proceeding on with his inspection, Davis took photographs of the immediate boiler tank area. See Compl. Exs. 17-A through 17-H.

As the inspection continued, Davis noticed that the airless sprayer being used by Coleman wasn't operating properly. It didn't appear to be putting out an adequate amount of water. Tr. 198. Coincidentally, Davis observed dust in the air in looking at Hightower's flashlight beam. Accordingly, the inspector ordered the two Coleman workers to get a garden hose to wet the area. Tr. 199.

Davis and Hightower next came upon 15 to 20 asbestos-filled bags in the boiler room containment area. Each bag was 3 to 3-1/2 feet by 1-1/2 to 2 feet in size. Also, each bag had a standard OSHA label which read: "Warning: Danger: Asbestos." Tr. 208.

Inspector Davis looked into four of these bags. Some of the bags contained thermal block insulation and some mudded insulation. Davis observed that the insulation material was dry. He reached down to the bottom of the bags, but did not find any signs of moisture.

Tr. 209-10. Davis then wetted this bagged insulation, broke the material by hand and crumbled it into dust. In examining the bag's contents, he again noticed visible emissions. Davis concluded, therefore, that the RACM contained in the bags was friable. Tr. 210.

Davis testified that the bags of insulation which he inspected were "very, very light." He opined that if the bags were adequately wetted, they would have been heavier, weighing at least 30 lbs. Tr. 211.

The Sampling

During this June 1 inspection, Inspector Davis took two samples of the insulation

contained in the bags. The first sample was of the mudded insulation. Tr. 215; see Compl. Ex. 17-H. Davis broke off a piece of the mudded insulation and put the sample into a film canister. He testified that this sample was fairly representative of the material contained in the bags, as well as the material on the tank where the Coleman employees were working when he entered containment. Tr. 216-17. The inspector believed that this material was friable because he got dust on his hands in taking the sample and because it was easy to crumble by hand pressure. Tr. 216.

The second sample taken by Davis was of thermal block insulation. This bagged material was located in the same general area as the mudded insulation. Tr. 218-19. Davis described the thermal block as white, brick-like, and "very fibrous, dry and dusty to the touch." Tr. 219. Davis took the sample and placed it in a second film container. Tr. 221. As with the mudded insulation, Davis concluded that the sampled thermal block insulation was friable. Tr. 220.

After taking the samples, Davis instructed the Coleman workers to re-wet the bags. He explained to these workers that they were to wet the insulation as they were removing it, so as to ensure that newly exposed surface areas were wetted. Davis also explained that the wetting of the RACM in this manner would result in the insulation remaining wet until it was disposed of in a regulated landfill. Finally, because the airless sprayer didn't seem to be working properly, Davis instructed the Coleman workers to bring a garden hose into the boiler room containment. Tr. 228-230.

Inspector Davis thereupon exited the containment area. Upon exiting, he sealed the samples with duct tape, labeled them as CTI-1 and CTI-2, and filled out the EPA Chain of Custody Form. Tr. 232, 249; Compl. Ex. 18. Davis then gave the samples to his secretary for packaging and shipment to the EssTek Ohio ("EssTek") laboratory for analysis. Tr. 234.

Laboratory Analysis

The EssTek laboratory is a privately owned facility. Tr. 410. Patrick Kilbane was the EssTek employee who received and analyzed the Coleman asbestos samples submitted by Inspector Davis. Tr. 447; Compl. Ex. 18. At the time, Kilbane was the laboratory manager. Tr. 411.

Kilbane testified that typically samples arrive at the laboratory by either courier, United States Mail, or by a package delivery service such as UPS. After Kilbane receives the samples, they are logged in and then placed in a locked file cabinet until analysis. Tr. 432-33. Also, the Chain of Custody Form which arrives with each sample is signed on the date that the sample is received by the EssTek employee taking custody of the sample. This Chain of Custody Form remains with the sample until the analysis is complete. If the samples are returned to the submitter, this form also is returned. If the samples are not to be returned, the Chain of Custody Form is sent along with EssTek's analytical report. Tr. 433-34. At this point, the Chain of Custody Form would be signed by the person boxing up the sample.

Tr. 440.

Kilbane further testified that as soon as a sample is opened, it is analyzed. Tr. 435. In analyzing bulk asbestos samples, such as samples CTI-1 and CTI-2, the EssTek laboratory follows "EPA Method 600." Tr. 414. Under this analytical method, the first step is to view the sample under a "stereomicroscope." Kilbane described a stereomicroscope as a three-dimensional binocular microscope. The sample is viewed under a "HEPA hood," a high efficiency particulate air filter, in order to prevent exposure to asbestos fibers. The stereomicroscope is used to examine the sample for fibrous material, the structure of any fibers, and the homogeneity of the material. Tr. 414-17, 421-22.

After completion of the stereomicroscope examination, fibers from the sample are set in an oil with a known refractive index. A slip cover is placed over the sample portion for viewing under a polarized light microscope ("PLM"). Tr. 419. A polarized light microscope is used to measure the difference between light going

through the oil and the light going through any mineral present in the oil. This allows the analyst to measure the refractive indices of the mineral based upon the known refractive index of the oil. Tr. 419-20.

In addition to determining the refractive indices of the particular mineral, polarized light microscopy allows for the determination of the birefringence (*i.e.*, the difference in refractive indices for the different axis of the mineral), the side of elongation (*i.e.*, the axis with the highest amplitude of wavelength), the refractive index of the oil, and the extinction angle (*i.e.*, where the minerals go extinct under cross polars). Tr. 420.

Once the PLM analysis is complete, the stereomicroscope again is used. At this point, after a specific fiber has been identified as being asbestos, the stereomicroscope is used to make a visual estimate as to the percentage of asbestos. Tr. 425. In making this visual estimate, drawings are relied upon in order to determine the area consumed by the particular asbestos fiber. Tr. 426. If the volume of asbestos is believed to be 10 percent or less, as a matter of quality control, Kilbane would employ the "point counting" system to determine the amount of asbestos present. Tr. 429-31. Point counting is used when there are low amounts of asbestos and human error could lead to an incorrect asbestos determination. Tr. 430.

Based upon the data collected, a determination can then be made as to whether the sampled material contains asbestos and, if so, how much asbestos. Moreover, if asbestos is detected, a further determination can be made as to whether it is chrysotile, crocidolite, or amosite asbestos. Tr. 422.

Upon examining CTI-1 and CTI-2, the Coleman samples, Kilbane made the determination that asbestos was present. The results of Kilbane's laboratory analysis are set forth in a Bulk Sample Analysis Report which was sent to ARAQMD. See Compl. Ex. 22. This EssTek report noted that both samples were taken from boiler room insulation. Sample CTI-1 was found to have an asbestos content of 15-25% chrysotile, and sample CTI-2 was found to have an asbestos content of 20-30% chrysotile.

The Notice Of Violation

Following receipt of the EssTek laboratory results, the Akron Regional Air Quality Management District concluded that Coleman violated 40 C.F.R. 61.145(c)(3) for failing to adequately wet RACM during removal. ARAQMD also concluded that respondent violated

40 C.F.R. 61.145(c)(6)(i) by failing to keep the removed RACM wet until collected for disposal. ARAQMD notified Coleman of its determination in a Notice of Violation letter dated

July 12, 1995. Compl. Ex. 1. The charges made in this notice of violation served as the basis for EPA's subsequent complaint filed against Coleman.

III. Discussion

A. The Violations

In this case, EPA alleges two NESHAP violations. Because it is undisputed that Coleman was removing more than 160 square feet of regulated asbestos-containing material from the Heminger School boiler room, the work practice requirements of 40 C.F.R. 61.145 apply. See Compl. Ex. 13. Each of the two counts at issue in this case involves such a work practice requirement.

Count I

Count I alleges a violation of 40 C.F.R. 61.145(c)(3). This section provides:

When RACM is stripped from a facility component while it remains in

place in the facility, adequately wet the RACM during the stripping operation.

The record in this case supports a finding that Coleman removed regulated asbestos-containing material without the material being adequately wet. ARAQMD Inspector Davis and Gandee representative Hightower observed this violative condition first-hand, and their testimony is found to be most credible. Their eyewitness accounts of Coleman's RACM stripping activity form the cornerstone for a finding that respondent violated Section 61.145(c)(3) as charged.

As recounted earlier, upon entering containment, Inspector Davis observed two Coleman workers removing RACM from a tank. One worker was using a crowbar to pry the insulation, apparently thermal block, while the other worker was pulling on mudded insulation. Tr. 187, 193. Of critical importance is Davis' testimony that the room was dry, and that there was "no visible presence of water." Tr. 187-88.

Moreover, Inspector Davis knew that the RACM was dry by touching both the thermal block and the mudded insulation. In that regard, when Davis touched the thermal block he got a white, chalky powder on his fingers. Tr. 189. Also, he was able to crumble the insulation, a further indication that the material was friable. Tr. 191.

Hightower was the only other witness to observe the two Coleman workers removing the RACM from a tank in the boiler room. Tr. 52. (As noted earlier, Bass, Coleman's supervisor, did not join the inspection party until midway through the inspection.) In fact, on June 1, even before Inspector Davis arrived at the school site, Hightower had conducted his own pre-inspection tour of the boiler room containment area and reached the same conclusions that the inspector subsequently reached.

In describing this pre-inspection tour, Hightower stated that the boiler room was "fairly messy." Tr. 51. He recalled that "the contractor had several pieces of asbestos-containing insulation scattered on the floor and lying in open bags in various states." *Id.* Hightower testified that at that time two Coleman workers were removing asbestos-containing insulation, both mudded insulating cement and thermal block. The problem in Hightower's view, however, was that the workers were removing the insulation faster than they could keep it adequately wet. Tr. 53.

Significantly, Hightower knew that the insulation was dry because it easily broke apart in his hands and it created dust. Tr. 54-55. Hightower instructed the workers to stop removal of the insulation until they could get caught up with what they already had stripped. He further instructed the workers to get more water on the material already removed, as well as on the material remaining on the pipes and boiler. Tr.57.

Later on June 1, Hightower reentered containment. This time, as described above, he accompanied Inspector Davis. Upon reentering the boiler room, Hightower observed that the insulation material was still not adequately wet. Tr. 59. During this second entry on June 1, he observed emissions in his flashlight beam. Tr. 59, 61. Although Hightower didn't touch the insulation while with Davis, Hightower nonetheless was of the opinion that the material was friable because he had used it on different projects and it is a known friable substance. Tr. 61, 67.

In addition, Hightower confirmed that Inspector Davis informed the Coleman workers that the material was not adequately wet and that the inspector felt the material. Tr. 127-28, 144. Hightower agreed with Davis' suggestion that the workers bring in a water hose, given the fact that they were removing the insulation faster than they could wet it with an airless sprayer. Tr. 150. Clearly, the testimony of Inspector Davis and Gandee representative Hightower amply support a finding that on June 1, Coleman removed regulated asbestos-containing material in violation of Section 61.145(c)(3).

Despite this testimony, however, Coleman argues that EPA failed to prove that stripping of insulation material occurred during the June 1 inspection, or that the RACM was dry. Resp. Br. at 14. Coleman points to what it asserts is an

inconsistency between Inspector Davis' testimony and his inspection report regarding respondent's use of an airless sprayer and whether the sprayer was working properly. Coleman also believes that Davis' testimony regarding his taking of the photographs in Exhibits 17-A through 17-H likewise is inconsistent. Resp. Br. at 15-16. Accordingly, respondent asserts that Davis is not a believable witness.

Coleman is wrong. Inspector Davis' testimony regarding respondent's use of the airless sprayer is not inconsistent with his report. The thrust of the inspector's testimony on this point is that the airless sprayer was incapable of adequately wetting the boiler room containment area, particularly the regulated asbestos-containing material being removed. This fact was borne out by the inspector's discovery of dry RACM and his being able to crumble that material into dust by hand.

As for the taking of the photographs depicted in Exhibits 17-A through 17-E, the fact that the inspector's testimony at hearing differed from his deposition testimony is of no consequence. Whether or not Inspector Davis was able to accurately recall if the Coleman workers were in the photographs is not important to this case. What is important are the dry conditions of the boiler room that are depicted in the photographs and the inspector's testimony as it relates to the workers' removal of RACM under these dry conditions. Exhibits 17-A through 17-H are, therefore, consistent with Davis' testimony that the boiler room was dry.

On all critical points, the testimony of Inspector Davis is corroborated by Gandee representative Hightower. Their testimony is accorded great weight inasmuch as it was based upon personal observation of the Coleman workers removing dry and friable RACM. This testimony reaches the very core of what is placed in issue by the allegations of Count I. Accordingly, Coleman's challenge to the credibility and reliability of Inspector Davis' testimony is rejected.

Coleman additionally argues that EPA "introduced absolutely no evidence that the inspector observed 'removal' of RACM during his inspection." Resp. Br. at 5. Citing the NESHAP definitions of "remove" and "facility" contained in 40 C.F.R. 61.141, respondent argues that there can be no violation of Section 61.145(c)(3) because the RACM was not "removed" from the Heminger School. In other words, there was no violation because the RACM was kept within containment. Resp. Br. at 5-6.

Coleman's argument is disingenuous. A plain reading of Section 61.145(c)(3) establishes that regulated asbestos-containing material must be kept adequately wet during the stripping operation. This is the interpretation advanced by EPA and it is the only reasonable reading of the standard. Indeed, the requirements of Section 61.145(c)(3) are clear and unambiguous, and adequately inform the regulated community as to the prohibited conduct. The prohibited conduct is the very act of stripping the dry, friable RACM from pipes and components. Coleman's contrary interpretation does nothing less than to turn the standard on its head. Accordingly, it must fail.

In a related argument, Coleman suggests that it was misled by the reference in EPA's complaint to the "removal" of RACM. Citing to paragraphs 22 and 23 of the complaint, the respondent argues that in order to prove the violation charged, EPA must show that it actually removed the RACM from the contained boiler room. Resp. Br. at 6.

This argument absolutely has no merit. As discussed above, the requirements of Section 61.145(c)(3) are quite clear. They prohibit the removal, or stripping, of RACM that is not adequately wet. The charges raised against Coleman by EPA in the complaint relate to these unambiguous regulatory provisions. It is inconceivable that reading the complaint in this manner, particularly in light of the regulatory provisions, results in a "manifest injustice," as Coleman submits is the case. See Resp. Br. at 7.

Moreover, even if the language of the standard and the complaint didn't fairly apprise respondent as to the issues to be tried, which they most certainly did, other events in this case adequately so informed Coleman. For example, prior to the

hearing in this matter there was an exchange of information between the parties pursuant to 40 C.F.R. 22.19. Following that, Coleman was granted permission to depose EPA's two witnesses. As if that wasn't enough, Count I of this case was tried on the theory that Coleman failed to adequately wet the regulated asbestos-containing material while it was being removed in the boiler room. In short, there is an abundance of record evidence that Coleman was timely made aware of the issues to be tried.

Count II

In Count II, EPA charges a violation of 40 C.F.R. 61.145(c)(6)(i). This section provides as follows:

(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

Again, the testimony of Inspector Davis and Gandee representative Hightower support a finding that Coleman violated Section 61.145(c)(6)(i) as alleged. On June 1, Davis looked into four bags of regulated asbestos-containing material within the boiler room containment area. The bags included both thermal block insulation and mudded insulation. Tr. 209. The contents of all the bags were dry. The inspector dug to the bottom of the bags, but there were no signs of moisture. During this investigation, Inspector Davis broke the insulation by hand. The insulation crumbled into dust, indicating that it was friable. Tr. 210, 216. Davis observed emissions as he was handling the bags. Tr. 387. The inspector also testified that the bags were "very, very light." He stated that if the bags were adequately wetted, given the material involved, they would have been heavy, weighing at least 30 pounds each. Tr. 211.

In addition, Davis took photographs of the contents of the bags. See Compl. Exs. 17-H & 17-G. Exhibit 17-G shows that when Davis sprayed the insulation with the airless sprayer, it turned a darker color. Tr. 214. This further supports a finding that the RACM was not adequately wet.

Hightower also testified that he was with Davis when the bags of insulation were inspected, and that he too noticed that the bags' contents were dry. Hightower stated that the bags were clear. He testified, "[y]ou can see inside the bag without opening it that there was little or no water droplets on the bag itself or in the bottom of the bag." Tr. 63. Hightower added that he lifted the bags and that they were light. He stated that if adequately wetted, the bags would have been heavier. Tr. 63-64.

Coleman's challenge to EPA's case regarding Count II is somewhat limited. Respondent doesn't take issue with the specific testimony of either Inspector Davis or Hightower. Instead, it renews the argument that there can be no violation because the bags of RACM were not removed from containment. See Resp. Br. at 18-19. As discussed earlier with respect to Count I, this argument has no merit and is rejected.

Accordingly, the testimony of Davis and Hightower is credited. On the basis of this testimony it is found that Coleman violated section 61.145(c)(6)(i) by failing to keep removed RACM adequately wet until collected for disposal.

C. Coleman's Other Defenses

Coleman raises three additional challenges to both Counts I and II which warrant individual treatment. These challenges are discussed below.

EssTek's Analytical Method

Coleman argues that both counts should be dismissed because the laboratory procedure followed by Kilbane was faulty. Coleman asserts that EssTek and Kilbane failed to analyze the samples taken by Inspector Davis in accordance with the analytical method prescribed by EPA. As expected, EPA takes the contrary position.

Analysis of this issue begins with the NESHAP definitional section of 40 C.F.R. 61.141. There, the term "friable asbestos material" is defined as follows:

Friable asbestos material means any material containing more than 1 percent asbestos as determined using the method specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy, that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure. If the asbestos content is less than 10 percent as determined by a method other than point counting by polarized light microscopy (PLM), verify the asbestos content by point counting using PLM.

Emphasis in original.

Consistent with this definition, Kilbane testified that if the asbestos content is determined to be 10 percent or less, he will engage in point counting. That proposition, however, does not seem to be challenged. Rather, the dispute here involves the earlier portion of the definition, *i.e.*, the meaning of the analytical method "specified in appendix E, subpart E, 40 CFR part 763, section 1." That is the Polarized Light Microscopy method.

Section 1.7.2.1 of this PLM method states that "[b]ulk samples of building materials taken for the identification and quantitation of asbestos are first examined for homogeneity at low magnification, with the aid of a stereomicroscope." It is undisputed that this procedure was followed by Kilbane. Next, Section 1.7.2.3 states that positive identification of asbestos requires a determination of the optical properties of morphology, color and pleochroism, refractive indices, birefringence, extinction characteristics, and sign of elongation. Again, as far as Kilbane's laboratory analysis is concerned, so far so good.

Section 1.7.2.4 is titled, "Quantitation of Asbestos Content." This is where the disagreement arises between the parties. This section in part states that "[a]sbestos quantitation is performed by a point-counting procedure or an equivalent estimation method." (*Emphasis added.*) Coleman argues that Kilbane did not follow such an equivalent estimation method. Accordingly, the respondent submits that the EssTek sample results are invalid. Resp. Br. at 3; Resp. R.Br. at 7.

Resolution of this question rests upon the interpretation of the phrase "equivalent estimation method." Appendix E to subpart E, "Interim Method of the Determination of Asbestos in Bulk Insulation Samples," does not explain what is meant by this phrase. (Nor have the parties cited to a definition contained in Appendix E.)

Nonetheless, EPA has provided guidance in this area by informing the regulated community as to what constitutes an equivalent estimation method. In a Federal Register publication dated November 20, 1990, EPA stated:

Point counting is not required for the PLM procedure. *An equivalent visual estimation technique may be used.* Visual estimation may be made during macroscopic examination with a stereobinocular microscope, resulting in a volumetric estimation of components. For most samples, quantitation by macroscopic examination is preferred.

55 Fed. Reg. 48410 (*Emphasis added*).

Despite this Federal Register publication, Coleman argues that Kilbane admitted that his visual estimation under a stereomicroscope is not an equivalent estimation method to point counting. Coleman, however, misstates Kilbane's testimony. See Tr. 466. What Kilbane said was that visual estimation provides a "range," while point

counting provides a "specific point." This testimony, therefore, does not support the proposition for which it is cited.

Although EPA has shown that the visual estimation employed by Kilbane is an equivalent estimation method to point counting, given that greater than 10 percent asbestos was determined, Coleman raises yet another issue relative to this laboratory methodology which warrants consideration.

In that regard, Kilbane testified that in analyzing the Heminger School samples, he followed the EPA Method 600. Kilbane described this method as "the new guidelines on doing bulk asbestos analysis." Tr. 414. These new guidelines were published in the Federal Register on August 1, 1994, and are titled, "Method for the Determination of Asbestos in Bulk Building Materials." Resp. Ex. 2 & Compl. Ex. 54. Coleman's challenge is two-fold. First, it argues that the EPA Method 600 procedure is invalid because it is not contained in the Code of Federal Regulations. Second, the respondent alternatively argues that, in any event, Kilbane failed to follow the EPA Method 600 guidelines.

Coleman's Code of Federal Regulations challenge must fail. The EPA Method 600 is an agency interpretation as to the appropriate procedure for conducting Polarized Light Microscopy analysis. It is not a regulation establishing a new standard of care for which a party may be penalized for noncompliance. EPA Method 600 does not change the regulatory provisions contained in appendix E, subpart E, section 1 of 40 C.F.R. 763; nor does it alter the definition of "friable asbestos material" that is contained in 40 C.F.R. 61.141. It is a guidance document only.

Coleman's challenge to Kilbane's laboratory procedure also must fail. Kilbane testified as to his use of the stereomicroscope and the PLM method to identify the presence of chrysotile asbestos, as well as to quantify the amount of the asbestos present. EPA is correct in asserting that Kilbane complied with the core analytical procedures identified in appendix E, subpart E, section 1 of 40 C.F.R. 763, as well as with EPA Method 600. Coleman's challenge to the EssTek laboratory procedures essentially is a post-hearing textbook type challenge which fails to discredit the convincing testimony of Kilbane. ⁽⁴⁾

Moreover, Kilbane's proficiency in analyzing bulk samples for asbestos went unchallenged by Coleman. Kilbane has undergone substantial in-house analytical training, and for a six-year period at the EssTek laboratory, he analyzed 200 to 300 bulk samples for asbestos each month. Tr. 409-14. In addition, the EssTek laboratory has successfully participated in the quality control program for asbestos analysis administered by the National Voluntary Lab Association Program. Tr. 426-29. These facts further support the finding that Kilbane properly analyzed the Heminger School samples for the presence of asbestos and that the laboratory results are reliable.

Finally, while the above facts alone establish that the samples taken by Inspector Davis contained more than 1 percent asbestos, it must be noted that this finding is consistent with Coleman's notification to the Ohio EPA that it would be removing RACM from the school boiler room, as well as with the pre-removal AHERA Sampling Plan performed by Gandee. See Compl. Exs. 13 & 34.

The Pedigree of the Samples

Coleman argues that EPA failed to show by a preponderance of the evidence that the samples described in EssTek's Bulk Sample Analysis Report were from the Heminger School. Resp. R.Br. at 12; see Compl. Ex. 22. Aside from the chain of custody argument which will be discussed below, respondent maintains that because both the fluffy, white thermal block sample and the cement mud sample are described in the EssTek report as "beige mud," some sort of sample mix-up must have occurred. Respondent also maintains that the "illegibility and sloppiness" of the EssTek Analytical Request Form (*i.e.*, Compl. Ex. 20) renders it unreliable. In that regard, Coleman asserts that one can not tell with any reasonable degree of assurance whether the Heminger School sample results, CTI-1 and CTI-2, are the samples being reported by EssTek.

Coleman's challenge to the sample results of CTI-1 and CTI-2 has a certain appeal to it. That appeal, however, must give way to the considerable contrary weight of the record evidence. In that regard, while Coleman takes issue with the EssTek Bulk Analysis Sample Report's description of CTI-1 and CTI-2 as being "beige mud," it failed to pursue that point in its cross-examination of Kilbane, the author of the report. Interestingly, on direct examination Kilbane offered the following explanation:

By 'beige mud,' typically that meant a type of asbestos either like a mudded elbow or a block material asbestos, or material, building material. The material is mostly formed of a --I wouldn't say a powder, but a formed fine grain material, which then has or does not have asbestos in it.

Basically, like a mudded elbow would be or a block insulation on a boiler or on thermal lines in a building.

Tr. 444 (*Emphasis added*). Kilbane's testimony explains why the term "beige mud" was used to describe both the mudded insulation and thermal block insulation in CTI-1 and CTI-2, and that the use of this term is not an indication that a sample mix-up occurred.

Aside from Kilbane's testimony, there is substantial record evidence supporting the fact that the sample results reported by EssTek, and relied upon by EPA in this case, are in fact the sample results for CTI-1 and CTI-2. For example, Kilbane testified that he knew of no occasion when EssTek either confused or mislabeled submitted samples. Tr. 473, 475. Also, EssTek sent the CTI-1 and -2 sample results to EPA by facsimile. Tr. 242; see Compl.

Ex. 21. The results reported by facsimile were identical to the results reported in the more difficult to read EssTek Analytical Request Form (Compl. Ex. 20). They show that both CTI-1 and -2 tested positive for asbestos, with CTI-1 containing 15-25% chrysotile asbestos and CTI-2 containing 20-30% chrysotile asbestos. [\(5\)](#)

The Chain of Custody Defense

From the time that samples CTI-1 and CTI-2 were collected by Inspector Davis, sent to the EssTek laboratory for analysis, and returned to the Akron Regional Air Quality Management District, they were accompanied by a Chain of Custody Form. Compl. Ex. 18. Coleman submits that EPA's chain of custody is inaccurate, thus, in its view, casting serious doubt on the integrity of the sample results. Resp. Br. at 12. In that regard, Coleman notes that at the hearing it was revealed that two individuals, Inspector Davis' secretary and EssTek employee Chris Hawke, handled the samples and that their names do not appear on the Chain of Custody Form.

There is less to this defense than meets the eye. First, EssTek employee Hawke handled the samples *after* they had been analyzed in the lab and *after* the asbestos determination had been made. See Compl. Ex. 20. Accordingly, the fact that Hawke's name does not appear on the Chain of Custody Form is not significant. [\(6\)](#)

Second, Inspector Kilbane's secretary handled the samples only in the normal course of business in shipping the samples to EssTek. Tr. 234. Inspector Davis explained that the samples were given to his secretary for packaging and delivery by U.S. Mail as standard operating procedure. Tr. 234-36. These samples were received by Kilbane at the EssTek laboratory. In his testimony, Inspector Davis explained how the samples were sealed in film containers. Tr. 221, 234. Kilbane testified that if the adhesive seals to the samples were broken, EPA would have been contacted to see if it still wanted the samples analyzed.

Tr. 446-47. There is, however, no evidence in this case that EPA was informed by EssTek that the Heminger School samples showed any signs of tampering.

In sum, the record evidence supports a finding that EPA established a proper chain of custody for the Heminger School samples.

B. The Civil Penalty

Section 113(d)(1) of the Clean Air Act authorizes the Administrator to assess a civil penalty for each violation of the Act. 42 U.S.C. § 7413(d)(1). Section 113(e)(1) of the Clean Air Act sets forth the criteria that is to be considered in assessing a civil penalty for the two NESHAP violations found in this case. It in part provides:

... [T]he 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).

EPA requests a civil penalty of \$50,000, \$25,000 for each violation. In calculating this proposed civil penalty, EPA specifically relied upon its "Clean Air Act Stationary Source Civil Penalty Policy" (the "General Penalty Policy") and "the Asbestos Demolition and Renovation Civil Penalty Policy" (the "Asbestos Penalty Policy"). See Compl. Br. at 38. [\(7\)](#)

Rule 27(b) of the Consolidated Rules of Practice states that the administrative law judge is to assess a penalty "in accordance with any criteria set forth in the Act." 40 C.F.R. 22.27(b). In other words, the directive of this procedural rule is to follow the statute in assessing a civil penalty. It is difficult to conceive of a more understandable, or even more fundamental, rule of practice. Therefore, in this penalty case it is incumbent upon EPA to establish the appropriateness of the agency's recommended penalty by demonstrating how the particular facts of the underlying violations relate to the Section 113(d)(1) statutory penalty criteria. See *Employers Insurance of Wausau and Group Eight Technology, Inc.*, 6 E.A.D. 735, 756 (1997). [\(8\)](#)

Rule 27(b) also states that the judge is to consider any penalty guidelines issued by the agency. In *Wausau*, *supra*, the Environmental Appeals Board discussed this aspect of Rule 27(b) and concluded:

The [judge's] penalty assessment decision is ultimately constrained only by the statutory penalty criteria and by any statutory cap limiting the size of the assessable penalty, by the Agency's regulatory requirement (40 C.F.R. § 22.27(b)) to provide 'specific reasons' for rejecting the complainant's penalty proposal, and by the general Administrative Procedure Act requirement that a sanction be rationally related to the offense committed (i.e., that the choice of a sanction not be an 'abuse of discretion' or otherwise arbitrary and capricious).

6 E.A.D. at 758-59.

Accordingly, consistent with Rule 27(b), EPA's General Penalty Policy and Asbestos Penalty Policy determinations will be considered to the extent that they are consistent with the statutory penalty criteria of Section 113(e)(1). Of course, analysis of the evidence in this case must be made against the statutory criteria of the Clean Air Act.

The Size of the Business

There is little evidence in this case regarding the "size of the business" penalty criterion. What evidence there is, however, shows that Coleman is a small company. It is family-owned and family-run. Tr. 513. Coleman typically has a workforce of only 15 to 20 employees. Tr. 514. Of that number, respondent had assigned three workers, as much as 20 percent of its workforce, to the Heminger School asbestos removal job. The contract price on the Heminger School project was just slightly

above \$15,000. Compl. Ex. 55.

In addition, Complainant's Exhibit 25, a 1995 Dun and Bradstreet report, likewise supports the finding that Coleman is a small company. This report listed respondent's worth at \$944,787, with projected sales of \$2,000,000.

Economic Impact of the Penalty

Coleman argues that assessment of the \$50,000 penalty proposed by EPA will have "an extremely detrimental impact" on its business. Resp. Br. at 21. With respect to this penalty criterion, EPA primarily relies upon the 1995 Dun and Bradstreet report, as well as on the testimony the higher priced asbestos removal jobs undertaken by Coleman. Compl. Br. at 30. EPA's argument seems to be that Coleman is doing well-enough to pay the full penalty. While the evidence offered by EPA is of a limited nature, it is sufficient to put the ball in respondent's court and require that respondent show that it is unable to pay the penalty sought. After all, the type of evidence under this penalty criterion is, for the most part, within the possession of the respondent.

Coleman, however, fails to rebut EPA's *prima facie* case on this issue. As support for its position that the proposed penalty will have an extreme detrimental impact on its business, respondent relies upon the testimony of Mark Coleman, the company's Vice President.

Mr. Coleman testified that the company suffered a loss in 1996. Tr. 530. He did not, however, discuss this purported loss in any detail; nor did respondent offer any financial data to support this assertion. The cursory testimony of Mark Coleman is insufficient to show that EPA is wrong and that the company can not afford to pay the proposed penalty in full.

Full Compliance History and Good Faith Efforts

Complainant's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, consist of various EPA and State notifications to Coleman regarding alleged asbestos NESHAP violations in matters other than the present case. EPA cites the Environmental Appeals Board's ("EAB") recent decision in *Ocean State Asbestos Removal, Inc.*, CAA Appeal Nos. 97-2 and 97-5 (March 13, 1998), for the proposition that "past unilateral notices of violation" issued to a respondent are properly considered under the "full compliance history" penalty criterion. Compl. Supp. Auth. at 1.

Insofar as this case is concerned, it appears that what *Ocean State Asbestos Removal* stands for is that EPA's Exhibits 1 through 10 establish that Coleman was aware of the asbestos NESHAP requirements, as well as the sanctions available for noncompliance. In that regard, the EAB states:

First, a prior notification, even without a determination that a violation occurred, is relevant to the penalty issue. A prior notification can serve as evidence of the respondent's knowledge of the Asbestos NESHAP requirements and the degree of fault associated with the subsequent violation.

Slip op. at 34 (*emphasis in original*). ⁽⁹⁾

Accordingly, the holding in the *Ocean States* case is applicable to this matter and the prior notices of violation and the like, relied upon by EPA, are accepted as evidence supporting the limited fact that Coleman was aware of the asbestos NESHAP requirements, as well as the potential sanctions for noncompliance. While these considerations don't appear to be in dispute in this case, the weight to be given to the respondent's knowledge of the asbestos NESHAP requirements is discussed, *infra*, in the Seriousness of the Violation section.

As for the "good faith" component of this penalty criterion, the record shows that the Coleman workers set about to abate the violative conditions while the ARAQMD inspection was still in progress.

Duration of the Violation

As noted, the testimony of the witnesses establishes that the violative conditions were abated shortly after they were discovered by Inspector Davis. The one-day duration of the violation is a factor that must be taken into account in determining the appropriate penalty. It does not result, as EPA seems to fear might be the case, in a downward adjustment of the penalty. Compl. Br. at 33. Rather, it is but one of the factors to be considered in determining the appropriate penalty in the first instance.

Payment of Penalties Previously Assessed

EPA has established that in *United States v. Coleman Trucking, Inc.*, Case No. 1 : 91CV0499 (N.D. Ohio 1995), Coleman paid a civil penalty of \$60,000 as part of a consent decree issued in an asbestos NESHAP case. Compl. Ex. 12

Economic Benefit of Noncompliance

The record does not support a finding that Coleman gained a significant economic benefit as a result of its noncompliance with the involved NESHAP regulations. This conclusion is supported by the fact that the violations were abated as soon as they were observed, and that abatement consisted of respondent's obtaining a garden hose and wetting the RACM in the boiler room containment area.

Nonetheless, EPA argues that "Coleman had the opportunity at hearing to describe the breakdown of the costs incurred on the job (e.g., cost of proper staffing of the job, costs for properly training workers and Supervisors, cost for additional time to adequately wet materials, increased overhead costs, etc.) and provide relevant documentary evidence, but failed to do so." Compl. R.Br. at 34. Thus, EPA argues that inasmuch as the economic benefit is unknown, EPA is entitled to rely upon the default economic benefit calculation in its Penalty Policy. *Id.* That figure is, according to EPA, a "rule of thumb" \$20 per linear, square, or cubic foot. In this case, EPA calculated that the "unknown economic benefit" to Coleman was \$6,700. Compl. Br. at 45.

EPA's position defies logic. It is EPA that bears the burden of proof in establishing the penalty criteria, not the respondent. Moreover, the litany of items listed by EPA that Coleman could have considered here raises the interesting prospect that the more thorough the job by the respondent, the higher the penalty it would have to pay. Finally, EPA's request for a \$6,700 economic benefit assessment just doesn't square with the facts of this case. In order to abate the violative conditions, Inspector Davis instructed the Coleman workers to procure a garden hose so as to adequately wet the asbestos-containing material. This is what the Coleman workers did. How Coleman could have incurred a \$6,700 economic benefit when all that it did to abate the violation was to obtain a run-of-the-mill garden hose is beyond this court's understanding.

Seriousness of the Violation

There is no doubt about it. The two NESHAP violations that occurred in this case were quite serious. They also were the result of Coleman's high degree of negligence. While all the statutory criteria are taken into account in determining the penalty in this case, it is safe to say that the gravity of the NESHAP violations as established by their seriousness and the high degree of respondent's culpability, are responsible for a considerable portion of the penalty assessment.

Section 112 of the Clean Air Act, 42 U.S.C. § 7412, authorizes the Administrator for EPA to publish a list of air pollutants that are determined to be hazardous and to describe the emission standards, known as NESHAPs, for those pollutants. It is undisputed that asbestos is such a hazardous pollutant and that, as a result, an asbestos NESHAP has been promulgated at 40 C.F.R. Part 61, Subpart M. Regarding this asbestos NESHAP, the Administrator has determined that "asbestos presents a significant risk to human health as a result of air emissions from one or more source categories and is therefore a hazardous air pollutant." 55 Fed. Reg. 40406

(November 20, 1990), *citing*, 36 Fed. Reg. 3031.

There is nothing in this case to indicate that asbestos is not the serious hazard that the Administrator has determined it to be. Indeed, the fact that Gandee established an asbestos removal protocol that Coleman was required to follow, and the fact that the Coleman workers were equipped with Tyvex suits, and full-face respirators, and were required to shower upon exiting containment is solid evidence that respondent understood the serious hazard posed by this pollutant.

Despite these facts, Coleman submits that "[t]he violations were extremely minor" and that EPA "introduced no evidence that a single person breathed asbestos fibers as a result of the alleged violations." Resp. Br. at 22. Respondent couldn't be more wrong. First, the violations were anything but minor. It is hard to conceive of a case where a violation of an asbestos NESHAP could be considered minor. If any such case exists, it certainly isn't this one. As discussed above, the serious hazards presented by exposure to asbestos are beyond dispute and respondent has made no showing that these hazards were not present here.

Second, EPA is not required to prove ingestion of asbestos fibers in order to establish that noncompliance with an asbestos NESHAP regulation poses a serious hazard. This draconian view is contrary to the remedial purpose of Section 112 of the Clean Air Act and the asbestos NESHAP.

Insofar as Coleman's negligence is concerned, the record is clear that its workers removed inadequately wet RACM and that they failed to keep the asbestos-containing material wet until its disposal. Coleman is in the business of asbestos removal and has been involved in a number of asbestos removal projects. Keeping the RACM wet under the circumstances of this case is about as fundamental as it gets in asbestos removal. Coleman was aware of this important work practice, and it simply failed to comply.

ORDER

Accordingly, it is held that Coleman Trucking, Inc., violated 40 C.F.R. 61.145(c)(3) and 40 C.F.R. 61.145(c)(6)(i). A civil penalty totaling \$30,000 is assessed for the two violations. Of this penalty amount, \$15,000 is being assessed for each violation.

Respondent shall pay the civil penalty within 60 days of the date of this order. Payment may be made by mailing, or presenting, a cashier's or certified check made payable to the Treasurer of the United States of America, U.S. Environmental Protection Agency, Region 5, P.O. Box 70753, Chicago, Illinois, 60673. [\(10\)](#)

Carl C. Charneski
Administrative Law Judge

1. The term "regulated asbestos-containing material" is defined in part as "[f]riable asbestos material." 40 C.F.R. 61.141. The term "friable asbestos material," in turn, is defined in part as "any material containing more than 1 percent asbestos as determined using ... Polarized Light Microscopy, that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure." *Id.*
2. The amount of RACM being removed is important inasmuch as 40 C.F.R. 61.145(a)(4)(i) provides that certain work practice requirements apply to renovation operations where at least 160 square feet of regulated asbestos-containing material is being stripped or removed.
3. ARAQMD acts as the representative of the Ohio EPA. Tr. 176.

4. Coleman was expected to call a witness to testify regarding asbestos analysis, but rested without so doing. Tr. 618. While Coleman is correct in stating that its decision not to call such a witness is not a proper basis upon which to draw an adverse inference, this court can not help but speculate that such a technical witness would have been helpful in understanding respondent's position relative to the EPA Method 600.
5. The same results for CTI-1 and CTI-2 also appear in EssTek's Bulk Sample Analysis Report. Compl. Ex. 22.
6. In any event, Hawke's name appears on Complainant's Exhibit 20, EssTek's Analytical Request Form, because he boxed the samples to be sent back to ARAQMD. This is standard operating procedure at the EssTek lab. Tr. 440-41, 456-57.
7. The General Penalty Policy appears in the record as Complainant's Exhibit 32. EPA did not seek to introduce the Asbestos Penalty Policy into evidence.
8. While the Environmental Appeals Board in Wausau was specifically discussing 40 C.F.R. 22.24, the burden of proof rule, its reasoning is equally applicable to Rule 27(b). 40 C.F.R. 22.27(b).
9. In *Ocean State Asbestos Removal, supra*, the EAB similarly concluded, "[a] history of prior notices not only is evidence that the respondent was aware of the required compliance, but also evidence that the respondent was aware of the sanctions for noncompliance." Slip op. at 35.
10. Unless this decision is appealed to the Environmental Appeals Board in accordance with 40 C.F.R. 22.30, or unless the Board elects to review this decision *sua sponte*, it will become a final order of the Board.

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