**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

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| **IN THE MATTER OF** | ) | |
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| **GRAY WASTE MANAGEMENT** | ) | **DOCKET NO. CAA-3-2000-0006** |
| **CORPORATION AND** | ) | |
| **MILLER-THOMAS-GYEKIS, INC.,** | ) | |
| | ) | |
| **RESPONDENTS** | ) | |

**Order on Complainant's Motion in Limine** [1]
**Order on Respondents' Motion in Limine**

This proceeding arises under the authority of Sections 113 (a) (3) and (d) of the Clean Air Act ("CAA"), as amended, 42 U.S.C. §§ 7413 (a) (3), (d). The proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.01-22.32.

On September 26, 2000, Complainant, the United States Environmental Protection Agency (the "EPA"), filed a Complaint against Respondents alleging two violations of Section 112 of the Clean Air Act, 42 U.S.C. § 7412, and its implementing regulations at Subpart M (National Emission Standard for Asbestos) of the National Emission Standards for Hazardous Air Pollutants ("NESHAP"), 40 C.F.R. Part 61.[2] Specifically, the Complaint charges that on October 25 and 26, 1999, Respondents failed to keep stripped regulated asbestos containing material ("RACM") removed from the roof of the Calvary Methodist Church ("Facility") in Pittsburgh, Pennsylvania, adequately wet until collected for disposal (Count I) and failed to carefully lower the RACM from the roof to the ground and floor (Count II) in violation of 40 C.F.R. §§ 61.145(c)(6)(i) and 61.145(c)(6)(ii), respectively. The EPA seeks a civil administrative penalty in the amount of $25,300 for these two alleged violations.

[1] Complainant's previous Motion for Additional Discovery or in the Alternative Motion in Limine filed on June 1, 2001, was withdrawn by Complainant on July 18, 2001.

[2] Both Respondents are represented by the same attorney and collectively are referred to as "Respondents."

On July 20, 2001, the EPA filed a Motion in Limine ("Complainant's Motion") moving to preclude Respondents from introducing all proposed documents, exhibits, and testimony relating to air samples taken by AGX, Inc. on behalf of Respondents at the Facility on various dates in October and November 1999. [3] In support of its motion, the EPA argues that these documents and testimony are not relevant to the charges because the sampling was not taken on dates or in locations related to the alleged violations and because air pollutants emitted to the ambient air are not relevant to the question of whether the RACM at issue here was kept adequately wet or was carefully lowered to the ground. *See In re Norma J. Echeverria and Frank J. Echevarria D/B/A Echeco Environmental Services,* 5 E.A.D. 626, 641, CAA Appeal No. 94-1 (EAB, Dec. 21, 1994); *United States v. MPM Contractors, Inc.,* 767 F. Supp. 231, 233 (D. Kan. 1990). Complainant's Motion at 1-3.

In response, Respondents present several arguments for the admissibility of the sampling information. First, Respondents assert that the EPA's argument that the air sampling was taken in locations not involved with the alleged violations is factually inaccurate. Respondents maintain that the air sampling was conducted on the workers while they were lowering materials to the ground and removing and/or wetting materials. Respondents' Response in Opposition to Complainant's Motion In Limine, Or in the Alternative, Respondents' Motion in Limine ("Response") at ¶ 5.

Second, Respondents contend that given the volume of information the EPA submitted for days other than those charged, the EPA's argument that evidence concerning air monitoring performed on days other than October 25 and 26, 1999, should be excluded is disingenuous. Response at ¶ 6. Respondents further argue that sample results from throughout the removal period are probative as to the conscientiousness of Respondents' actions. In this regard, Respondents maintain that air monitoring performed prior to and after the alleged violation demonstrates that Respondent Gray Waste Management Corporation was using good faith efforts to ensure that no airborne emissions occurred thereby ensuring the safety of the workers and the environment. Additionally, Respondents argue that such monitoring is relevant to Gray's prompt response to suggested corrective measures and thus directly factors into the computation and mitigation of the proposed penalty. Response at ¶ 6.

Finally, Respondents assert that the EPA's argument that air monitoring is irrelevant to the "adequately wet" issue is without merit. In support of its position that airborne monitoring is relevant and probative of the adequately wet issue, Respondents cite *In the Matter of Shawano County,* 1997 EPA ALJ LEXIS 136 (June 9, 1997), in which Chief Administrative Law Judge Biro reportedly rejected the identical argument raised by the EPA and allowed evidence of air monitoring to be admitted. Respondents point out that Judge Biro relied on the regulatory definition of "adequately wet," which includes the description, "sufficiently mixed or penetrated with liquid to prevent the release of particulates." 40 CFR § 61.141. As cited by Respondents, this regulation also

[3] The hearing in this matter is scheduled for August 21 through August 24, 2001, in Pittsburgh, Pennsylvania.

provides that "[i]f visible emission are observed coming from asbestos-containing material, then that material has not been adequately wetted." *Id.* [4]

In the alternative, Respondents argue that if Complainant's Motion in Limine is granted, then Respondents' Motion in Limine to exclude the EPA's proposed evidence concerning days other than October 25 and 26, 1999, must also be granted. Response at ¶ 12. In this regard, Respondents note that the EPA's proposed exhibits include inspection reports, analyses of samples of roofing materials collected at the Facility, and photographs and videotapes made on and taken at the Facility on days for which the EPA is not seeking penalties. Response at ¶ 2.

Respondents' alleged liability in this case centers on the questions of whether the alleged stripped RACM was kept adequately wet until collected for disposal and whether the RACM was carefully lowered to the ground. These two alleged violations involve the work practice standards set forth in 40 C.F.R. §§ 61.145(c)(6)(i) and 61.145(c)(6)(ii). The asbestos NESHAP regulations impose strict liability for violating any of the work practice standards. *See United States v. Sealtite Corp.*, 739 F. Supp. 464, 468 (E.D. Ark. 1990); *United States v. Ben's Truck and Equipment, Inc.*, 25 ERC 1295, 1298 (E.D. Cal. 1986); *Echevarria, supra*, 633. Liability is established when the EPA shows that the work practice standards of the applicable asbestos NESHAP regulations have not been satisfied. *MPM Contractors, supra,* 233; *Echevarria, supra,* 633.

The EPA persuasively argues that the air sampling at issue should be excluded from the record because the question of emissions of an air pollutant to the ambient air is not relevant. *See* Section 22.22 (a) of the Rules of Practice, 40 C.F.R. § 22.22 (a).[5] See *Echeverria, supra,* 641. In support of this proposition, the EPA cites *MPM Contractors, supra,* 233, in which the court held that "[i]t is the failure to follow the work practice to wet adequately rather than the release of visible emissions which creates liability." The Environmental Appeals Board ("EAB") and courts have consistently found that the EPA need not show that emissions occurred to establish a violation of the adequately wet requirements. *MPM Contractors, supra,* 233; *Echevarria, supra,* 641; *Schoolcraft Construction, Inc.,* CAA Appeal No. 98-3, 1999 EPA App. LEXIS 22 at * 27 (EAB, July 7, 1999). The EAB has found that the "absence of asbestos particles in air samples cannot conclusively show whether the RACM was adequately wet 'to prevent' the release of asbestos . . ." *Schoolcraft, supra, 27.*

Respondents' responsive argument that the air sampling is relevant is based on the underlying argument that air sampling demonstrating the absence of airborne asbestos particles

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[4] Respondents omitted the next sentence in that regulatory provision which states that, "the absence of visible emissions is not enough to prove that the material is not adequately wet." 40 C.F.R. § 61.141.

[5] Section 22.22 (a) of the Rules of Practice, in pertinent part, provides: The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value..." 40 C.F.R. § 22.22 (a).

vitiates the allegation of a violation of the wetting work practice requirements. This argument is rejected. In its recent holding in *Schoolcraft, supra*, the EAB stated:

> The wetting work practice standard and the regulatory definition of "adequately wet" focus on whether asbestos releases *can* occur, not whether they actually did occur. The definition of "adequately wet" specifically states that the RACM must be mixed or penetrated with liquid "to *prevent* the release of particulates." 40 C.F.R. §61.141 (emphasis added). The absence of asbestos particles in the air samples cannot conclusively show whether the RACM was adequately wet "to prevent" the release of asbestos; it can only show that releases were not detected at the times and locations of the samplings.

*Schoolcraft, supra*, 26- 27.

I have also considered Respondents' reliance on the Administrative Law Judge's ruling in *Shawano County, supra*, in support of its argument that air monitoring is relevant to the adequately wet issue. In view of the EAB's holdings in *Echevarria, supra*, and *Schoolcraft, supra*, the cited ruling of my esteemed colleague is not considered binding.[6]

Respondents' conclusory assertion that the air sampling is relevant to the alleged violation for failing to carefully lower the RACM to the ground (Count II) is not supported. Count II alleges violation of another work practice standard of the asbestos NESHAP. Liability for violation of the work practice standard as charged in Count II arises from the failure to follow the requirement to carefully lower the RACM to the ground rather than from the release of emissions. *See MPM Contractors, supra*, 233.

In conclusion, I find that the air sampling at issue is irrelevant because such sampling is not relevant to the adequately wet issue or the careful lowering issue. In other words, the absence of asbestos in the air surrounding the workers has no relevance in determining Respondents' liability as alleged in Count I or II of the Complaint. Accordingly, the proposed evidence concerning the air sampling will be excluded from the liability phase of this proceeding.

However, as Respondents argue, the proposed evidence concerning the air sampling may possibly be relevant to the proposed penalty. The Asbestos Demolition and Renovation Civil Penalty Policy (May 5, 1992) ("Asbestos Penalty Policy") accords particular attention to the human and environmental harm resulting from an asbestos NESHAP violation. Asbestos Penalty Policy at

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[6] The Administrative Law Judge's ruling in *Shawano County, supra*, was not an initial decision and is not a final order. *See* Section 22.27 (c) of the Rules of Practice, 40 C.F.R. § 22.27 (c).

1-2. These factors are important in determining the gravity of the violation. Respondents maintain that the air sampling was conducted on the workers while they were lowering materials to the ground and removing and/or wetting materials. Respondents persuasively argue that the air sampling is relevant because it demonstrates that Respondent Gray was attempting to ensure the safety of its workers and the environment and thus could be considered in the computation and mitigation of the penalty sought by the EPA. Accordingly, the proposed evidence concerning the air sampling will be admissible for the limited purpose of determining any penalty.[7]

Turning now to Respondents' Motion in Limine, I note that the EPA has not yet responded to this motion and that its response period has not expired.[8] Accordingly, this motion remains pending and will not be addressed further in this Order.

## Orders

Complainant's Motion in Limine is Granted in Part and Denied in Part. Respondents' proposed documents, exhibits, and testimony concerning air sampling by AGX, Inc. on behalf of Respondents is excluded from the liability phase of the proceeding but is admissible during the penalty phase of the proceeding, if applicable.

Respondents' Motion in Limine remains pending.

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Barbara A. Gunning
Administrative Law Judge

Dated: August 17, 2001
Washington, DC

[7] The parties retain the right to raise all relevant evidentiary objections at the hearing.

[8] Respondents' Motion in Limine was filed on or about August 8, 2001. Section 22.16 (b) of the Rules of Practice, 40 C.F.R. § 22.16 (b), provides that a party has fifteen (15) days after service of a written motion in which to file its response.

In the Matter of Gray Waste Management Corporation and Miller-Thomas-Gyekis, Inc., Respondents
Docket No. CAA-3-2000-0006

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Complainant's Motion In Limine And Order On Respondent's Motion In Limine**, dated August 17, 2001 was sent this day in the following manner to the addressees listed below.

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: August 17, 2001

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