UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
Indespec Chemical Corporation	)	
and	)	**Docket No. CAA-III-086**
Associated Thermal Services, Inc.	)	
	)	
Respondents	)	

Order on Motions

Complainant Environmental Protection Agency (EPA) has filed a Motion to Strike Affirmative Defenses of Respondent Associated Thermal Services, Inc. (ATS) and a Motion in Limine[(1)]. As characterized by EPA, these motions relate to the Respondent's assertion that:

..there is an affirmative requirement under the Asbestos NESHAP[(2)] that EPA conduct moisture testing of asbestos-containing material (ACM) as a necessary prerequisite to proving that such ACM has not been 'adequately wet' as that term is defined in the asbestos NESHAP.

EPA Motion at 1. EPA seeks to have any such "moisture testing" affirmative defense stricken along with any testimony in support of that theory. On that basis EPA seeks to have the affirmative defenses set forth in paragraphs 44, 45, 48, and 57 of Respondent ATS' Answer stricken. EPA Motion at 6-7.

Noting that the Consolidated Rules of Practice (40 C.F.R. Part 22) do not set forth criteria for striking material in an Answer but that the Federal Rules of Civil Procedure provide a source of guidance, EPA observes that Fed. R. Civ. P. 12(f), permits the striking of any insufficient defense or any immaterial or impertinent matter from any pleading.

EPA points to the definition of "adequately wet" as set forth at 40 C.F.R. § 61.141 which provides that the phrase means to:

...sufficiently mix or penetrate with liquid to prevent the release of particulates. If visible emissions are observed coming from asbestos-containing material, then that material has not been adequately wetted. However, the absence of visible emissions is not sufficient evidence of being adequately wet.

Further, EPA points out that the issue of providing a "moisture test" was addressed during the rulemaking for the asbestos NESHAP regulations and rejected for lack of establishment of a moisture measurement method and device. Motion at 11, quoting from National Emission Standards for Asbestos- Background Information for Promulgated Asbestos NESHAP Revisions, EPA 450/3-90-017, October 1990.

Citing Chief Administrative Law Judge Susan Biro's Order Denying Motion to Strike and Motion in Limine In the Matter of Shawano County, National Service Cleaning Corp., and Grow Constructions Managers Inc., (Docket No. V-5-CAA-013, June 9, 1997), EPA observes that the respondent's evidence of its conducting moisture testing of samples of RACM was allowed on the issue of whether the material had been adequately wetted as the regulations do not preclude any particular method of determining that condition. Judge Biro noted that the observations of the EPA inspector were also admissible on the issue of wetness.

For its part, the position of Respondent ATS is that the regulation defining "adequately wet" at 40 C.F.R. § 61.141 is "so vague as to not be a legitimate standard." ATS asserts that:

...striking its affirmative defense would, in effect, preclude it from questioning whether or not the ACM was 'adequately wet' and producing any evidence in support of its position.

In its response to the Complainant's memorandum in support of its motion to strike and motion in limine, ATS explains further its position that the "test used by the EPA for a determination that the ACM was "adequately wet" was vague [,] subjective and without any workable criteria which would lead to an objective legal determination of "adequately wet." Yet, ATS backs away from any implication that EPA must produce moisture testing to establish a prima facie case:

Nowhere in the paragraphs in question is it stated that in the absence of moisture testing "any determination" by the EPA that the ACM was not adequately wet constituted a legal nullity.

ATS Response at 1. (Emphasis in original)

In further response to ATS, EPA filed a Motion to Strike on Additional Grounds and Motion in Limine. In those documents EPA concedes that ATS has the right at the hearing to question EPA witnesses as to their understanding of the regulations at issue and their meaning. EPA disputes, however, the right of ATS to challenge *the adequacy of the regulation itself* for purposes of determining whether the material is adequately wet. EPA Response at 6.

Pointing to the Environmental Appeals Board's (EAB) decision In re Norma Echevarria and Frank Echevarria, d/b/a Echeco Environmental Services, 5 EAD 626, CAA Appeal No.94-1 (December 21, 1994), counsel for EPA notes that the EAB declined to review a challenge to the validity of the regulation based on the alleged vagueness, ambiguity, and lack of objectivity and quantifiable standards in the term "adequately wet."

Discussion

It appears that the position of ATS suffers from a degree of vagueness in its own right. To the extent that ATS is seeking to challenge the validity of the standard itself, as constitutionally infirm on the basis of its putative "vagueness," those arguments are rejected. The adequacy of the regulation itself is not contestable in this proceeding. In this regard I adopt the reasoning and authority cited by former Chief Administrative Law Judge Henry B. Frazier, III as expressed In the Matter of Norma J. Echevarria and Frank J. Echevarria, dba Echeco Environmental Services, (Docket No. [CAA X] 1091-06-13-113, December 22, 1993). There, Judge Frazier observed that:

A properly adopted substantive rule establishes a standard of conduct which has the force of law. In subsequent administrative proceedings involving a substantive rule, the issues are whether the adjudicated facts conform to the rule and whether the rule should be waived or applied in that particular instance. The underlying policy embodied in the rule is not generally subject to challenge before the agency.

1993 CAA LEXIS 89, 36 citing to Pacific Gas and Electric Co. v. Federal Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974). The

provision at issue here is such a properly adopted rule. As further noted by Judge Fraser:
Section 307(b)(1) of the CAA, 42 U.S.C. Section 7607(b)(1), limits judicial review of any emission standard or requirement promulgated under Section 112 of the Act to the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia within 60 days of the promulgation of the regulation. Furthermore, Section 307(b)(2) of the Act, 42 U.S.C. Section 7607(b)(2), specifically prohibits judicial review of such regulations in civil and criminal enforcement actions.

1993 CAA LEXIS 89, 36

Beyond that, ATS has itself disavowed any intent to argue that the EPA can only establish its case through evidence of moisture testing. Any suggestion that EPA is required to produce evidence of moisture testing, as part of a prima facie case, is rejected. A prima facie case on the issue of adequate wetting may be established, for example, through the testimony of the observations of EPA's witnesses. United States v. M.M. Contrs.,Inc. 767 F.Supp. 231, 234, (D. Kan. 1990) citing United States v. Sealtite, 739 F.Supp.464 at 469 (E.D. Ark. 1990).

This does not mean that ATS is without available defenses. The critical issue is, afterall, whether the evidence supports a finding that the asbestos containing material was "adequately wetted." Among other bases, ATS is free to challenge both the observations and credibility of the EPA witnesses. In addition, as conceded by EPA, ATS may inquire as to the witnesses' understanding of the regulations at issue and the interpretation of their meaning. ATS may also ask, *as a factual matter*, whether moisture testing was conducted by any of the EPA witnesses. Further ATS is free to bring forward its own witnesses, who can testify as to their own observations as to the degree of wetness they observed and the results of any moisture testing, if any, conducted by ATS . Similarly, ATS witnesses, like EPA's, will be subject to the rigors of cross-examination.

Therefore, for the reasons articulated, EPA's Motion to Strike Affirmative Defenses and Motion in Limine is granted.

So Ordered.

William B. Moran

Administrative Law Judge

Dated: December 5, 1997

Washington, D.C.

1. **An additional motion is also pending before me in which ATS seeks leave to amend its answer. EPA has responded that it has no objection to the amended answer. The motion is granted.**

2. "NESHAP" refers to the National Emissions Standards for Hazardous Air Pollutants.

IN THE MATTER OF INDESPEC CHEMICAL CORPORATION AND ASSOCIATED THERMAL SERVICES, INC.,

Respondent

CAA-III-086

CERTIFICATE OF SERVICE

I certify that the foregoing **Order on Motions**, dated December 5, 1997, was sent in the following manner to the addressees below:

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Date: December 5, 1997

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