UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
USA REMEDIATION SERVICES, INC.,	)	**DOCKET No. CAA-03-2002-0159**
	)	
Respondent.	)	

INITIAL DECISION

Before: Susan L. Biro
Chief Administrative Law Judge

Issued: June 26, 2003

Appearances:

For Complainant: A.J. D'Angelo, Esq.
Dennis Abraham, Esq.
United States Environmental Protection Agency
Region 3
Office of Regional Counsel, 3RC10
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Respondent (pro se): David M. Kelsey, J.D.
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I. Factual and Procedural Background

This case was initiated on May 23, 2002 by Complainant, the Director of the Waste and Chemicals Management Division, EPA Region III, against Keystone Abatement Services, Inc., USA Remediation Services, Inc., and the Board of Governors of West Virginia University. The Complaint charged the three Respondents with violating section 112 of the Clean Air Act (CAA) (42 U.S.C. § 7412) in connection with an asbestos removal project on the campus of West Virginia University.

USA Remediation Services, Inc. (USA), specializes in demolition, asbestos and lead removal, decontamination and environmental cleanup services. The Board of Governors of the West Virginia University (WVU) contracted with USA in February of 2000, to perform certain services at the West Virginia University Coliseum (the Facility) in Morgantown, West Virginia, including asbestos removal and renovation. The Coliseum is a 30 year old basketball arena, surrounded by offices.

In turn, USA subcontracted with Keystone Abatement Services (Keystone) to perform a portion of the asbestos removal services at certain locations in the Facility. USA submitted to EPA an Initial Notice of Demolition/Renovation Activities, identifying itself as the "Asbestos Contractor" and Keystone as the "Other Contractor." The Initial Notice stated that 200,000 square feet of asbestos-containing surfacing material, which is 30 percent asbestos, and 1,000 linear feet of asbestos-containing pipe insulation, which is 15 to 20 percent asbestos, were to be removed by wet removal methods. Apex Environmental, Inc. (Apex) was also retained by WVU to serve as the project architect, engineer and designer, to perform certain duties including air monitoring during asbestos abatement, and to inform WVU of progress, quality and deficiencies of work performed at the Facility.

EPA inspector Douglas Foster inspected the Facility on May 4, 2000, and observed Keystone personnel removing Regulated Asbestos-Containing Material (RACM). On June 28, 2000, Foster inspected an asbestos containment area[1] on a second floor hallway area in the Facility, where Keystone had been removing RACM ceiling plaster and was cleaning up. Mr. Foster took samples of plaster material, and explained to Keystone and USA representatives about the requirement to keep RACM adequately wet during and after removal.

Subsequently, on November 15, 2000, EPA sent information request letters to Apex, USA, Keystone and WVU, and in response, USA submitted information and documents, including letters from USA to Keystone.

On December 13, 2001, EPA issued to USA, Keystone and WVU a Notice of

[1] A containment area is an area which has been lined with plastic sheeting to prevent the escape of asbestos fibers from an asbestos removal area into the ambient air.

Noncompliance (NON) which requested each recipient submit to EPA whatever information it thought EPA should consider prior to filing a complaint, and provided the opportunity to meet with EPA representatives.

Subsequently, EPA issued the Complaint, alleging two counts of violating regulations promulgated under the CAA. Specifically, Count 1 charged Respondents with failing to adequately wet asbestos containing material when stripping it, in violation of 40 C.F.R. § 61.145(c)(3), and Count 2 charged Respondents with failing to ensure all asbestos containing material removed remained wet until collected and contained or treated in preparation for disposal, in violation of 40 C.F.R. §61.145(c)(6)(i). The Complaint proposed a penalty of $35,000 jointly against all three of the Respondents.

In June 2002, EPA settled this action against Keystone Abatement Services, Inc. and the Board of Governors of West Virginia University. Pursuant to Consent Agreements and Final Orders, Keystone agreed to pay a penalty of $10,000, and the University agreed to pay a penalty of $10,500.

In response to the Complaint against it, on June 27, 2002, an Answer and Request for Hearing was filed *pro se* by David M. Kelsey, J.D., an officer and co-director of USA. In its Answer, USA denied the accuracy of certain factual allegations in the Complaint and denied the allegations regarding failure to adequately wet or keep wet the asbestos material being removed from the Facility.

Subsequently, EPA and USA accepted the opportunity to participate in this Tribunal's Alternative Dispute Resolution process, but settlement attempts were not successful. On September 10, 2002, the undersigned was designated to preside over a hearing in this matter, and thereafter a Prehearing Order was issued requiring the parties to engage in their prehearing exchange in October and November 2002. Pursuant to that Order, Complainant filed its Prehearing Exchange in a timely manner, and stated that it would seek the remaining $14,500 of the proposed penalty from USA. USA did not file any prehearing exchange by the due date. Only after a Show Cause Order was issued did USA file its Prehearing Exchange. Therein, USA stated that it "shall not put on any direct evidence" but "shall solely rely upon the cross-examination of Complainant's witnesses, procedural and evidentiary objections, and argument on controlling and applicable law at Hearing."

The hearing in this proceeding was held on March 4, 2003 in Washington, D.C. Complainant presented testimony of three witnesses: Douglas E. Foster, Richard D. Ponak, and Stephen Forostiak. Complainant offered 38 exhibits which were admitted into evidence, namely, Complainant's Exhibits ("C's Ex.") 1 through 18, 20, 21, 22, 25 through 29, 31, 36, 40, 43, 45, 47, 48, 49, 51, 52, 64, and 65. USA offered no testimony and no exhibits. Complainant timely filed its Post-Hearing Brief. Although given an opportunity to do so, USA has not filed a post-hearing brief.

II. Statutory and Regulatory Background

Section 112(d) of the CAA (42 U.S.C. § 7412(d)) authorizes EPA to promulgate regulations establishing emission standards for major and area sources of hazardous air pollutants. Accordingly, EPA promulgated National Emission Standards for Hazardous Air Pollutants (NESHAPs), including the National Emission Standard for Asbestos (Asbestos NESHAP), codified at 40 C.F.R. part 61 subpart M. Within subpart M is the standard for demolition and renovation, at 40 C.F.R. § 61.145, of which the paragraphs pertinent to the Complaint provide:

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

40 C.F.R. §§ 61.145(c)(3), 61.145(c)(6)(i).

Demolition or renovation activities to which Paragraph 61.145(c) applies are set out in Paragraph 61.145(a), which provides, in pertinent part, "In a facility being renovated, all the requirements of paragraphs (b) and (c) apply if the combined amount of RACM to be stripped, removed . . . or similarly disturbed is . . . at least 15 square meters (160 square feet) on . . . facility components." 40 C.F.R. § 61.145(a)(4).

The term "owner or operator of a demolition or renovation activity" is defined in the Asbestos NESHAP as "any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation operation, or both." 40 C.F.R. § 61.141.

The term "adequately wet" is defined as "sufficiently mix or penetrate with liquid to prevent the release of particulates." 40 C.F.R. § 61.141.

III. Discussion, Findings and Conclusions as to Liability

There is no question that in regard to this matter the threshold amount of RACM is met, *i.e.,* 160 square feet of RACM to be stripped or removed, as set out in 40 C.F.R. § 61.145(a), and that the work practice requirements of 40 C.F.R. § 61.145(c) apply to the activities at issue in the

Complaint.

A. Count I

USA's principal defense appears to be that Complainant failed to prove that any removal of RACM was performed without it being adequately wet.[2] Specifically, USA argued at the hearing that the inspector did not personally witness Keystone's removal of asbestos and that EPA, therefore, did not carry its burden of proof as to Count 1.[3] Tr. 413-414.

The testimony and evidence in the record shows that Keystone had been removing ceiling plaster on the morning of June 28, 2000. For example, a Daily Log Sheet for June 28, 2000, signed by Joseph Lema, the supervisor for Keystone, states, "Today . . . we will also drop the ceiling in the staging area," and, for 7:00 a.m., "Bagout continues," and for 10:00 a.m., "ceiling in extended area complete." C's Ex. 20. An Apex daily report signed by Jerrod Hager for June 28, 2000, states, "Keystone on-site at 5:30 a.m. Continued abatement in phase II office level. Expected to complete ceiling removal today." C's Ex. 21. *See also*, C's Ex. 22 (another Apex daily report for June 28, 2000, stating "Keystone continues phase II office level"); C's Ex. 25 and Tr. 211-213 (waste manifest reports dated June 28 and June 29, 2000, signed by Mr. Lema for Keystone as the waste generator and asbestos operator, identifying waste as 30 yards of plaster and iron); Tr. 30 (testimony that Mr. Lema told the inspector on June 28, 2000 that workers "had just finished removing."); Complaint ¶¶ 42, 43, Answer ¶ 3 (USA admitted that the June 28 inspection "included an inspection of an asbestos containment area . . . where Keystone personnel had performed asbestos . . . removal activities earlier that day."). There is no testimony or evidence to the contrary.

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[2] In its Answer, USA also appeared to raise as a defense that it was not an "owner or operator of a demolition or renovation activity." Specifically, at paragraph 9 therein, USA denied that it "had authority and control over the abatement, operations, or related activities on the project," asserting that "USA's authority and control was subject to and required the step-by-step approval" of Apex and WVU. However, USA did not pursue this argument in its prehearing exchange or at the hearing. Moreover, USA admitted in its Answer (at ¶ 3) the allegation, "At all times relevant to the Complaint, USA was the general contractor at the Facility responsible for the performance and/or supervision of all asbestos removal, abatement and related activities and operations at the Facility." Complaint ¶ 57. In addition, documents in the record show that USA did have control and supervision over the demolition or renovation activity at issue in the Complaint. For example, the contract between USA and Keystone for asbestos removal at the Facility provides, "USA Remediation shall have the right to direct the manner in which the Subcontractor performs its work." Complainant's Exhibit ("C's Ex.") 3, ¶ 5. *See also,* C's Ex.16, 26, 27, 28, 45. Therefore, this defense is unsupported by the record.

[3] USA at the hearing orally moved to strike the evidence as to Count 1 for lack of sufficiency, on the basis that EPA had no direct evidence of Keystone removing the RACM without it being adequately wet. The motion was denied. Transcript ("Tr.") 413-417.

The inspector, Douglas Foster, has been trained and is authorized by EPA to conduct Asbestos NESHAP inspections. Mr. Foster testified that he has performed over 1,000 asbestos inspections over the course of twelve years. Tr. 18-19. Mr. Foster arrived at the Facility around 10:00 in the morning on June 28, 2000, and upon arrival, met with Mr. Lema. Tr. 30. Mr. Foster testified that after talking to Mr. Lema, he went alone into the second floor containment area and observed workers therein on a scaffold working on a ceiling light and the metal grid around it. Tr. 31-32, 42-43; C's Ex. 6, photograph 7. He testified further that as he walked through the containment area, he saw dry material on the floor that he assumed was ceiling plaster. Tr. 32. He testified that there was about 30 or 35 feet of ceiling plaster which was not yet removed. Tr. 32-33. In the containment area, he took 26 photographs, which were admitted as evidence. Tr. 33, 81. Included were photographs of ceiling plaster, which had three layers: rough coat, white coat, and a sprayed-on acoustical layer. Tr. 35-36.

Mr. Foster climbed the scaffolding and took four samples of ceiling plaster from the ceiling, taking measures to avoid cross-contamination of samples. Tr. 36-38; C's Ex. 6 photographs 1- 6. Mr. Foster testified that he crushed the corners of each of the four samples, to see if they were friable, and that "They crumbled very easily." He testified in the negative when asked whether he saw any evidence of moisture on the material sampled, or in the immediate vicinity of the samples collected, on the walls nearby, or on the floor beneath the ceiling. Tr. 39-40. Mr. Foster testified that he did not see any kind of sprayers in the containment area. Tr. 144-145. Mr. Foster took two samples of ceiling plaster from a box of ceiling plaster inside the containment area. Tr. 43-44; C's Ex. 6 photographs 8, 9,10. He testified that the ceiling plaster material inside the box was dry, and that when he applied hand pressure to the corner of a sample inside the bag, it crumbled. Tr. 44-45. He testified in the negative when asked whether he saw any signs of moisture on the floor area or containment walls in the area of the box. Tr. 46. He took four samples and several photographs of pieces of ceiling plaster in several areas on the floor of the containment area, and he testified that the pieces were dry and that there was no sign of water or moisture in the containment. Tr. 46-51, 104; C's Ex. 6 photographs 11 through 20. All of the samples were friable, Mr. Foster testified. Tr. 51-52, 105. After the inspection, Mr. Foster told Mr. Lema that the material was very dry and that he needed to adequately wet it to be in compliance. Tr. 55-56. Mr. Foster also talked to Matthew Maggard, USA's Project Manager, about what he found in the containment area. Tr. 56-57.

When asked at the hearing how he knew the ceiling plaster on the floor was dry, Mr. Foster testified that "You could see it was powdery on the floor," and that there was no condensation in the plastic zip-lock bag containing the samples of plaster material. Tr. 103, 105. When questioned on cross-examination about an object in a photograph which looked like a hose, he testified that it "was a sealed hose" or "could be an empty hose." Tr. 100-101. He observed that black duct tape, which holds together the plastic sheeting on the floor, was "not very black" because it "had a lot of dust on it, powdery." Tr. 53, C's Ex. 6 photograph 22. When asked by the undersigned at hearing whether the plaster material would change color or weight when wet, Mr. Foster testified in the affirmative, stating that the material would get darker. Tr. 146. When asked whether he noticed a difference in color of the material, or whether the weight of the samples suggested that it was wet, he answered in the negative. Tr.

147-148.

A little while later that same day (June 28, 2000), Mr. Foster then returned to the containment area with John Coleman, who is a supervisor (Remedial Construction Manager) for USA, and with an employee of Apex, and videotaped this second walk through the containment area Tr. 57-59; C's Ex. 8. Mr. Foster testified that he pointed out and videotaped dry plaster material lying on the floor in several areas. Tr. 59-63. On this second walk through, however, unlike the first, Mr. Foster testified, he observed a water hose with water running onto the floor near the box from which he had earlier taken samples. Tr. 58, 62. He testified that that was the only water he saw in the containment area. Tr. 62. He spoke to USA representatives after the second walk through the containment area, and prepared an asbestos field data report. Tr. 66; C's Ex. 5.

Corroborating his testimony, the field data report states, "During the inspection of the second floor hallway asbestos containment of the Coliseum, I found dry friable asbestos ceiling plaster scatted (sic) on the floor and inside a large asbestos black waste box . . . that was full of dry friable asbestos ceiling plaster. . . . Keystone . . . had finished removing asbestos plaster from the ceiling prior to my visit today and was cleaning-up when I arrived." C's Ex. 5.

The samples were analyzed for asbestos content by polarized light microscopy by Stephen Forostiak of Criterion Laboratories, Inc., which is an accredited laboratory. Tr. 171-172, 397, 390, 406; C's Ex. 10. The certificate of analysis for the samples showed that one of the two or three layers of each of the ten samples was between 15 and 20 percent chrysotile asbestos. Tr. 173-174, 397; C's Ex. 10. The parties do not dispute that, of the three layers of ceiling plaster, the sprayed-on layer contained the asbestos. Tr. 130-131, 299-301; C's Ex. 10.

It is noted that on Mr. Lema's Daily Abatement Checklist for June 28, 2000, the space for "Material Wet Prior to Removal" is marked with a "y" for "yes." C's Ex. 20. At the hearing, USA through cross examination elicited testimony from Mr. Foster that he touched the samples with gloves on, not with his bare hands, did not use a hydrometer to measure water content, and did not take air samples. Tr. 103-105, 108, 111-112. USA also elicited his testimony that the 12 negative air machines in the containment area move the air in the containment area, pulling airborne fibers out of the air into a filter, and that when air is blown over a wet surface, it dries. Tr. 120, 122-126. In that regard, USA pointed out that Keystone workers were on site at 5:30 in the morning of the inspection on June 28, and that Mr. Foster did not arrive on site until 10:00 in the morning. C's Ex. 21; Tr. 310-311.

Richard Ponak, who is an EPA case development officer responsible for Asbestos NESHAP enforcement, has also performed over 1,000 inspections. Tr. 155, 159, 288. USA elicited testimony from Mr. Ponak on cross examination that "maybe some forms of asbestos don't readily absorb water." Tr. 287. However, Mr. Ponak explained at the hearing that the laboratory reports of the samples state that most of the material is "non-fibrous particulate . . . a very powdery substance which does absorb water" and if it is wet "would show that it's wet."

Tr. 286. He testified further that "if the material is adequately wet, the binder, which is a good portion of the sample and the material that Mr. Foster handled and observed, would have been wet." Tr. 287-288. Mr. Ponak explained that "Material that has no moisture at all is very easy to observe that it wasn't wet. It's very powdery, very fibrous. You can tell it wasn't wetted, especially when you are crumbling it in your hand." Tr. 289-290. Mr. Foster pointed out that while he was taking the samples he could not take his glove off, because then he would be contaminated, and that even with the glove, he "can feel whether or not there's any moisture." Tr. 113. Mr. Ponak testified that "if this material was adequately wet during stripping and for collection, it would have still be (sic) wet, " and that he had conducted sampling in containment areas where he has found material that had still been wet after several days. Tr. 290-291. He testified further that "this type of material, with my experience, if it was adequately wetted in that area, could stay wet for several days, well over four-and-a-half hours," and that interchanges of air from the negative air machines are "[n]ot enough to take all the moisture out of that material." Tr. 313-314.

Although Mr. Foster did not observe the stripping of RACM, his observations of the condition of the ceiling plaster on the morning of June 28, 2000, within four and a half hours of the actual stripping of RACM, is sufficient to establish that the RACM was not adequately wet during the stripping operation.[4] "In cases involving alleged violations of the NESHAP for asbestos, courts have routinely relied on the observations of inspectors to determine whether asbestos was adequately wetted." *United States v. MPM Contractors, Inc.*, 767 F. Supp. 231, 233 (D. Kan. 1990). The fact that no hydrometer was used to measure moisture content of the RACM is irrelevant. *Allegheny Power Service Corp.,* 9 E.A.D. 645 (EAB 2001)(liability for failure to adequately wet RACM upheld although inspector did not use any instrumentation but merely relied on visual and observation and weight of the material). The Environmental Appeals Board (EAB), affirming liability for failure to adequately wet RACM during the stripping operation where the inspector did not observe the stripping activity, stated, "When an inspector trained to determine compliance with the applicable regulations reasonably determines that a violation has occurred and provides a rational basis for that determination, liability should follow, absent proof that the inspector's testimony lacks credibility." *Norma J. Echevarria,* 5 E.A.D. 626, 639-640 (EAB1994). The EAB reasoned that "If an inspector was required to observe the stripping operation, regulated entities could effectively halt any enforcement activity by stopping work whenever an inspector appears on site." *Id.* at 643. There is no legal requirement for a finding of liability that the inspector observe the on-going stripping operation; if the inspector is not present during the stripping operation, then the issue is "whether inferences may be drawn from [an inspector's] observations * * * which would be sufficient to establish that the RACM was not adequately wet when it was being stripped." *Allegheny Power Service Corp.,* 9 E.A.D. at 648 (quoting *D & H Contractors, Inc.,* EPA Docket No. CAA-III-022, slip op. at 16 (ALJ, Dec. 22, 1993)); *see also, Ocean State Asbestos Removal, Inc.,* 7 E.A.D. 522, 531-533 (EAB 1998).

[4] The photographs and videotape in evidence are not clear enough to determine whether the plaster material depicted therein is wet or dry.

Mr. Foster's testimony and field report of his observations of the plaster ceiling material, combined with Mr. Ponak's testimony about the length of time asbestos materials would remain wet, are sufficient to draw an inference that the RACM at issue was not adequately wet when it was being stripped, and are not materially challenged by any testimony or evidence to the contrary. USA has not successfully undermined Mr. Foster's or Mr. Ponak's credibility or training through cross examination. Mr. Lema's Daily Abatement Checklist, indicating that material was wet prior to removal, does not establish that *all* RACM that was removed that day was *adequately* wet. C's Ex. 20.[5]

Accordingly, a preponderance of the evidence shows that the RACM at issue was not adequately wet during removal by Keystone on June 28, 2000, and USA is liable for violating 40 C.F.R. § 61.145(c)(3) as alleged in Count 1 of the Complaint.

B. Count II

In its Answer (¶ 15), USA denied that any stored RACM was not maintained adequately wet. As summarized above, Mr. Foster testified as to his direct observation that the RACM at the facility which had been removed but not yet collected and bagged for disposal, was not adequately wet. It is noted that Mr. Lema's Daily Abatement Checklist for June 28, 2000, shows

[5] At the hearing, USA did not present the testimony of Mr. Lema or the testimony of any Keystone or USA employees who were in the containment area and/or who spoke with Mr. Foster on the day of the inspection, such John Coleman or Matthew Maggard. USA's unexplained failure to present such evidence suggests application of the missing witness rule, which provides that if a witness is peculiarly within the control of one party and the witness' testimony would elucidate the facts at issue, and the party fails to call the witness, an inference may be drawn that the testimony, if produced, would be unfavorable to that party. *Jamaica Water Supply Co. and Dynamic Painting Corporation*, EPA Docket No. II RCRA-93, 1996 EPA ALJ LEXIS 163 (ALJ, 1996) citing *Graves v. United States*, 150 U.S. 118 (1893) and others. Because of economic interests, an employer-employee relationship between the witness and a party has been held sufficient to establish the required peculiar control, or practical unavailability, of the witness. *Jones v. Otis Elevator Co.*, 861 F.2d 655, 659 (11th Cir. 1988)(employee of defendant was deemed "unavailable" to the plaintiff because of the employer-employee relationship); *United States v. Beekman*,155 F.2d. 580, 584 (2nd Cir. 1946)(where there is likelihood of bias on the part of the missing witness in favor of one party, that witness, in a true sense, is not equally available, and thus an inference may be drawn against that party). However, application of the adverse inference rule is discretionary with the fact-finder, and Complainant has not requested such an inference to be drawn, has not presented evidence that the missing witnesses are still employed by Keystone or USA, and has proven its case without such adverse inference being drawn. Therefore the missing witness rule is not applied in reaching the decision herein.

a "y" for "yes" in the space for "Removed Material Bagged Promptly." C's Ex. 20. However, this does not establish that *all* RACM that was removed was *adequately wet* until collected for disposal. Indeed, the plaster material on the floor of the containment, shown in the photographs and videotape (C's Ex. 6, 8) and observed by Mr. Foster, indicates that not all removed material was bagged promptly. Even assuming *arguendo* that the ceiling plaster had been wet at some point on the morning of June 28, 2000, there is no regulatory exception from the requirement to keep RACM adequately wet for RACM which dries from evaporation due to negative air machines. *Ocean State Asbestos Removal*, 7 E.A.D. at 533 ("failure to keep the RACM adequately wet constitutes a violation of the Asbestos NESHAP, even if that failure occurred as a result of evaporation.")

A preponderance of the evidence shows that on June 28, 2000, the RACM at issue that had been removed or stripped did not remain wet until collected and contained in preparation for disposal. Accordingly, USA is liable for violating 40 C.F.R. § 61.145(c)(6)(i) as alleged in Count 2 of the Complaint.

IV. The Penalty

Complainant proposed a penalty of $35,000 against all three Respondents. The proposed penalty was calculated pursuant to penalty determination factors in Section 113(e), the Clean Air Act Stationary Source Penalty Policy (CAA Penalty Policy), and Appendix III thereof, entitled, "Asbestos Demolition and Renovation Civil Penalty Policy" (Asbestos Penalty Policy). C's Ex. 64, 65. The CAA Penalty Policy provide that "If the case is settled as to one defendant, a penalty not less than the balance of the settlement figure for the case as a whole must be obtained from the remaining defendants." C's Ex. 64 p. 24. The Asbestos Penalty Policy also includes that provision,[6] and provides further, that the remaining penalty may be mitigated or increased in accordance with the CAA Penalty Policy. C's Ex. 65 at 8. Complainant proposes in this action as a penalty against USA only the $14,500 balance remaining from the settlements of the other two Respondents.

The Clean Air Act provides, at Section 113(d), that an administrative order may be issued assessing a civil administrative penalty of up to $25,000 per day of violation upon a finding of violation of a requirement or prohibition of any rule promulgated under the CAA. The $25,000 penalty cap is raised to $27,500 under the regulation, "Adjustment to Civil Monetary Penalties for Inflation," at 40 C.F.R. part 19 (Inflation Rule). Section 113(e) of the CAA provides that in determining the amount of any penalty to be assessed, the factors to be taken into consideration are the size of the business, the economic impact of the penalty on the business, the violator's

[6] Both Penalty Policies provide also that where one party is willing to settle and another is not, the latter should pay portions of the penalty attributable to it in addition to a reasonable portion of the amounts not directly assigned to any single party. C's Ex. 64 at 24; C's Ex. 65 at 8.

full compliance history and good faith efforts to comply, the duration of the violation, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, the seriousness of the violation, and other factors as justice may require.

The Asbestos Penalty Policy directs that a gravity component is calculated first, which takes into account the seriousness of the violation, size of the violator, duration of the violation and whether the violation is a first or a subsequent asbestos NESHAP violation. C's Ex. 64 p. 9; C's Ex. 65 pp. 1-2. In calculating the proposed penalty, Complainant first determined a penalty of $16,500 for each violation, reflecting the seriousness and duration of the violations, and then added $2,000 to reflect the size of the violator. The CAA Penalty Policy is used to adjust the gravity based penalty for the other statutory factors. Complainant did not adjust the gravity based penalties for the factors of full compliance history, good faith efforts to comply, payments for the same violation, economic benefit of noncompliance, economic impact on the business, or any other factors as justice may require.

A. Seriousness and Duration of the Violations

In the applicable Penalty Policies, the seriousness of the violation is reflected by the environmental harm resulting from the violation, the importance of the requirement to the regulatory scheme, the duration of the violation, and size of the violator. C's Ex. 64 p. 9-10; C's Ex. 65 at 1-3. The Asbestos Penalty Policy provides a matrix of penalties to assess for the gravity component of penalties for work practice violations, such as failure to adequately wet RACM. C's Ex. 65 at 17. The variables on the matrix are the amount of asbestos involved in the operation, whether the violations occurred on single or multiple days, and whether it is a first, second of subsequent asbestos NESHAP violation. The amount of asbestos is measured in units, where one unit is 160 square feet or 35 cubic feet. Where only part of a renovation project involves improper stripping, removal or handling, the penalty may reflect only the amount of asbestos related to such improper practice. C's Ex. 65 at 3-4. In the matrix, there are three levels of asbestos listed: ten or fewer units, more than ten but not more than 50 units, and over 50 units. The matrix for the gravity based penalties for work practice violations shows that for a single first-time violation of more than 50 units of asbestos, the penalty is $15,000. C's Ex. 65 at 17. Ten percent added to that value under the Inflation Rule yields a gravity component of $16,500 for each count.

Mr. Ponak testified that he calculated there being over 50 units of asbestos involved in the area at issue in the Complaint. Tr. 256. He testified that the amount of asbestos removed in the area at issue on June 28, 2000 included approximately 6,000 square feet, or approximately 37 units of asbestos,[7] based on the information in USA's response to the November 15, 2000 Information Request, and the waste manifest. Tr. 256. That Response states that on June 28, 2000, "Keystone was performing asbestos abatement operations at the Office Level; the

[7] 6,000 square feet is equivalent to 37.5 units of asbestos.

parameters of the work area extended from Rooms 231-238. The total square footage of the regulated area was approximately 6,000 square feet." C's Ex. 16 response number 21. Mr. Ponak stated that he then added 13 additional units based on the amount of over-spray that was removed and the contamination on the wire, lathe, and metal. Tr. 256-257. The waste manifest states that 30 yards of plaster and wire mesh waste were to be disposed of. C's Ex. 25. The figure of 6,000 square feet is consistent with Keystone's Daily Abatement Checklist for June 28, 2000, stating that the project size is 18,000 square feet, and with the contract proposal between USA and Keystone providing for removal of 17,500 square feet of ceiling at the office level *and* for removal of overspray from surfaces above the ceiling, coupled with a memorandum dated February 7, 2000 from Keystone stating that the Office level will be broken down into three containments. C's Ex. 20; C's Ex. 3. Keystone's June 28 Daily Abatement Checklist states that there were "1 ½ " for "How Many Loads" of "Debris Removal" and notes "Dumpsters," which suggests 1½ dumpster loads of ceiling debris was removed. C's Ex. 20.

Although Complainant has not presented documentary evidence which, apart from Mr. Ponak's testimony, establishes that the amount of RACM at issue exceeded 50 units, USA has not challenged the Complainant's calculation of the amount of RACM with any argument or evidence to the contrary.

In any event, aside from the calculation under the Penalty Policy, the $16,500 figure appropriately represents the gravity for each of the two violations at issue. The risk of environmental harm resulting from the violations at issue, and the importance of the wetting requirement to the regulatory scheme, are significant. Mr. Ponak testified that wetting the RACM is the crucial work practice standard to prevent asbestos fibers from becoming airborne and becoming an inhalation hazard. Tr. 163-614. Where RACM is not adequately wet, asbestos fibers are more likely to be emitted into the air. Airborne asbestos produces a public health threat, exposing workers and the public to an inhalation hazard which can cause cancer and mesothelioma.[8] Tr. 164, 254. The danger is increased if asbestos fibers escape into ambient air outside the containment, where there are rips or holes in the containment. Tr. 216-217. In the containment at issue, Mr. Foster observed rips in the containment plastic, one of which he described as approximately 6 by 4 inches in size. Tr. 47-48, 60, 63; C's Ex. 8.

The $16,500 figure for the two violations is also deemed appropriate because there is some support in the record for continuing violations, although Complainant declined to allege continuing or multi-day violations.[9] Mr. Ponak explained that only single-day violations were

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[8] Asbestos exposure may cause asbestosis (which causes scarring of the lung tissue), and cancer of the lung, esophagus, stomach and colon. 39 Fed. Reg. 8820 (April 6, 1973); see also, 48 Fed. Reg. 51086 (1983); *Reserve Mining v. EPA*, 514 F.2d 492, 508-9 n. 26, *modified*, 529 F.2d 181 (8th Cir. 1975).

[9] A presumption of a continuing violation may be applied where the operator has been notified of the violation by EPA or the state agency and that a *prima facie* showing can be made

alleged, as there was direct evidence of the two violations only on June 28, 2000. Tr. 264, 266. However, he testified, USA was "kind of lucky that we never had continuing violations for any of these dates, because we did have a reason to believe that this dry rule was occurring throughout the project." Tr. 375. The Asbestos Penalty Policy provides that $1,500 more per additional day of each violation may be added to the penalty. C's Ex. 65 at 5, 17. On May 4, 2000, Mr. Foster and Leonard Womble, of the West Virginia Division of Environmental Protection, conducted an inspection, and observed no water or moisture in the containment area where Keystone workers were removing ceiling plaster. C's Ex. 29. Mr. Foster asked Mr. Lema how he was wetting the asbestos and when he answered that two air misters were being used, Mr. Foster explained to Mr. Lema that air misters were to reduce asbestos particulates in the air inside the containment and are not to be used to adequately wet the asbestos. *Id.* Furthermore, a letter dated April 12, 2000 to Keystone from John Coleman of USA quotes Matt Van Patten and Bob Rosenstiel of Apex as stating that the materials they are demolishing are dry and lying on the ground. C's Ex. 27. An undated letter to Keystone from John Coleman of USA states, "There was dry ACM [asbestos containing material] found on the floors. We need to insure this material is wet and bagged as soon as possible." C's Ex. 28.

Therefore, the proposed gravity-based penalty of $16,500 is an appropriate assessment for each of the two counts.

B. Economic Benefit of Noncompliance

The Asbestos Penalty Policy describes the factor of economic benefit of noncompliance as the measure of economic benefit accruing to the operator as a result of noncompliance with the regulations. The CAA Penalty Policy provides that EPA has discretion not to seek the economic benefit component where it is less than $5,000. C's Ex. 64 at 7. Complainant did not adjust the penalty to account for this factor, because the benefit received as the cost of not wetting material would be less than $5,000. Tr. 267. Complainant's discretion as to this factor will not be disturbed.

C. Size of Business or Size of Violator

The Asbestos Penalty Policy refers to the CAA Penalty Policy for calculation of the size of the violator factor, which equates with the statutory factor "size of the business." C's Ex. 65 at 6. The CAA Penalty Policy directs that an additional dollar amount be added to account for the size of the violator; for the smallest violators, those with a net worth of under $100,000, an additional $2,000 is added to the gravity based penalty. C's Ex. 64 at 14. Increasingly larger amounts are added for violators with net worth in increments over $100,000. *Id.*

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that the conduct giving rise to the violation is likely to have continued or recurred past the date of notice. C's Ex. 65 at 5.

To account for the size of the violator in its penalty proposal, Complainant considered the sizes of all three Respondents, but added only $ 2,000 to the total penalties based upon the size of Keystone, because Keystone was the company which performed the removal at issue. Tr. 267-268.

Although there was some testimony at the hearing to the effect that USA's net worth was at some point in time over $900,000 (tr. 273.), which is significantly greater than Keystone's, there is no documentary evidence supporting that assertion or providing any details in regard thereto and, as such, no increase in the penalty for this factor beyond $2,000 is imposed.

D. Degree of Cooperation and Degree of Willfulness/Negligence

The penalty factor "good faith efforts to comply" in Section 113(e) of the CAA appears to be subsumed in the CAA Penalty Policy factor "degree of cooperation." See, C's Ex. 64 at 16-17; Tr. 270-271. The CAA Penalty Policy provides that a penalty may be increased where the respondent is not making efforts to come into compliance and is negotiating with the agency in bad faith or is not negotiating, and may be decreased where the violator promptly reports noncompliance, takes corrective action, and/or is cooperative during EPA's investigation. C's Ex. 64 at 16-17.

Mr. Ponak testified that the penalty was not adjusted for degree of cooperation, but did not elaborate on the reasons, except to say that USA did not make a good faith effort to keep Keystone in compliance because there were numerous times when dry asbestos was found at the site. Tr. 260, 271. The record indicates that even after the inspection, on June 30 and on July 20, 2000, Keystone left dry material lying inside the containment, and on July 20, 2000 Apex ordered USA to stop Keystones' work and to submit a plan on how the problems will be corrected. C's Ex. 40, 43. USA responded with a written protocol addressed to Apex, dated July 20, 2000, stating that USA will "provide in-house supervision inside the regulated area," add eight of its labor personnel and a Site Safety and Health Manager, and ensure, *inter alia*, proper clean-up of residue or debris on the floor and repair of breeches to containment barriers. C's Ex. 45.

The response to the shut-down shows that USA made an effort to bring Keystone into compliance a few weeks after the inspection, however, because it was not comprehensive corrective action done immediately after the inspection on USA's own initiative, it was not deemed the "extraordinary efforts" the Penalty Policy requires for mitigating a penalty. C's Ex. 64 at 17. Keystone's continuing problems after the inspection and USA's response thereto do not suggest either aggravation or mitigation of the penalty for degree of cooperation.

The factor in the CAA Penalty Policy, "degree of willfulness/negligence," may only be used to increase a penalty. C's Ex. 64 at 16. The CAA Penalty Policy provides that in determining whether to increase the penalty for the degree of willfulness or negligence, the following should be considered: the degree of control the violator had over the events

constituting the violation, the foreseeability of such events, the level of sophistication within the industry in dealing with compliance issues, and the extent to which the violator in fact knew of the requirement at issue. C's Ex. 64 at 16.

EPA did not increase its proposed penalty for this factor, as Mr. Ponak acknowledged that "at certain times in the project there were attempts to wet [RACM]." Tr. 258, 374. In addition, USA attempted to correct Keystone's noncompliance, as evidenced by the following correspondence from USA to Keystone: (a) a letter, dated April 11, 2000, advising Keystone not to wet debris with a water hose but to use an airless sprayer continuously (C's Ex. 26); (b) a letter, dated April 12, 2000, stating that Apex had complained of dry materials lying on the ground, and advising Keystone to remove the waste as they demolish (C's Ex. 27); and (c) an undated letter stating that there was dry ACM on the floors and advising that it be wet and bagged as soon as possible (C'S 28). Thus, considering this testimony and evidence, the penalty will not be increased for willfulness or negligence.

E. Compliance History and Payment of any Penalties Previously Assessed

Mr. Ponak testified that he investigated the full compliance history of the three respondents, and found that there were no prior violations reported for any of the three respondents, except that the West Virginia Department of Health and Human Services had issued a Notice of Violation on June 7, 2000 against Keystone for leaving ceiling plaster and spray-on ACM in the work area after it was abated on the concourse of the Coliseum. Tr. 260-262; C's Ex. 36. However, Mr. Ponak testified, it was a state asbestos violation and was not considered to be a NESHAP violation, so it did not result in an upward adjustment to the proposed penalty. Tr. 263. The proposed penalty also was not increased based on Mr. Foster's findings during his inspection on May 4, 2000, because Respondents were not officially put on notice for a violation. Tr. 263-264; *see*, Tr. 83-88, C's Ex. 29. The penalty in this proceeding therefore will not be adjusted for the factors of compliance history or payment of any penalties previously assessed for the same violation. Tr. 264.

F. Economic Impact of a Penalty on USA

The CAA Penalty Policy provides in regard to the economic impact of a penalty, that EPA generally will not request penalties that are "clearly beyond the means of the violator." C's Ex. 64 at 20. It provides further that EPA should assess this factor only if the violator raises it as an issue and provides the necessary financial information to evaluate the claim. *Id.*

Nevertheless, as a statutory factor for determining penalties under the CAA, Complainant must, and did, consider it in support of the proposed penalty. Mr. Ponak testified that based on a Dun and Bradstreet report for USA (which was not offered into evidence at the hearing), the work USA was doing, and the actual amount of money USA received for the project, EPA did not find that USA would have a problem paying all or a portion of the proposed penalty. Tr.

273. Mr. Ponak testified that USA received over $7 million for the project, had cash on hand, and had a net worth of $900,000. *Id.* On cross examination, he revealed that he did not know the net profit earned from the project.

However, USA made no efforts to present a case as to inability to pay the proposed penalty or as to the economic impact on its business. Indeed, in its Notice of Noncompliance and Request to Show Cause, dated December 13, 2001, EPA specifically invited the Respondents to submit documentation to rebut EPA's presumptions as to ability to pay a penalty and to impact of the penalty on their business. C's Ex. 47. In the Prehearing Order dated September 12, 2002, USA was required to submit all documents it intends to rely on in support of any claim of inability to pay the proposed penalty or in mitigation of a penalty. In spite of being given such advance notice of the need for such documentation, USA has not submitted any evidence. USA merely submitted financial statements in its Prehearing Exchange which USA elected not to offer into evidence at the hearing.

The penalty therefore will not be decreased for the economic impact of the penalty on USA's business.

G. Other Factors as Justice May Require

Complainant has not proposed any adjustments to the penalty for any other factors as justice may require.

The Asbestos Penalty Policy provides that EPA should generally seek a penalty for the case as a whole which the multiple respondents can allocate among themselves, but that there are circumstances where EPA may apportion a penalty among respondents, such as where one party appears more culpable than others, or is particularly deserving of punishment so as to deter others. C's Ex. 65 at 7- 8. Courts have recognized that mitigation of a penalty against one defendant may be appropriate where the evidence shows that it is less culpable due to the actions of another defendant. *U.S. v. J & D Enterprises of Duluth,* 955 F. Supp. 1153, 1161 (D. Minn. 1997).

The mere fact that USA was only supervising the asbestos removal, and that Keystone was directly at fault for the violations, does not warrant mitigation of the penalty. Indeed, in *Schoolcraft Construction, Inc.,* EPA Docket No. CAA-010A-1, 1998 ALJ LEXIS 41 (ALJ, June 23, 1998), an asbestos abatement contractor which supervised the asbestos removal of another contractor was assessed a gravity based penalty of $4,000 for the failure to adequately wet RACM during the stripping operation, and a gravity based penalty of $10,000 for failure to ensure RACM remained adequately wet until collected and contained for disposal.[10] The EPA in

[10] The contractor which actually removed the RACM settled the case before the hearing, but EPA had assessed higher penalties against it on the basis of its past violations.

that case argued in support of such allocation that the supervising contractor held itself out to be an expert in asbestos management and supervision of asbestos related renovations, and the owner, a school system (which was not named as a respondent), relied on that representation for insuring that all asbestos would be safely removed. The allocation to the supervising contractor of $14,000 in penalties in *Schoolcraft* is similar to the $14,500 penalty allocation to USA in the present case. The fact that the penalty assessment against USA is higher than the penalties in the settlement agreements with Keystone and WVU is no reason to decrease the penalty against USA, as consent agreements necessarily involve some element of compromise and cannot provide a meaningful reference point for matters litigated to judgment. *Chem Lab Products, Inc.,* __ E.A.D. __ , 2002 EPA App. LEXIS 17 (EAB 2002).

As to the specific facts of this case, Mr. Ponak testified that the Respondents all had an equal responsibility. Tr. 376. As to USA's culpability, Mr. Ponak testified that USA "didn't do enough to solve the problems," as "all the way from May throughout the project . . . there was all these situations where dry material was found, material not wet enough. And they [USA] should have done something about that," as "their contract clearly said that was their job." Tr. 371-372. He testified further that USA is an asbestos company that knows the regulations and "have numerous people trained in this type of work," and that they "should have been aware of this well before June 28." Tr. 373-374. Mr. Ponak suggested that USA "could have fired Keystone somehow," or gotten USA employees in the work area to ensure compliance. Tr. 374.

USA, in its December 8, 2000 response to EPA's information request, stated that it verbally notified Mr. Lema of deficiencies in Keystone's work practices, as well as provided written directions to cure deficiencies. C's Ex. 16. USA stated further that many key personnel were involved with day-to-day matters with Keystone, including three managers employed by USA. *Id.*

However, USA could have made a greater effort to supervise Keystone, and even described the further efforts it planned to make in its letter to Apex, in response to the stop-work order. C's Ex. 45. Specifically, USA planned to "provide in-house supervision inside the regulated area," to assign a USA manager for "overseeing all operations conducted inside the containment" and acting as quality control enforcement, to add USA personnel to Keystone's work force, and to ensure that debris is properly cleaned up and that breaches of containment barriers are repaired. *Id.*

These efforts came too late. They should have been implemented when USA first noted that Keystone was not in compliance with the requirements for adequately wetting the RACM, or at least when USA noted that its verbal notifications were not effective in keeping Keystone in compliance. USA has not presented any testimony or evidence to show that the penalty should be mitigated on account of its lack of culpability. Therefore, while USA did make some efforts to bring Keystone into compliance, it has not shown that its efforts are sufficient to warrant mitigation of the penalty.

Accordingly, upon consideration of the evidence, the $14,500 penalty proposed by the

Agency is deemed appropriate and is hereby assessed against Respondent USA Remediation Services, Inc. for the two violations of 40 C.F.R. §§ 61.145(c)(3) and 61.145(c)(6)(i) alleged in Counts I and II of the Complaint.

ORDER

1. A civil penalty of $14,500 is assessed against Respondent USA Remediation Services, Inc.

2. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c) , as provided below. Payment shall be made by submitting a certified or cashier's check in the amount of $14,500, payable to the Treasurer, United States of America, and mailed to:

Mellon Bank
EPA - Region 3
Regional Hearing Clerk
P.O. Box 360515
Pittsburgh, PA 15251

3. A transmittal letter identifying the subject case and the EPA docket number, as well as Respondent's name and address must accompany the check.

4. If USA fails to pay the penalties within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed. *See,* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

5. Pursuant to 40 C.F.R. §22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties; or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. §22.30(b).

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Susan L. Biro
Chief Administrative Law Judge