

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
City of Wilkes-Barre,)	Docket No. CAA-03-2005-0053
A.R. Popple, Inc.,)	
Wyoming S.& P., Inc.)	
)	
Respondents)	

Clean Air Act § 112 (42 U.S.C. § 7412)- Hazardous Air Pollutants-Asbestos NESHAP, 40 C.F.R. Part 61, Subpart M-Demolition/Renovation –Notification Of Intent To Demolish

Where Steam Heat Plant was demolished under an Order from the City because it was determined to be in imminent danger of collapse and a hazard to the public and the record established that the combined amount of RACM exceeded the limits in § 61.145(a)(1) for a facility being demolished and Asbestos Abatement and Demolition/Renovation Notification Form was submitted to EPA the working day following issuance of the Order as required by § 61.145(b)(3)(iii), but Notification was defective in that, inter alia, it did not include a description of work practices and engineering controls to be used in removing RACM from the Site and to prevent asbestos emissions, did not include a certification that an asbestos trained supervisor would be on site during demolition, did not identify asbestos waste transporters or the waste disposal site, nor did it include a copy of the Demolition Order, and deficiencies in the Notification were substantially cured by a revised Notification submitted within one week of the initial Notification, with the exception that it too did not include a copy of the Demolition Order, and Complainant conceded that deficiencies in the initial Notification were excusable due to the emergency nature of the demolition, it was concluded that no penalty would be assessed for this alleged violation. Moreover, the purpose of the Notification is to enable the Agency to monitor compliance and the record established that this purpose was substantially served by telephonic notice to PADEP which did in fact monitor the demolition.

Clean Air Act § 112 (42 U.S.C. § 7412)-Hazardous Air Pollutant Asbestos NESHAP, 40 C.F.R. Part 61, Subpart M – Demolition Activity-Owners or Operators

Although it did not own the facility, Steam Heat Plant, being demolished, the City, as the person who supervised and controlled, not only the facility being demolished, but who ordered, supervised and controlled the demolition; A.R. Popple, Inc., as the person who actually operated the demolition activity; and Wyoming S. & P., Inc., as the person who identified asbestos and removed it from the Site, held to be owners or operators of a demolition or renovation activity as defined in § 61.141 and subject to the standard for demolition and renovation in § 61.145.

Clean Air Act § 112 (42 U.S.C. §7412)-Hazardous Air Pollutants - Asbestos NESHAP, 40 C.F.R. Part 61, Subpart M-Demolition-Work Practice Standard- Adequately Wet

A preponderance of evidence held to establish that RACM was not adequately wet as required by § 61.145(c)(6)(i) at time of EPA inspections of demolition Site on July 16 and July 31, 2002. The City as supervisor, A.R. Popple, Inc., as the demolition contractor and Wyoming S. & P., Inc., as the asbestos-abatement contractor, held to be liable for this violation.

Clean Air Act § 112 (42 U.S.C. § 7412)- Hazardous Air Pollutants-Asbestos NESHAP, 40 C.F.R. Part 61, Subpart M- Demolition- Work Practice Standard-Failure to Have Asbestos-trained Supervisor on Site and Failure to Dispose of RACM as Soon as Practical

Count alleging failure to have an asbestos-trained supervisor on site while demolition was in progress as required by § 61.145(c)(8) was dismissed as to asbestos abatement contractor where evidence established that contractor did not arrive on Site until after dates of violation alleged in complaint. The fact that the building or the remnant thereof was unsafe to enter was considered in determining whether and when it was practical to dispose of RACM as required by § 61.150(b).

Clean Air Act § 113(d) (42 U.S.C. § 7413(d)) -Administrative Assessment of Civil Penalties-Clean Air Act Stationary Source Civil Penalty Policy (1991)- Multiple Respondents- Apportionment of Penalty

Where penalty calculated by Complainant was assessed against Respondents collectively and apportionment was necessary because a count was dismissed as to one Respondent, penalty was apportioned based on apparent degree of control Respondents had over violations as shown by record.

Clean Air Act § 113(d) (42 U.S.C. § 7413(d))-Administrative Assessment of Civil Penalties-Final Revisions to the Asbestos Demolition and Renovation Civil Penalty Policy (1992)-Size of Business Adjustment

Where in accordance with its general practice in a multiple respondent case, Complainant based size of business adjustment to proposed penalty on net worth of contractor who handled and disposed of asbestos, and contractor's net worth was based on a two and-half year old Dun & Bradstreet report and did not consider evidence that the contractor's net worth had declined precipitately to zero in the interim, adjustment for size of business was determined to be arbitrary and penalty was assessed without regard to such an adjustment.

Appearances:

For Complainant:

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U.S. EPA
Philadelphia, PA

For Respondents:

City of Wilkes-Barre
Timothy J. Henry, Esq.
City Attorney
Wilkes-Barre, PA

A.R. Popple, Inc.
Joel M. Wolff, Esq.
Elliot Greenleaf & Siedzikowski, P.C.
Scranton, PA

Wyoming S. & P., Inc
Karl J. Kwak, Esq.
Cefalo & Associates
West Pittston, PA

Initial Decision

This proceeding under Section 113(a)(3) and (d) of the Clean Air Act, 40 U.S.C. § 7413(a)(3) and (d) (“CAA” or the “Act”), was commenced on December 30, 2004, by the filing of a complaint by the Division Director of the Waste and Chemical Management Division of the United States Environmental Protection Agency, Region 3 (“Complainant” or “EPA”). The complaint charges the City of Wilkes-Barre, A.R. Popple, Inc., and Wyoming S.& P., Inc. (“Respondents”) with violations of Section 7412 of the Act and of the Asbestos National Emission Standard for Hazardous Air Pollutants (“Asbestos NESHAP”), 40 C.F.R. Part 61, Subpart M. The complainant alleges that the Respondents are the owners or operators of a “demolition activity” as defined by 40 C.F.R. § 61.141 and that the facility being demolished is the Wilkes-Barre Steam Heat Plant (“Steam Heat Plant” or “Site”). Count I of the Complaint alleges that Respondents violated § 61.145(b) by failing to give adequate notice of the demolition. Count II alleges that Respondents violated § 61.145(c)(6) by failing to keep all regulated asbestos-containing material¹ (“RACM”) adequately wet until treated or contained in preparation for disposal. Count III alleges that Respondents failed to have a trained supervisor present during the demolition activities in accordance with § 61.145(c)(8). Lastly, Count IV alleges that Respondents violated § 61.150(b) by failing to dispose of all waste material containing asbestos as soon as practical. For all these alleged violations, Complainant proposed a civil penalty of \$36,650 against Respondents. No apportionment or allocation of the penalty among the Respondents was made or attempted.

The City of Wilkes-Barre (“City”) answered the complaint. The City denied that it was an owner or operator of a demolition activity within the meaning of § 61.141 (City Answer at 6, ¶ 40 and at 15, ¶ 1). The City rejected EPA’s allegation that it was the owner of the Wilkes-Barre Steam Heat Plant. Instead, the City contended that the Steam Heat Plant is titled to the Wilkes-Barre Steam Heat Authority, which is recorded as an existing authority by the Department of State Bureau of Corporations (City’s Answer at 4, ¶ 30). As proof, the City attached a copy of a deed, dated August, 27, 1976, whereby the Wilkes-Barre Steam Heat Company granted and conveyed the property upon which the Steam Heat Plant was situated to the Wilkes-Barre Steam Heat Authority. Further, the City asserted that it did not assume responsibility for the Steam Heat Plant and merely acted in its municipal capacity in attempting to abate a nuisance (City’s Answer at 5, ¶ 33 and at 15, ¶ 4). In addition, the City denied knowledge of, or responsibility for, the alleged violations during the demolition of the Steam Heat Plant. The City admitted that it had contracted with A.R. Popple, Inc. (“Popple”) for demolition of the Steam Heat Plant and that it contracted with Wyoming S.& P., Inc. for asbestos abatement work during the demolition. The City contended that it acted in a municipal capacity to abate a nuisance but not as an owner or operator (City’s Answer at 5, ¶ 33). However, the City did admit that it assisted “at the time of the demolition (not with the demolition) by having firefighters on hand keeping the alleged asbestos area wet at the direction of the co-respondents.” (City’s Answer at 15, ¶ 3). The City’s Answer denied any liability and requested a hearing (id. at 14).

¹ “Regulated asbestos-containing material” is defined as “(a) Friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart.” 40 C.F.R. § 61.141.

A.R. Popple, Inc. filed an answer stating that it was an excavation contractor who also performed demolition projects (Popple's Answer at 2, ¶ 26). Popple admitted that in June of 2002, the City contacted it to abate an emergency situation at the Steam Heat Plant (Answer at 3, ¶ 34). Popple contended that it took action to prevent further damage after the collapse of a Steam Heat Plant roof. Popple did, however, deny that it was an owner or operator of a demolition activity within the meaning of 40 C.F.R. § 61.141. Popple also denied that any violation of regulations occurred and alleged that any violation which may have occurred resulted from acts or omissions by other entities outside of Popple's control (Answer at 12, ¶ 86). In addition, Popple stated that the Pennsylvania Department of Environmental Protection ("PADEP") was present at the site and authorized all of its work (Popple's Answer at 12, ¶ 87). Popple also alleged that the Wilkes-Barre Fire Department was at the Steam Heat Plant wetting all the material (Popple's Answer at 12, ¶ 88). Popple contended that the complaint was barred by the doctrine of laches and by the statute of limitations and that the complaint failed to state a claim upon which relief may be granted (Popple's Answer at 12, ¶ 89-91). It opposed any penalty and moved that the complaint be dismissed with prejudice (Popple's Answer at 5).

Wyoming S.& P., Inc. ("Wyoming") responded to the complaint via a letter signed by its president, Bruce S. Postupak, dated April 14, 2005 ("Wyoming's Answer"). Wyoming claimed that it had no contract with either the City or Popple for the demolition at the Steam Heat Plant (Wyoming's Answer at 1). Wyoming insists that it was "to supply Supervisory personnel only on the days requested to be there by the contractor." The letter continues "[w]e were not responsible for asbestos abatement of the building." (Id.). Mr. Postupak continues by explaining that it was not responsible for abatement prior to the demolition but rather was hired after the demolition had begun (Wyoming's Answer at 1). Specifically, Wyoming asserts that supervisory personnel were not requested until late on June 21, 2004 [2002] and that its first day working on the site was the next day [June 22] (id.). Wyoming denied responsibility for the violations alleged in the complaint and requested a hearing.

Thereafter, the parties exchanged prehearing information in accordance with a March 17, 2005 order of the Administrative Law Judge and Complainant filed two motions. The ALJ denied Complainant's Motion in Limine, which sought to exclude all documents, exhibits, and testimony in relation to the financial condition of the Respondents and any claims of Respondents' inability to pay the proposed penalty or whether the proposed penalty would have an adverse effect on their ability to conduct business (Transcript "Tr." 10). The Motion in Limine further requested that the ALJ preclude Respondent Popple from offering or introducing any and all documents, exhibits, and testimony relating to demolition activities at the site prior to June 20, 2002, which involved parties not named in the proceeding (Tr. 11). Complainant's Motion to Supplement Record, which sought to introduce records from the Pennsylvania State Climate Office showing temperature and rainfall conditions in Scranton, Pennsylvania, apparently maintained by the Federal Aviation Administration, during the period July 28, 2002, through July 31, 2002, was also denied.

A hearing on this matter was held in Wilkes-Barre, Pennsylvania, on August 23 and 24, 2005. Based upon the entire record including the proposed findings, conclusions and briefs of the parties, I make the following:

Findings of Fact

1. The City of Wilkes-Barre is a municipality incorporated in the Commonwealth of Pennsylvania, which maintains an office at 40 East Market Street in Wilkes-Barre, Pennsylvania, 18711 (Complaint at ¶¶ 24 and 25; City’s Answer at ¶¶ 24 and 25).

2. A.R. Popple, Inc. (“Popple”) is a corporation incorporated in the Commonwealth of Pennsylvania having a place of business at 190 Mundy Street, Wilkes-Barre, Pennsylvania 18702 (Tr. 192). Popple is in the excavation business and also does demolition work.

3. Wyoming S. & P., Inc (“Wyoming”) is a Pennsylvania corporation which is in the business of asbestos abatement and maintains an office at 11 New Frederick Street, Wilkes-Barre, Pennsylvania 18703 (Tr. 192).

4. As indicated infra, the address of the former Wilkes-Barre Steam Heat Plant as stated in the “Bid Package” is located at 129 North Washington Street, Wilkes-Barre, Pennsylvania. The Plant or Facility may properly be described as a complex consisting of two or three buildings with adjoining or abutting walls (Tr. 310). The Site is in a residential area (Tr. 36).

5. The property upon which the Steam Heat Plant was situated was deeded to the Wilkes-Barre Steam Heat Authority on August 27, 1976 (Tr. 234; Exhibit “Exh” WB-4). There were no members of the Wilkes-Barre Steam Heat Authority [available in the summer of 2002] who could be ordered to demolish the Steam Heat Plant (Hayward, Tr. 384-85). The Wilkes-Barre Steam Heat Authority later lost the property at a tax sale on December 31, 2002 (WB-4). The sheriff’s deed conveying the property contains references to a commercial building commonly known as 135 North Washington Street, Wilkes-Barre, Pennsylvania (WB-4). This building was specifically excluded from the demolition at issue here (infra note 2).

6. The Steam Heat Plant had been abandoned for many years. Testimony at the hearing indicated that the site had become a haven for vagrants and the homeless (Tr. 307, 378-379). Mr. William Murtha, a captain in the Wilkes-Barre Fire Department, testified that the site was on “fire watch,” which is a term that the Fire Department reserves for buildings deemed hazardous (Tr. 306-308). He testified that the Steam Heat Plant was on fire watch because it “was considered hazardous structurally, as well as the fact the [Fire Department] knew it was a building that should not be occupied, but also may be occupied by vagrants” (Tr. 307). He stated that “they at times even set traps so you can’t invade their private space.” (id.).

7. In June of 2001, the Office of Economic and Community Development for the City of Wilkes-Barre (“OECD”) solicited and received bids for the demolition of the Steam Heat Plant (Tr. 232; Bid Package, Exh 23). The Bid Package describes the project as “Demolition and Site Clearance 129 North Washington Street ‘Steam Heat’ ”.² A contract, however, was never awarded (Tr. 232). Mr. Frank Eick, Deputy Director of OECD, opined that the failure to award a contract resulted from a lack of funding (Tr. 232). The City reopened the bidding process in

² An Addendum entitled “Special Provisions” provided in part: “All buildings and tanks, except for the two stack towers and the multi-story building on the corner of North Washington and Jackson [Bennett] Street shall be demolished and disposed of properly.”

October of 2001 (Tr. 232). During the second bidding session, A.R. Popple, Inc. submitted the lowest bid to raze the building complex (Tr. 232). Again, a contract was not awarded (Tr. 232). A contractor named Bradaric Excavating (“Bradaric”), sometimes referred to as “Brdaric,” handled [demolished] another part of the collapsed Steam Heat Plant on Washington Street at the instance of the City (Tr. 51, 53, and 57). Ms. Karen Gee, an inspector for PADEP, thought that Bradaric’s activities with respect to the Steam Heat Plant occurred in 2001, because she located an Asbestos Notification Form in PADEP files from Bradaric for 2001, but none for 2002 (Tr. 51, 52). Mr. Anthony Popple, president of A. R. Popple, Inc., testified, however, that he became very upset that Bradaric was performing work upon which Popple had been the low bidder and that this occurred sometime in May of 2002.³

8. Mr. James D. Hayward (“Hayward”) was the acting City Administrator during the summer of 2002 (Tr. 366). On or about June 19, 2002, Mr. Hayward was in the mayor’s office when he received a telephone call (Tr. 367). Mr. Hayward testified that the “phone call was from the fourth floor where they answered the hotline telling me that a woman who lived across the street, on Jackson Street, from Steam Heat saw and heard a collapse, something inside the building, and that she was worried that the building was going to collapse.”⁴ In response, Mr. Hayward contacted the building inspector’s office and, accompanied by Code Enforcement and other City employees, went to the Site (Tr. 367). The building inspector’s office sent Gerald Goeckel, then Director of the Wilkes-Barre Department of Public Safety’s Bureau of Code Enforcement, to investigate as well. Mr. Hayward testified that he observed an over 250-foot-plus long, over 40-feet high [brick] wall weaving like a snake in immediate danger of collapse (Tr. 370). He opined that “(i)f the wall collapsed, five homes across the street would have been destroyed” (id.).

9. Mr. Hayward and Mr. Goeckel spoke with the woman who had called the hotline (Tr. 368). While the City representatives were speaking with the woman, they heard another loud noise coming from the Steam Heat Plant (Tr. 368). According to Mr. Hayward, “it appeared that the roof joists across the building collapsed even further while we were standing there; and the [thirty to forty foot high brick] wall actually started to sway.” (Tr.368). Messrs. Hayward and Goeckel determined that the wall was in danger of collapsing. Mr. Hayward testified that he was concerned the wall would fall into the houses across the street “because it was high enough to reach.”⁵ They concluded that, not only did the collapse pose a threat to nearby homes, but there

³ Tr. 401-02. However, a letter from counsel for A.R. Popple to Complainant’s counsel, dated August 2, 2004, states that the building had been partially demolished by another contractor several months prior to June 2002 (Exh 25, note 1). According to A.R. Popple, this occurred in approximately March of 2002 (Pre-hearing Statement of A.R. Popple at 2).

⁴ Tr. 367. References to Jackson Street were intended to be Bennett Street as the Steam Heat Plant fronted on North Washington Street and was located between Bennett and Union Streets in the City of Wilkes-Barre (Tr. 36, 384, 399). As indicated supra, the Bid Package identified the address of the Steam Heat Plant as 129 North Washington Street, which according to Ms Gee, is the Steam Plant Annex (Tr. 36; Map 50A, C’s Exh 23). The endangered homes were apparently across Bennett Street, which the Map indicates is on the opposite side of the building from No. 129.

⁵ Id. This testimony is to be contrasted with that of Mr. Popple who testified: “[w]e were asked by the City to come in under an emergency basis with an excavator and front-end loader to secure the wall . In other words, to—we collapsed it in inward (sic) versus letting it fall out into the alley.” (Tr. 400). He stated that the roof had collapsed on

was a possibility that the wall would destroy a telephone [power] pole with four high powered electrical transformers having 50,000 volts of electricity (Tr. 368–369; C-22). This appears to be the power pole shown in photos 1, 5, 6, and 25 (C’s Exh 8).

10. After consulting the mayor, Mr. Hayward was told “to do whatever we had to do to make it safe.” (Tr. 372). Mr. Hayward contacted Popple to take immediate action to demolish the Steam Heat Plant (Tr. 222-223). He requested that the contractor “do whatever it is [necessary] to make sure that this [wall] doesn’t collapse onto the houses or telephone pole.” (Tr. 372). Mr. Popple testified that we were asked by the City to come in under an emergency basis with an excavator and a front-end loader to secure the wall (supra note 5). The contract between A.R. Popple, Inc. and the City of Wilkes-Barre for demolition of the Steam Heat Plant is entitled “AGREEMENT FOR DEMOLITION AND SITE CLEARANCE,” dated June 19, 2002, and is in the amount of \$394,000 (Popple Exh 1). Although there is evidence that the start date of the demolition was June 19, 2002 (infra finding 18), certified payroll records of A.R. Popple, Inc. indicate that the first activity at the demolition site by employees of Popple occurred on June 20, 2002 (Exh WB-21).

11. On June 20, 2002, Mr. Goeckel issued a Demolition Order due to the dangerous conditions that existed at the Steam Heat Plant (Tr. 372-373; Exh C-30). Among other things, the Order states that the building represents a clear and immediate danger to the safety of the public and the residents of Bennett Street and that the structure should be demolished immediately to prevent damage to life and property.

12. Suspecting that the Steam Heat Plant may contain asbestos, Mr. Hayward also contacted the Vice President of Wyoming, Carl Smatko (Tr. 373). It is not clear when this call was made as Mr. Postupak testified that Carl was away and would return on Sunday (Tr. 319). Mr. Hayward, however, insisted that he had spoken to Mr. Smatko, stating that he had Carl’s cell phone number (Tr. 393). It appears that this call must have been made subsequent to the call on June 21 described by Mr. Postupak (infra finding 13).

13. Bruce Postupak, the president of Wyoming, testified that late in the afternoon of [Friday] June 21, 2002, he was contacted by the City (Tr. 317). He was not certain if he had been called by either Jim Hayward or Bob Mosley, but thought that he had spoken with Mr. Mosley (Tr. 317, 318). He (Postupak) stated that he was informed that the City was demolishing a building under emergency circumstances and that they wanted two people at Steam Heat the next day (Tr. 318-19). He was informed that two people would be needed to pick up debris around the area, one of whom would have to be an [asbestos trained] supervisor but that they would not be allowed where the demolition was taking place (Tr. 319, 322). He testified that he sent two people over on Saturday and visited the Site later that day. He found his employees there and observed that the fire company was “wetting the building and everything else” (Tr. 319). He explained that Wyoming was “only going to supply them [workers] when they wanted people, and a supervisor” (Id.). He denied that Wyoming had any control over how many Wyoming workers would be at the Steam Heat Plant or any power as to when the Site would be

one of the back walls “which an alley ran behind.” (Id.). Although Mr. Hayward alluded to an alley between two of the buildings [constituting the Steam Heat complex] (Tr. 171), the only alley evident on Map 50A is between buildings across Bennett Street.

watered down (Tr. 320). Under cross-examination, Ms. Gee testified that Wyoming S. & P. had nothing to do with the Steam Heat Demolition Project as of June 20 and June 21, 2002 (Tr. 61-63).

14. Mr. Postupak denied ever being asked by Mr. Popple to do any asbestos work, denied having a contract with either the City or Popple before or after June 21, and repeatedly denied having “any contract or scope of work” with the City (Tr. 317, 320, 322, 329, 360). It should be noted, however, that three of the four Asbestos Abatement And Demolition/Renovation Notification Forms identify Wyoming S. & P., Inc. as the asbestos abatement contractor (C’s Exhs 28, 29, 30, and 31). As indicated infra, only the second and fourth of these Forms were signed by Wyoming’s president, Bruce S. Postupak (Exhs 29 and 31). Moreover, as indicated, infra finding 15, there are other documents in the record which reflect that Wyoming was a subcontractor. It developed that Wyoming was only going to supply people when they were asked for and that Wyoming got paid by the person on the job per day (Tr. 326). Mr. Postupak testified that “the only one that I ever knew that I worked for was the City. I didn’t even know A.R. Popple was on the job in the beginning.” (Tr. 321). The fact that Wyoming S. & P. was contacted and brought onto this project by the City appears to be confirmed by Mr. Hayward’s letters to Harry Daw, EPA, dated July 21, 2003, and to Karen Gee, dated July 31, 2002 (infra findings 17 and 26). He (Postupak) stated that when he submitted a bill, the City notified him that Popple would be responsible for payment (Tr. 321). Mr. Popple confirmed that he paid Wyoming S. & P. as a “pass-through” from the City (Tr. 418) Mr. Postupak acquiesced in this arrangement after the City guaranteed payment (Tr. 321- 22).

15. Mr. Kurt Sauer, Director of Community Development for the City of Wilkes-Barre, testified that the [Steam Heat] demolition project was federally funded under the Community Development Block Grant Program (Tr. 248-49). Because federal funds were involved, he pointed out that there were a number of forms which the prime contractor was required to assure that all subcontractors filed with his office. Examples of such forms are “Certification of Non-segregated Facilities”; “Pre-Construction Conference Memorandum”, which Mr. Sauer pointed out concerned affirmative action requirements for new hires; “Wage Rate Acceptance, Pay Roll Clerk Authorization”; “Contractor’s Certification Labor Standards And Prevailing Wage Requirements “; and “Contractor’s Verification of Contractor Eligibility”(Exh WB-8). Although these forms would normally be submitted before [work] on a project starts, in this instance they were submitted in August of 2002 (Tr. 284). The forms were submitted by Wyoming S. & P., were signed by Carl G. Smatko, vice-president, are dated August 22, 2002, and identify Wyoming as the bidder or as subcontractor. Mr. Sauer testified that the prime contractor was responsible for control of the job site, which in this instance was A.R. Popple (Tr. 284-85). See, however, finding 16 infra.

16. Mr. Frank Eick, deputy director of the City’s Office of Economic and Community Development, testified that once the Director of Code Enforcement Office declares a site as an emergency, his office contacts demolition contractors to obtain an estimate to rectify the situation (Tr. 231). Mr. Eick testified that the Steam Heat Plant contract was awarded to Respondent Popple because of his prior bids (Tr. 232). In cases of emergency demolition, OECD does not adhere to a bid process and the City approached Popple in June 2002 for the emergency demolition (Tr. 232). In agreement with Mr. Sauer (finding 15), he pointed out that

once a contract was awarded, the contractor was responsible for control of the site (Tr. 233). It should be noted, however, that Mr. Hayward testified that in this instance, the “then mayor wanted to control everything” and “I wouldn’t allow the contractors to control it [demolition site].” (Tr. 390). For Mr. Popple’s testimony that Mr. Robert Mosley, identified infra finding 17, controlled the Site on behalf of the City, see finding 49 infra.

17. Mr. Robert Mosley, formerly employed by the City as a building inspector, testified that at the instruction of the [City] administration he was on the [Steam Heat] job constantly (Tr. 224). Asked what other City personnel were on site, he replied “[f]iremen.” (Tr. 224-25). At the formation of the contract between the City and Respondent Popple, Mr. Mosley understood that it would be Popple’s responsibility to make sure that the asbestos was properly treated and removed from the Steam Heat Plant (Tr. 223-224). He testified that to his knowledge there was no contractual relationship between the City and Respondent Wyoming because they were a contractor that Popple had awarded to do their asbestos removal work (Tr. 224). He explained that the City “awarded a contract to one person, to my knowledge, which was A.R. Popple. Under the guidelines, [Respondent Popple was] to award or take care of everything according to any state or government regulations, like asbestos abatement” (Tr. 226). However, Mr. Mosley testified that he had never seen a written contract between Respondents Popple and Wyoming (Tr. 228). Although Mr. Mosley may be correct as to the City’s contracting guidelines, the record is clear that the City and not Popple brought Wyoming S. & P. onto the Steam Heat demolition project (finding 15). Moreover, Administrator Hayward’s letter to Harry Daw, Chief Pesticides/Asbestos Programs and Enforcement, dated July 21, 2003, refers to Wyoming S. & P. as “our asbestos abatement contractor”(Exh C-22). Mr. Popple, however, acknowledged that under the contract with the City, he was responsible for asbestos abatement (Tr. 415-16, 417).

18. Mr. Eick signed and submitted on behalf of the City an initial Asbestos Abatement and Demolition/Renovation Notification Form (“Asbestos Notification Form”), dated June 20, 2002, to EPA (Exh C-28). The Notification was mailed to EPA on June 21, 2002, and received by EPA on June 25, 2002. Among other things, the Notification identified the facility as the Wilkes-Barre Steam Heat Plant, indicated that it was an ordered demolition, described the work as “Demolition and Site Clearance and Asbestos Removal,” stated that an inspector would be on site for duration of demolition and provided that, if unexpected asbestos is found or previously non-friable asbestos becomes crumbled, pulverized or reduced to dust, all work would stop, asbestos would be removed and work would resume. The Notification stated that an asbestos abatement contractor would be on site for the duration of the project. Section 7 of the Notification identified the abatement contractor as “PDG, Inc”, Drums, PA (C-28 at 1). In Section 10, entitled “Facility Inspection,” the Form indicates that the City will assume the material to be asbestos (Tr. 146; C-28 at 2). The Notification did not identify work practices to be employed to prevent asbestos emissions, nor identify the waste transporter or the waste disposal site. In common with the other Notifications referred to infra, the facility owner was identified as the City of Wilkes-Barre. The Notification indicated that the start date was June 19, 2002, and the complete date was July 19, 2002. The Notification did not include a copy of the Demolition Order (Tr. 145).

19. The Pennsylvania Department of Environmental Protection's Ms. Gee, informed the City that the Notification would be rejected (City letter to Karen Gee, dated July 31, 2002, Exh C-5). The City per Administrator Hayward signed and mailed to EPA a revised Asbestos Notification Form on June 27, 2002, which was received by EPA on July 8, 2002 (Tr. 146, Exh C-29). In this version of the Asbestos Notification Form, Wyoming S. & P., Inc., was identified as the asbestos abatement contractor, work practice and engineering controls to prevent asbestos emissions were listed.⁶ Wyoming S. & P., Inc. was identified as the first waste transporter, Freehold Cartage, Inc. as the second waste transporter and Meadowfill Landfill, Bridgeport, W.V. as the waste disposal site. Section 23, which provides a certification that a representative trained in provisions of the Asbestos NESHAP will be on Site, was signed by Bruce Postupak, the president of Wyoming S. & P., who certified that an individual trained in the provisions of 40 CFR PART 61, Subpart M would be on site during demolition and that all work would be done in accordance with all applicable State and local agency rules and regulations (Exh C-29). This Notification again failed to include a copy of the Demolition Order (Tr. 146). It did, however, include information concerning the Order. i.e., that it was issued by the City of Wilkes-Barre, that the individual issuing the Order was Gerald Goeckel, Chief of Code Enforcement, that the Order was dated June 21, 2002 rather than the actual date of June 20, 2002, and that demolition was to begin on the date of issuance.

20. Another Asbestos Notification Form was submitted to EPA on July 12, 2002, and received by EPA on July 17, 2002 (Exh C-30). This version included a copy of the Demolition Order but did not have a signature that an [asbestos] trained person would be on-site during the demolition (Tr. 147; C-30 at 4). On July 18, 2002, a fourth Asbestos Notification Form was mailed to EPA (Tr. 147; Exh C-31). This Notification was received by EPA on July 22, 2002. EPA accepted this form because all of the previous deficiencies were addressed (Ponak, Tr. 147).

21. Due to the dangerous condition of the Steam Heat Plant, the building was not inspected prior to demolition to determine the presence or quantity of asbestos (City letter to EPA, dated July 21, 2003; Exh C-22). The Asbestos Notifications did not provide an estimate of how much RACM would be removed but did indicate that the material would be assumed to be asbestos (Exhs C-28-31).

22. On June 20, 2002, the day of the collapse, Mr. Hayward also contacted PADEP to notify it of the emergency circumstances and the actions taken by the City. Ms. Gee, identified finding 7, testified that she was called at home on the evening [afternoon] of June 20, 2002, and notified of the demolition (Tr. 37). She returned to Wilkes-Barre and to the Site, arriving between 5:15 p.m. and 6:00 p.m. She found that A.R. Popple was demolishing what she referred to as "the [Steam Heat] Annex" and that City officials [City Administrator Jim Hayward and Mayor Tom McGroarty] were there (Tr. 38; Inspection Report, C's Exh 1). She was told by City officials that the Annex had previously been determined to be free of asbestos-containing material (Tr. 43; Inspection Report at 2). In other testimony, she indicated that a wall of the Steam Heat Plant on Bennett Street was starting to fall over toward residences [on the opposite side of Bennett Street] and they were taking the wall down in a manner that would not impact the

⁶ These practices and controls are: 1. Wet Removal Methods will be used. 2. HEPA Air Filtration Units Will be Utilized For Cleaning Air. 3. Materials Will Be Double Bagged In A Total of 12 MIL Plastic For Transportation In A Closed Vehicle. 4. Disposal Will Be At An EPA Approved Landfill Facility.

residences (Tr. 38). She estimated that the height of the wall was such that, if it had fallen, it would have struck one of the residences across Bennett Street (Tr. 59). She observed that the Wilkes-Barre Fire Company was keeping all materials well wetted and continued to do so throughout her inspection. Her Inspection Report states that she observed no violations of asbestos and fugitive emission regulations. This is apparently because she had been incorrectly informed that the Annex had been determined to be free of asbestos-containing materials. She returned the next morning [June 21] at approximately 7:00 a.m., finding that the contractor was using heavy equipment to segregate steel from building debris and again observed no violations (id.). Because Ms. Gee had been informed that Wyoming S. & P. had conducted an inspection of the Annex for the presence of asbestos, Wyoming was listed as the asbestos abatement contractor in the Inspection Reports by Ms. Gee and Ms. Luevano (C's Exhs 1 and 2). Ms. Gee testified that she personally and members of her staff inspected the Site over one to two weeks [while work was in progress] (Tr. 48). Mr. Popple testified that he probably visited the Site for an hour or two every day (Tr. 422) and that he observed Ms. Gee at the Site every other day (Tr. 412).

23. The Site was again inspected at 10:00 a.m. on June 21, by PADEP environmental trainee, Pamela Luevano (Inspection Report, C's Exh 2). The Report lists Wyoming S. & P. as the asbestos abatement contractor, states that heavy equipment was being used to remove scrap metal and that fireman were on the scene wetting the work area. She reports an incident where an equipment operator for A.R. Popple attempted to knock down a roof over pipes having possible asbestos containing material attached. Mr. Mosley representing the City directed the operator not to work in that area. Again no violations appear to have been observed.

24. A third inspection of the Site was conducted by Ms. Luevano on June 28, 2002 (C's Exh 3). The Inspection Report states, among other things, that no barriers or asbestos signs were on Bennett Street. When Ms. Gee asked Wyoming S. & P. for a copy of the inspection report [evidencing the Site had been determined to be asbestos-free], Wyoming denied having inspected the "Complex" (Tr. 43). EPA was next identified as the possible source of an inspection, but when Ms. Gee called an unidentified person at EPA, she was informed that they had done a "characterization" rather than a complete inspection (Tr. 44). The Notice of Violation (C's Exh 4) refers to the "characterization report" as a report prepared by Weston for EPA, but denies that this was an asbestos inspection. Additionally, the NOV states that the persons involved were not certified as asbestos inspectors.

25. When Ms. Gee learned that an inspection of the Site had not been conducted prior to the demolition, she became concerned because there had been releases which may endanger workers and residents of the area (Tr. 44). She explained that in cases where an inspection wasn't possible prior to demolition, [owners or operators] had two options: they could have an onsite inspector go through the debris looking for asbestos and, if asbestos were found and a release had occurred, the entire site had to be treated as contaminated, or they could just assume that the whole site was contaminated.⁷ Thereafter, Ms. Gee drafted a Notice of Violation ("NOV") which was mailed to the City under date of July 18, 2002 (Tr. 45; C's Exh 4), and,

⁷ Tr. 44, 45. It should be noted that the Addendum Special Provisions to the Bid Package (C's Exh 23) specifies that all materials shall be treated as asbestos contaminated and that materials and metal shall be removed from the pile and placed in an area where a certified asbestos abatement technician can examine the debris and remove any detected asbestos in accordance with federal and state requirements.

which refers to the ordered demolition as having been precipitated by the collapse of the “fire-damaged roof.” The NOV states, inter alia, that due to lack of an asbestos inspection prior to demolition, all Wilkes-Barre Steam Heat Buildings are assumed to contain asbestos and are considered to be asbestos-contaminated, citing 40 C.F.R. §61.145(c)(1)(iii); that on June 20 and 21, 2002, Department staff members observed heavy machinery separating steel from other demolition debris and placing the steel in containers to be transported away from the Site and that, in violation of 40 C.F.R. § 61.145(c)(8), at no time during either of these days was an individual trained and certified to supervise RACM removal on Site; that during an inspection on June 28, 2002, a member of the Department’s Air Quality Program observed that friable asbestos-containing waste was left in open bags in an unsecured area of the Site, that these bags were not sealed or labeled as required and material inside the bags was not adequately wet nor were the bags labeled as containing RACM in violation of 40 C.F.R. § 61.145.(c)(6). Other provisions of the NOV concern the adequacy and timeliness of the Asbestos Abatement and Demolition/Renovation Notification Form submitted by the City and notice that, if RACM were not removed for safety reasons, the RACM and any exposed asbestos-contaminated debris must be treated as asbestos-contaminated material and adequately wet at all times until disposed of, in accordance with 40 C.F.R. § 61.145.(c)(1)(iii). Because this was an ordered demolition, the requirements of § 61.145(c)(1) do not apply (§ 61.145(a)(3)). The requirement to keep RACM adequately wet until collected or contained in preparation for disposal, nevertheless, applies because of § 61.145(c)(6)(i).

26. The City responded to the NOV by a letter from Administrator Hayward addressed to Karen Gee, dated July 31, 2002, which included a copy of an Asbestos Notification Form, dated June 27, 2002 (C’s Exh 5). The letter states that emergency demolition of the Steam Heat [Plant] began on Thursday, June 20, 2002, [due] to collapse of supporting roof members, that Notification was sent out on Friday, June 21, 2002, and that Pople had informed us that PDG, Inc. was going to be the asbestos abatement contractor. The letter states that he (Hayward) contacted Wyoming S. & P. as Wyoming was the only one able to send technician[s] soon enough. The letter referred to the fact that Ms. Gee had informed Mr. Hayward that the initial Notification would be rejected and that he immediately contacted “Ruth” [Ann Gutenkunst] at Wyoming S. & P. who prepared a new Notification and delivered it to Hayward for his signature. This is the second Notification (Exh C-29) which, like the first, failed to include a copy of the Demolition Order (finding 19). Mr. Hayward acknowledged that he was incorrect, that the asbestos inspection was of Sanitary Laundry [rather than Steam Heat] and that due to the dangerous condition no prior inspection of the Steam Heat Building was conducted. The letter states that waste and asbestos manifests for asbestos products removed from the Site are enclosed. The attachments include what appear to be a two-page shipping document (Manifest No. L 18797) showing delivery of 30 bags of asbestos materials from the Wilkes-Barre Steam [Plant] to Wyoming S. & P. on June 24, 2002, and thence from Wyoming S. & P. to the Meadow Fill Landfill, Bridgeport, W.V. on July 2, 2002.

27. The Site was inspected by Mr. Richard Ponak, an environmental scientist employed by EPA, on July 16, 2002 (Tr. 91; report of inspection, C’s Exh 6). Asked how the Steam Heat Plant demolition came to his attention, Mr. Ponak replied that as part of our general targeting procedures he looked at newspapers, trade journals, magazines and on the Internet for potential demolition sites, and that was where he came across the instant Site (Tr.105). Mr. Ponak

testified that he had been with EPA since 1991 and that his duties included Asbestos NESHAP enforcement, inspections, and case development (Tr. 91, 92). He stated that he was sample coordinator for EPA Region 3, i.e., responsible for logging in and maintaining custody of samples until the samples needed to be analyzed for asbestos content (Tr. 93). He estimated that he had performed over a thousand asbestos inspections since being employed by EPA (Tr. 94). He has testified in prior administrative and judicial asbestos enforcement cases and qualified as an expert in Asbestos/NESHAP requirements (Tr. 94, 95).

28. Mr. Ponak described asbestos as a natural occurring fibrous mineral having extremely strong tensile strength [with] strong fiber, which is a good insulator and fire proofing material (Tr. 97). He stated that asbestos was a known carcinogen, related to asbestosis, lung cancer and mesothelioma (Tr. 97, 98). He explained that the goal of the Asbestos/NESHAP was to prevent the release of asbestos fibers into the air and that the regulation applied to all owners and operators of demolition or renovation projects. He described demolition as any project where a load-bearing member is being wrecked or demolished and any handling operations of that material (40 C.F.R. § 61.141). Regulated asbestos-containing material (RACM) is any asbestos material [containing] greater than one percent asbestos and which is friable (Tr. 99; § 61.141). Demolition or renovation projects are subject to the Asbestos/NESHAP, if the amount of asbestos-containing material exceeds 260 linear feet [on pipes], 160 sq. ft [on other facility components] or at least one cubic meter (35 sq ft) [off facility components where the length or area could not be measured previously] and the asbestos-containing material exceeds the one percent threshold (Tr. 100; § 61.145(a)). Owners and operators are required to thoroughly inspect the facility [for the presence of asbestos] prior to renovation or demolition activities. If it is not feasible to inspect the facility prior to demolition, all demolition debris must be treated as RACM (Tr. 101). The determination of whether the one percent threshold asbestos content has been exceeded is made by Polarized Light Microscopy (Tr. 103). Mr. Ponak described friable as material that, when dry, can be crumbled with air and [hand] pressure to produce dust and/or fibers. He testified that, in his experience, thermal insulation such as pipe, boiler and tank insulation was more likely to become friable. The significance of the material being friable is that it is more likely to become air borne and thus, a public health threat (Tr.104).

29. Mr. Ponak found no one at the Steam Heat Project Site at the time of his inspection on July 16, 2002 (Tr. 107; report of inspection). The Comments and Recommendations section of his report of inspection contains the following: “Building $\frac{3}{4}$ demolished, transite (crushed) and suspect thermal insulation all over the Site, some asbestos warning signs in place, but lying on ground, crushed transite dry, RACM some dry, some wet (moist), much of suspect RACM access[ible] to public, in parking lot or one or two feet from sidewalk on Bennett St.” (Tr. 107; C’s Exh 6). He identified the demolition debris as bricks, soil, gravel, wood, and metal and stated that “pretty much” most of it was contaminated with suspect RACM (Tr.107-08). He took some 26 photos of the Site (Exh 8) and compiled a Photo Identification Log Sheet (Tr. 109; Exh 7). He identified Photos 8 and 9 as photos of mixed demolition debris with suspect RACM scattered throughout (Tr. 112). He described the suspect asbestos-containing material as “white chunks.” (Id.). Similar white chunks are depicted in Photos 10 ,11, 15, 16, 19, 20, 21, 23, 24 and 26. Photos 15 and 16 depict suspect RACM “about a foot off the sidewalk” on Bennett Street and directly across from the residence, No. 70 Bennett Street, shown in Photo 17 (Tr. 113-14). He

indicated that the parking lot from which Photos 19, 20, 22, 23 and 24 were taken was in use at the time of his inspection.

30. Referring to the large white chunk of suspect asbestos-containing material in Photo No. 13, Mr. Ponak indicated that the fact the material appeared bright white, that there was dust on a pipe below the white chunk and there were fibers sticking up were indications that the material was not wet (Tr. 112-13). Although his report of inspection states that some RACM was dry [and that] some was wet (moist) (finding 29), he testified that there was no evidence that the material had recently been wetted (Tr. 116).

31. Describing his sampling procedures, Mr. Ponak stated that he labeled a 6 mil Ziploc sample bag, turned it inside out, placed his hand inside the bag, picked up the suspect material, and withdrew his hand [leaving the suspect material inside], sealed the bag, placing his custody seal thereon, and then placed that bag in a larger bag (Tr. 116). Ziploc bags containing samples are shown in Photos 11, 13, 16, 20, and 22. He tested for friability with the material in the bag, saying that "I usually shake it or crumble it with my hand" (Tr. 116). Explaining his procedure for obtaining representative samples, Mr. Ponak stated that he surveyed the site and took [what he regarded] as representative samples of homogeneous materials or like materials such as boiler insulation, floor tile, roofing material or whatever it may be (Tr. 117). The Sample Collection Log compiled by Mr. Ponak reflects that he collected five samples, two of which are identified as "crushed transite" and described as dry, the other three being identified as "suspect thermal insulation", one of which is described as dry (C's Exh 9). He testified that these samples were collected "pretty much" from the perimeter of the Site and that he tested the samples for friability and determined that all five samples were friable (Tr. 118-19). He locked the samples in his GSA vehicle and, when he returned to the office, relinquished them to the laboratory (Tr. 119-20; Chain of Custody Record, dated July 18, 2002, C's Exh 10). The samples were analyzed for asbestos by Polarized Light Microscopy by Criterion Laboratories, Bensalem, Pennsylvania, with the result that three of the samples contained 40% chrysotile asbestos, one contained 35% chrysotile/amosite asbestos and asbestos was not detected in the sample collected from the debris pile next to the boiler at the Steam Heat Plant Site (Testimony of James Weltz, President and Laboratory Manager, Criterion Laboratories, Tr. 83; Criterion Laboratories, Inc. cover letter, dated July 29, 2002, with enclosures including Bulk Sample Report and Certificate of Analysis).

32. Thereafter by cover letter addressed to Mayor McGroarty, dated July 24, 2002, EPA served the City of Wilkes-Barre with an Administrative Order (Exh C-19). The letter pointed out that as an owner/operator of a demolition or renovation activity containing more than 160 square feet of regulated asbestos-containing material, the City was subject to the Asbestos NESHAP and that an EPA inspection revealed that the City had violated the Asbestos NESHAP. The Administrative Order provided, among other things, that the City had violated the Asbestos NESHAP by failing to adequately wet all RACM as required by 40 C.F.R. § 61.145(c)(6); to discharge no visible emissions to the outside air during collection, processing, packaging or transporting of any asbestos-containing material, or [to] use one of the emission control and waste treatment methods specified in the applicable regulation (40 C.F.R. § 61.150(a)); and by failing to deposit all asbestos-containing waste material as soon as practical at waste disposal sites operated in accordance with the provisions of 40 C.F.R. §§ 61.154 & 61.155 (40 C.F.R. §

61.150(b)). The City was ordered, inter alia, to submit a work plan designed to eliminate asbestos contamination at the Site within three days of receipt of the Order.

33. The City responded to the Administrative Order by letter signed by Administrator Hayward, dated July 31, 2002, asserting, inter alia, that it had received the Order on July 29, 2002 (C's Exh 20). The letter may be summarized as stating that all activities at the Site ceased the day he (Hayward) received a call from Richard Ponak and that a certified asbestos abatement contractor removed all visible suspicious asbestos-containing material from the safe areas of the Site (emphasis added); that a qualified asbestos abatement contractor, Wyoming S. & P., Inc. has been on Site since June 22, 2002, and will be on Site whenever any work is performed; that immediately following your [Ponak's] phone call, all asbestos-containing materials were separated from non-asbestos containing debris and disposed of as spelled out in the attached waste manifests; that since June 20, 2002, when we first started work on the Site, the Wilkes-Barre Fire Department has watered down the Site continuously during business work hours and every two hours after business hours-the only exception being when an alarm sounded, in which case they would return and immediately wet the Site following cessation of the alarm; the letter asserted that there were areas of the project site that are hazardous to the health and safety of asbestos workers and that visible asbestos-containing material is removed by demolition equipment to safe areas where the asbestos contractor can properly handle the materials.⁸ The letter further stated that a certified asbestos-abatement contractor would be on Site whenever work was being performed and that the Site would be continuously watered down by the Fire Department as work was being performed. All waste and contaminated waste would be properly disposed of in accordance with 40 C.F.R. § 61.150. The letter indicated that the demolition contractor intended to work from 7:00 a.m. to 4:00 p.m., Monday through Friday and on Saturday, if possible; asserted that demolition and removal of asbestos would be accomplished as expeditiously as safety concerns allow and that the tentative completion date was currently August 31, 2002.

34. Mr. Ponak again inspected the Steam Heat Plant Site on July 31, 2002, to check for Asbestos NESHAP compliance and compliance with the Administrative Order (Tr. 128; report of inspection, C's Exh 12). His report of inspection contains the following: "Arrived on site. Some excavation/ debris removal work going on/ RACM debris still throughout site-most debris dry-dry debris still on sidewalk Bennett Street. Informed Bob Mosley, City of Wilkes-Barre, all RACM needed to be cleaned up/ wetted and disposed of by asbestos contractor ASAP. Frank Schwartz of Wyoming on site, stated RACM would be cleaned up. Informed Popple not to run equipment over RACM debris/ keep all debris wet." (Tr. 129-30).

35. Mr. Ponak testified that other than the small pit area located by the smoke stack in the Thomas-Thomas parking lot, the entire perimeter and site were dry (Tr. 130). He asserted that "[e]ven though there was some moisture, I would not call any of that debris adequately wet."

⁸ The letter quoted Wyoming S. & P. as stating that paragraph 33 of the Administrative Order requiring use of a HEPA-rated vacuum to remove asbestos-containing material or asbestos-contaminated material from the Facility or areas outside the Facility "did not apply to this job." This is apparently because this was an ordered demolition and in accordance with § 61.145(a)(3), the requirements of § 61.145(c)(1)-(3) did not apply.

(Id.). Elaborating on this testimony, he stated that “[t]he dry material was still present pretty much everywhere else on the sidewalk, all over the rest of the demolition site, back in here in the parking lot, pretty much everywhere.” (Tr.131). He took some 19 photos of the Site (Exh 14) and prepared a Photo Identification Log Sheet (Exh 13). The photos generally show the remainder of the Steam Heat Plant, the smoke stack referred to by Mr. Ponak in Photos 1, 2, 3 and 4, demolition debris and Pople’s equipment in Photos 1 and 3, and demolition debris in the remaining photos (Photo Identification Log). Mr. Ponak described suspect RACM in the debris as “white pieces” (Tr. 134-35). He followed the same procedure in collecting samples as in his prior inspection, placing the samples in Ziploc bags. Bags containing suspect RACM appear in Photos 8, 9, 14, and 18 (Sample Collection Log, Exh 15). However, only three samples are identified in the Sample Collection Log, two of the samples being described as dry thermal insulation and the third as transite. He testified that these samples were placed in individual bags labeled with his custody label, placed in a larger bag labeled Steam Heat and the date and placed in the custody locker upon his return to the office (Tr. 137-38). He stated that as the sample coordinator, he is the only one having access to the custody locker. He released these samples to Criterion Laboratories for testing for the presence of asbestos by Polarized Light Microscopy on May 18, 2004 (Chain of Custody Record, Exh 16). The result of the analyses was that the first of the samples revealed 30% amosite asbestos and 5% chrysotile, the second sample revealed 30% chrysotile and 5% amosite and the third sample revealed 25% chrysotile asbestos (Criterion Laboratories Letter, dated May 26, 2004, with enclosures Bulk Sample Log and Certificate of Analysis, C’s Exh 18). Messrs Weltz and Ponak testified that the length of time between the sampling and the testing did not affect the results.⁹

36. By letter, dated June 24, 2004, EPA served on Respondents a Notice of Noncompliance and Request to Show Cause (Exh C-24). Of particular relevance is Wyoming S. & P.’s response by letter, dated July 14, 2004 (Exh C-26), which provides in pertinent part:

The City of Wilkes-Barre contracted (sic) Wyoming S. & P., Inc on the 21st of June 2002 and requested we provide a PA. licensed asbestos certified person to monitor demolition and remove asbestos containing materials as the safety conditions permitted. The site was extremely dangerous and no Wyoming S. & P., Inc. [personnel] were allowed to enter the site until demolition activities made operations safe. This did not occur for many days.

The City of Wilkes-Barre provided the demolition contractor with a fire department water gun to keep all operations wet. Our personnel were allowed on site only during actual demolition operations. Initial removal operations were restricted to perimeter activities during the first two weeks or so. Wilkes-Barre office of PADEP monitored the site on a daily basis.

All asbestos containing materials were removed from the site on a daily basis. All materials removed were properly bagged or barreled according to appropriate regulations . . . Only when an area when an area was deemed safe by Wilkes-Barre Department of Safety personnel and Wyoming S. & P., Inc. personnel was any cleanup done . . .

By early August 2002, all demolition had been completed and accessible and identifiable asbestos containing materials were removed

⁹ Tr. 86, 141. The Steam Heat Plant Site was also inspected by PADEP environmental trainee Pamela Luevano on July 31, 2002. However, her Asbestos Renovation/Demolition Inspection Report (C’s PHX 17) was not offered into evidence by Complainant (Tr. 207).

37. Mr. Postupak testified that his people [employees of Wyoming S. & P] did what the City asked them to do, i.e., put up barrier tape which had to be done every day and pick up debris as they made it safe to go in or to bring it out (Tr. 320). He said that is all I did is supply them when they, apparently the City, asked including supervisors and that there were some retired people that were willing to do it (Tr. 320, 323). He stated that “[t]hey [his employees] could not go in anywhere where demolition was taking place. They weren’t allowed in there [inside the building]. They were only outside.” (Tr. 322). He explained that, if they encountered a piece of steel with suspect asbestos on it, it would be lifted out so that “our guys” could clean it up. The steel would then go to reclamation or a junkyard.¹⁰

38. Wyoming S. & P. Daily Log Sheets for the period June 22, 2002, through September 10, 2002, are in the record (C’s Exh 27-A). Time shown on the Log Sheets is confirmed by the Certified Payroll Register for named employees for the periods at issue (Exhs WB 9-20). The first log sheet indicates that two employees arrived at the Steam Heat Site at 7:00 am on [Saturday] June 22, that they setup barrier tape, wet the area, that they picked up 14 bags of debris from the perimeter and that they left the Site at 3:30 p.m. (id.; Tr. 340-41). According to Mr. Postupak, they were bagging suspected RACM, but “wet the area” did not mean that his employees were wetting the whole area down as this was accomplished by the “fire company.” The Log Sheets indicate that only one Wyoming employee was on Site during the period June 24-28, and July 1-10, 2002, and that this employee was monitoring the demolition, policing the perimeter and bagging suspected RACM (Tr. 342-43, 344). Mr. Postupak testified that “we” weren’t there from July 10 to the 23rd, because Popple wasn’t there and working and nobody wanted to pay me (Tr. 323, 344). He asserted that the City did not ask him to be there during that period of time. One Wyoming employee, Frank Schwartz, was on Site during the period July 22, 2002, through July 26, 2002, replacing signs, and tapes, policing the area, wetting down the area and helping wet down the area (Log Sheet; Tr. 345). Only one Wyoming employee was on Site during the period July 29 through 31, helping wet down, policing the area, replacing broken barrier tape, putting new signs up and picking up one bag of transite on July 29, five bags on July 30, and eight bags on July 31 (Log Sheet; Tr. 345). Wyoming had three employees on Site on August 1 and four employees on Site on August 2, 2002 (Log Sheet). Referring to the Log Sheets, Mr. Postupak recounted that [on August 1] they replaced barrier tape and signs, policed the area, put pipe on flat ground, picked-up nine bags and wet down; on [August 2,] they policed the exterior parking lot, picked- up more pipe and picked-up nine [more] bags. He confirmed that they were bagging [suspected] asbestos-containing material and explained that it was necessary to replace barrier tape every day because somebody ripped it down at night (Tr. 346).

39. There were two Wyoming employees on the Site on August 5, 2002, the Log Sheet stating, inter alia, that “Pipe area safe to enter.” Noting that 40 bags and four barrels [of RACM] were loaded or removed, Mr. Postupak opined that “I guess the pipe area now was safe” and that “he [Wyoming employee] must have [gone] inside and removed some asbestos when it was safe to go in.” (Tr. 347). He explained that fiber drums were used to hold transite or whatever [material] that would cut through plastic bags. There were three Wyoming employees on Site on

¹⁰ Tickets for scrap metal from the Steam Heat demolition delivered to Allan Industries, Wilkes-Barre, by Popple during the period July 25, to September 16, 2002, are in the record (Exh P-3). Under the contract with the City, scrap materials became the property of the contractor, A.R. Popple, Inc.

August 6. The Log Sheet states in part “Pipe exposed. Footing safe. Pick up and bag what we can get.” They loaded 27 bags and four barrels. Mr. Postupak stated that the building at this point was safe. He testified that before “[i]t wasn’t safe. You couldn’t go in.” (Tr. 348). In other testimony, he emphasized that we got to it [the asbestos] as soon as it was safe to do so (Tr. 349, 353-54).

40. Respecting safety, Mr. Hayward distinguished between the initial demolition period with “walls collapsing” and later periods (Tr. 387). He testified that as of July 16, conditions were different but opined “they’re still unsafe.” (Id.). He emphasized that there were two “sub-basements” under this [the Site] and stated that “[y]ou wouldn’t know where to walk or how to walk on there. People could have dropped through.” (Id.). In further testimony, he stated that anybody walking there would not know where they were going and, referring to the metal, asserted that “you [could] get impaled by half of that stuff.” (Id.). He contended that driving heavy equipment over the area was a little different than walking on it. Under cross-examination, he was asked whether there was a time when a “Bobcat” [earth moving machine] actually fell into a sub-basement. He replied that, while he did not believe there was a Bobcat at the Site, there was a piece of equipment that did [fall into the sub-basement] (Tr. 396). He opined that the area was generally unsafe. He acknowledged, however, that it would not be unsafe to pick up suspected RACM on the perimeter of the Site or [near] the sidewalk on Bennett Street (Tr. 388).

41. Mr. Popple testified that the building was not safe to enter when he first began demolishing it (Tr. 411). He attributed conditions at the Site to the prior demolition [by Bradaric] (finding 7; Tr. 414, 416, 418). He testified that the work was done safely and denied having a Bobcat on the Site or that any [equipment] ever fell through the floors (Tr.420). He denied having any accidents and claimed that the work was done in a very meticulous manner. Asked to confirm that, as evidenced by weight or landfill tickets (Exh P-3), Popple did not begin to dispose of [demolition] debris until August 12, 2002, Mr. Popple replied that we had to get it [the building] down first and separate the steel from the rest of the [debris] (Tr. 428-29). He explained that it was a large building and we had to get it down on the ground, separate the metal, and then get a pile to the point where Wyoming could do what they do for the obvious asbestos (Tr. 429).

42. Asked to specify Wyoming S. & P.’s primary function at the Site, Mr. Popple replied that they had a certified person there to identify any asbestos (Tr. 418). He explained “[i]n other words, he was the knowledgeable person to say, ‘That’s asbestos. That’s not.’” (Id.). In further testimony, Mr. Popple stated “in other words, we worked together, pure asbestos, they [Wyoming] bagged and disposed of.” (Tr. 419). As to the rest of the general material, he indicated that except for the steel, Wyoming supervised the lining of the trucks with plastic and then the loading and the covering of that to make sure it didn’t blow off on the way (id.).

43. There were two Wyoming employees on Site on August 7, 8, and 9, 2002. They picked up 52 bags on August 7; 70 bags and 19 barrels on August 8; and five bags of suspected RACM on August 9 (Log Sheets; Tr. 349-50). The narrative of the August 7 Log Sheet states in part “Pick-up iron pipe as they exposed it.” The narrative of the Log Sheet for August 8 states in part “Pickup from pipe pile.” Mr. Postupak pointed out that this refers to a pile of pipe which

has RACM or suspected asbestos on it (Tr. 350). The narrative for August 9 states “Police parking lot + Side Street and Pick up.” (Tr. 351). Wyoming had three employees on Site on August 12 and two employees were on Site during the period August 13 through August 16, 2002 (Log Sheets). These Log Sheets indicate that the principal activity during this period was “poly trucks” and “wet down.” Mr. Postupak testified that this was when the contractor started hauling debris to the landfill because the truck [bodies or beds] had to be lined with plastic, the material put in and wetted down, covered with plastic and taken to the landfill (Tr. 351). Landfill tickets indicate that demolition debris was hauled to the Keystone Landfill, Dunmore, PA (Popple Exh P-3). Mr. Popple stated that Keystone was the only landfill in the area licensed to accept asbestos-contaminated material (Tr. 407-08). These deliveries of asbestos-contaminated debris by Popple to Keystone are to be distinguished from the deliveries of bagged and drummed RACM to Meadow Fill Landfill, Bridgeport, WV by Wyoming S. & P.

44. Wyoming had two employees on Site on August 19, but only one during the period August 20 through August 23, 2002 (Log Sheets). Again the principal activity was “wet down,” including hosing the street, and “poly trucks.” Two employees of Wyoming were on Site on August 26, but only one during the period August 27 through August 30. The Log Sheets indicate that the principal activity was “brick filler” [fill for area where bricks had been removed] or “bags filler” [fill for material which had been bagged], which Mr. Postupak described as “backfilling.”¹¹ Log Sheets indicate that there were two employees on Site on September 3, 2002, and one on September 4, 2002. Among activities on these dates was hose down dust and repair tape. A letter from Wyoming S. & P., to the City, dated August 26, 2002, Re: Final Asbestos Inspection at Steam Heat Property After Removal of All Debris, states that on that date Carl G. Smatko, Asbestos Inspection License No.001427, performed an inspection of the referenced property, which yielded no observable or identifiable asbestos containing materials (Exh 26, Encl.). The letter further states that no traces of asbestos were discovered in an additional inspection of cleaned metal debris. The letter was signed by Carl G. Smatko, vice-president of Wyoming. A Wyoming letter to the City, dated September 12, 2002, is entitled “Project Completion-Steam Heat Facility” and recites, inter alia, that on September 10, 2002, representatives of PADEP, EPA, Wyoming S. & P., A.R. Popple and the City of Wilkes-Barre, were present at the Steam Heat Facility. The letter states that PADEP performed an inspection and found no discrepancies. The letter further states that all manifests for friable asbestos removed by Wyoming S. & P. and all manifests for construction debris removed by A.R. Popple were attached.¹²

45. Mr. Postupak described the disposition of asbestos-containing debris picked up by his employees. He testified that it was double-bagged, labeled and placed in secured 100 [cubic] yard trailers on “our” property which was about ten blocks away (Tr. 323-24, 325). He

¹¹ Tr. 352. The “Addendum Special Provisions” to the Bid Package requires that “all soil at the Site be removed to a depth of six inches and disposed of as contaminated.” In addition, Mr. Popple indicated that the contract required that the Site be backfilled, and that the “hole in the ground” be filled to bring it to an even grade (Tr. 416-17). For this purpose, Popple purchased crushed rock from “Buck Mountain Quarry” (Clean Fill Tickets, Popple Exh 4).

¹² Mr. Postupak described documents in the record (Popple Exh P-3) showing deliveries of demolition debris by Popple to Keystone Landfill as “weight tickets” rather than manifests (Tr. 363-64). These tickets refer to the debris as “Refuse 10 Demolition Waste” or “Refuse 10A/Demolition Small.” Mr. Popple testified that “Refuse 10” was Keystone’s code for material containing, or possibly containing, asbestos (Tr. 426-27).

explained that normally a trailer would be placed on the [job site], but in this instance there was no room on the lot and the owners of the parking lot would not allow a trailer on their property. Therefore, the material was manifested and stored with material from other projects until a trailer load could be sent [to the landfill] (Tr. 3254-25). He testified that we shipped on July 16, and August 22, 2002, and on January 3, 2003. The last shipment was delayed at the request of the City which contemplated doing additional clean-up work at the Site. This additional work did not materialize due to a lack of funding. Mr. Postupak testified that he was informed by the City that no further work would be done and job was complete in late November or early December [2002](Tr. 325). As indicated supra, manifests in the record indicate that 30 bags of asbestos containing material were delivered to the Meadow Fill Landfill, Bridgeport, WV on July 2, 2002, (Exh 27-C). Additionally, 311 bags and 19 barrels of asbestos-containing material were delivered to the Meadow Fill Landfill under separate manifests on August 14, 2002, and 174 bags of asbestos-containing material were delivered to the Meadow Fill Landfill on January 15, 2003 (id.).

46. Mr. William Murtha, identified finding 6, explained the role of the Fire Department in the Steam Heat demolition (Tr.289). He testified that “we” wet down debris as they were bringing the building down to keep dust down. He pointed out that the Fire Department had wet down debris at other demolition sites in the City to control dust. Captain Murtha testified that the Fire Department was at the Site every day and that he assumed that the order for the Fire Department to wet down the Site came from Mayor McGroarty (Tr. 290-91; see finding 15). He explained that they would [usually] arrive at the Site about 7:30 in the morning and that the last visit would be around eleven o’clock at night (Tr. 294). He stated that they would wet the debris two or three times a day even if no one was there (Tr. 297-98). In other testimony, he emphasized that they wet down both sides[apparently Bennett Street side and parking lot side] even when no one was there (Tr. 315).

47. Captain Murtha was personally at the Site quite often where he encountered representatives of both A.R. Popple and Wyoming S. & P. He noted that both Popple and Wyoming would occasionally direct that a certain area, such as a brick wall which was to be demolished or which was drying out, be wetted or to stop wetting an area (Tr. 292). He indicated that Fire Department personnel followed such directions. Asked whether the wetting was adequate, Mr. Postupak replied that “[y]ou could have drowned in some parts of it” (Tr. 336). Mr. Popple confirmed that the Fire Department was at the Site on a daily basis, stating that they were “[l]iterally pouring water on the site” (Tr. 415). He testified that it got to the point where they were putting so much water on the Site that they were worried about water infiltration into Thomas E Thomas’ [Thomas/Thomas parking lot owners’] basement (Tr.414-15). Mr. Hayward testified that he visited the Site two or three times a day (Tr. 388). In other testimony, he indicated that he was there [at least] a couple of times a day and that there was constant watering throughout the area (Tr. 395).

48. Fire Department records are in evidence.¹³ Mr. Popple testified, and the records confirm, that the City was there putting water on the Site for some time before we [Popple] even

¹³ Popple Exhibit 1. Although Mr. Wolff represented that the records covered the period January 1, 2002, through August 26, 2002 (Tr. 311-12), he apparently elected not to offer the records in their entirety, because the records available to the ALJ do not extend beyond June 13, 2002.

arrived (Tr. 408). Captain Murtha referred to the records as two different kinds of reports: Fire Department Public Service Operation and Fire Watch (Tr. 304-05). He described Public Service Operation records as, for example, documenting the time an engine left [the fire house] for a specific purpose and the type of call that it was (Tr. 305-06). With respect to Fire Watch records, he explained that there were a number of buildings which were deemed hazardous for various reasons including the fact vagrants were living there, which increased the likelihood of a fire. He stated that Steam Heat was on fire watch for that reason and for the additional reason that it was structurally unstable (Tr. 307-08). Captain Murtha pointed out that for the most part he put a “guesstimate” of the gallons of water [usually 250-300 gallons] applied to the Site when he ran water, but that he could not say that everyone did (Tr. 300). He testified that we were at the Site from 7:30 in the morning until the completion of the work-day and even when we left, we would come back and wet it down again. In other testimony, Captain Murtha emphasized that the records did not necessarily represent all of the time the Fire Department was at the Site (Tr. 308-09). Explaining the reason the records did not represent all of the times the Fire Department visited the Site, he asserted that it became such a ritual that he thought some of the paperwork “went out the window.” (Tr. 300).

49. Mr. Popple testified that this was a very structured project and that the City came in and pretty much took it over, like as a general contractor to keep PADEP happy (Tr. 408). In other testimony, he identified Bob Mosley as the City’s site manager and asserted that he (Mosley) ran the Site (Tr. 413, 416). Mr. Popple supported this assertion with the statement that Mosley decided what part of the building “went first” (id.). It should be noted, however, that Paragraph A “Procedure of the Technical Specifications For Demolition and Site Clearance of the City’s contract with Popple provides in part: 1. the sequence of property to be demolished shall be determined by the City of Wilkes-Barre.” (See also finding 23 for an instance of Mr. Mosley directing a Popple employee).

50. Mr. Ponak calculated the proposed penalty.¹⁴ He listed the Penalty Assessment Criteria (CAA § 113(e)) as: one, size of the business; two, economic impact of the penalty on the business; three, violator’s full compliance history and good faith efforts to comply; four, duration of the violation as established by any credible evidence; five, payment by the violator of penalties previously assessed for the same violation; six, economic benefit of noncompliance; seven, seriousness of the violation; and eight, such other factors as justice may require.¹⁵ In calculating the proposed penalty, Mr. Ponak used the Clean Air Act Stationary Source Civil (“General Penalty Policy”), dated October 25, 1991 (Tr. 170; C’s Exh 38), and Appendix III to the General Penalty Policy, Final Revisions, dated May 11, 1992, to the Asbestos Demolition

¹⁴ Because the violations were more than one year old at the time Complainant was preparing the complaint, EPA sought and obtained a waiver of the 12-month limitation period in § 113(d) of the Clean Air Act (42 U.S.C. § 7413(d)) from the Department of Justice (Tr. 167-68; C’s Exhs 32, 33 and 34). The letter from the Department of Justice is dated July 23, 2004, and includes a determination that the violations are appropriate for administrative penalty action (C’s Exh 34).

¹⁵ Tr.174-75; C’s Exh 37. Mr. Ponak defined “such other factors as justice may require” as addressing “extraordinary situations that none of the other [penalty] factors addressed.” (Tr. 189). This closely accords with the Environmental Appeals Board’s holding that the “other matters as justice may require” factor comes into play only where application of the other factors has not resulted in a fair and just penalty. *Catalina Yachts, Inc.* EPCRA Appeals Nos. 98-2 & 98-5, 8 E.A.D. 199 (EAB 1999).

and Renovation Penalty Policy, dated August 22, 1989 (C's Exh 39). He testified that the proposed penalty of \$36,850 was assessed against the Respondents jointly (Tr. 175).

51. Mr. Ponak defined the economic benefit of noncompliance as basically [the amount] saved by not complying with the regulation (Tr. 175, 205). With regard to the notification, he asserted that there would not be any economic benefit by not providing all of the information [on the Asbestos Notification Forms] (Tr. 177). Although he recognized that there would be an economic benefit by not having an [asbestos] trained individual on site for two days, that the Respondents would have had to pay someone to wet the RACM, and that there would be a [deferred] saving in not treating all asbestos containing material as RACM and sending it to a landfill complying with [40 C.F.R. § 61.154], he did not have exact dollar figures for labor or for wetting and so did not adjust the penalty for economic benefit (Tr. 177, 204).

52. Mr. Ponak testified that seriousness of the violation is based on how much asbestos is involved in the project, because the more asbestos, the more chance there is of risk to the environment and public health (Tr. 178). He pointed out that in this instance there was quite a bit of asbestos and that the facility was located in an occupied residential and commercial area. With respect to notification, he stated that missing data would not make the violation more serious except for the possibility we would not be able to track the waste and there would not be a trained individual signing the notice. According to Mr. Ponak, not having an asbestos trained individual on site increased the risk of public exposure, because there was no one on site to identify RACM which was mixed with demolition debris and being run over by heavy equipment (Tr. 178-79). He regarded wetting or the lack thereof as serious because, if friable asbestos [material] were dry and left out in the open air, it could easily become airborne and become a public health hazard in this occupied and commercial and residential area. Failure to dispose of as soon as practical is serious because by leaving the material out and accessible to the public and easily airborne, has the potential for greater exposure to the public (Tr. 179). Mr. Ponak opined that by not disposing of the waste in accordance with § 61.154 also gave rise to the possibility of exposure to this waste both at the Site and at the landfill. He testified that barrier tape being down [increased the risk] because it would allow access by anyone not knowing about the demolition or asbestos (Tr. 180).

53. Mr. Ponak testified that the maximum penalty permitted by the Act was \$27,500 per violation per day (Tr. 170). He pointed out that duration was the actual number of days we have evidence that violations occurred (Tr.180). He explained that the notification violation, and two of the work-practice violations, i.e., the lack of a trained person on Site and the failure to dispose of [RACM] as soon as practical were all considered one-time violations (Tr. 180-81). The failure to keep wet violation was considered as a two-day violation based on the inspections on July 16 and July 31, 2002. Although he had evidence of a prior work practice violation by Wyoming S. & P. (Complaint and Notice of Opportunity for Hearing, December 29, 1994; Consent Agreement, dated September 3, 1997 C's Exh 50) and subsequently learned that PADEP had issued a notice of violation to the City of Wilkes-Barre for Asbestos NESHAP demolition violations in April of 1999 (C's Exh 48), Mr. Ponak did not adjust the penalty upward for this reason (Tr. 181-82).

54. Mr. Ponak testified that he determined the actual penalty amounts using the General Penalty Policy and the Renovation/Demolition Penalty Policy (Tr. 182), hereinafter Appendix III. He pointed out that notification violations were addressed on page 15 of Appendix III [Late, Incomplete or Inaccurate notice] on a scale of \$15,000 to \$200, “pretty much based on the seriousness of the violation”, no notice being the most serious and late but still submitted [prior to asbestos removal date] the least serious (Tr. 183). Under this scale, \$500 is listed as the appropriate penalty where the amount of asbestos is missing, improperly dimensioned, or for multiple facilities. Mr. Ponak assigned a penalty of \$500 for notification deficiencies (Tr. 185).

55. Regarding the three counts of work-practice violations, Mr. Ponak reiterated that the more asbestos there is in a project, the more potential for a release and thus for harm (Tr. 183). He pointed out that the penalty matrix [in Appendix III] was based on the total amount of asbestos involved broken down into units. He defined a unit as 260 linear feet, 160 square feet or 35 cubic feet (Tr. 184). Regarding the amount of RACM, he explained that only the RACM disposed of by Wyoming was counted (Tr.190). Accordingly, he relied on the waste manifests provided by Wyoming S. & P. to determine the number of units which he indicated ranged between 10 and 50.¹⁶ Using this quantity, he turned to the matrix on page 17 of Appendix III which reflects that the penalty for the first violation for more than 10 units, but less than 50 units, is \$10,000. This was the initial penalty determined for each of the work-practice violations: failure to keep RACM adequately wet, failure to have a trained individual on site and for failure to dispose of as soon as practical (Tr. 185). In accordance with the penalty matrix, he added \$1,000 for the second day of violation (July 31, 2002) failure to keep RACM adequately wet. This brought the total penalty to \$31,500. Multiplying this figure by 1.10 to account for the Inflation Adjustment Rule (40 C.F.R. Part 19; C’s Exhs 40 and 41) results in a total of \$34,650. To this figure, Mr. Ponak added \$2,000 for the size of the violator factor in accordance with the Table at 14 of the General Penalty Policy to reach the penalty claimed of \$36,850 (Tr. 191). He pointed out that size of the violator is based on net worth and testified that where there are multiple respondents, net-worth is typically based on the respondent who actually handled or disposed of the asbestos, in this case Wyoming S. & P. (Tr. 186-87). He determined Wyoming S. & P.’s net worth of \$141,000 from a Dun & Bradstreet report, dated March 31, 2003 (Tr. 188; C’s Exh 42). The Table at 14 of the General Penalty Policy indicates that the upward adjustment for a net worth of between \$100,000 and one million dollars is \$5,000. Because Wyoming S. & P.’s net worth was closer to \$100,000 than to one million dollars, Mr. Ponak limited the upward

¹⁶ Id. From manifests in the record, Complainant determined that Wyoming disposed of a total of 503 bags and 19 barrels of RACM at the Meadowfill Landfill, Bridgeport, WV (Post-Hearing Brief at 38, note 25). By using the total amount of asbestos disposed of to calculate the penalty, Complainant overstates the quantity involved in Count IV because the initial 30 bags of RACM were delivered to the Meadow Fill Landfill, Bridgeport, WV on July 2, 2002, and there is no allegation or evidence that this disposal was not as soon as practical. Data provided in the EPA Field Guide, Reporting and Recordkeeping Requirements for Waste Disposal (Exh C-36), indicate that drums of asbestos waste are assumed to contain a volume of 0.133 cubic yards and plastic bags are assumed to contain a volume of 0.075 cubic yards of asbestos waste (id. 2). This results in a total of 2.527 cubic yards of asbestos in drums and 37.72 cubic yards of asbestos in bags for a total of 40.25 cubic yards. This figure multiplied by 27, the number of cubic feet in a cubic yard, equals 1,087 cubic feet. Dividing 1,087 cubic feet by 35, the number of cubic feet in a unit, equals 31.057 units. However, these 30 bags equal less than 2 units (30 x 0.075 = 2.25 cubic yards x 27 = 60.75 cubic feet ÷ 35 equals 1.7357 units). Subtraction of this figure from 31.057 units would not change the penalty calculation in accordance with Appendix III, which is based on a range of from 10 to 50 units (id. 17). If the overstatement of the quantity of asbestos involved in the violations changed the range of units utilized in the penalty calculation in accordance with the matrix, this could be a basis for holding the units range in the matrix arbitrary.

adjustment for net worth to \$2,000 (Tr. 188-89). He pointed out that none of the Respondents raised an ability to pay issue.

56. Mr. Ponak testified that we considered “good faith efforts to comply” in determining the penalty (Tr.185-86). He noted that this factor was addressed under the “degree of willfulness or negligence” and the “degree of cooperation” on page(s) 16 [and 17] of the General Penalty Policy (Tr. 186). He pointed out that while we did not adjust the penalty upward for willfulness or negligence, but [by the same token] based on lack of cooperation, i.e., missing information in the notices, failure to timely comply with the [administrative] order and basically the same conditions existing at the Site found by the inspections of July 16 and July 31, 2002, we did not reduce the penalty for good faith efforts to comply (id.).

57. Mr. Postupak testified that he was [in the process] of closing his business two or three months ago because there was not a volume of work around and his company was losing value [money] for the last three years (Tr. 327). He testified that we have one large contract which we are finishing up, which was the only reason he stayed [open] (Tr. 332-33). He asserted that the value of his company was now less than zero (Tr. 327).

CONCLUSIONS AND DISCUSSION

1. The City of Wilkes-Barre is a municipality incorporated in the Commonwealth of Pennsylvania.
2. A.R. Popple, Inc. and Wyoming S. & P., Inc. are corporations incorporated under the laws of the Commonwealth of Pennsylvania.
3. The City of Wilkes-Barre, A.R. Popple, Inc. and Wyoming S. & P., Inc. are persons within the meaning of Section 302(e) of the Act (42 U.S.C. § 7602(e)) and thus subject to the Asbestos NESHAP (40 C.F.R. Part 61, Subpart M).
4. The Wilkes-Barre Steam Heat Plant, located at 129 North Washington Street, Wilkes-Barre, Pennsylvania, is or was a facility as defined in 40 C.F.R. § 61.141. In 2002, the Steam Heat Plant was owned by the defunct Wilkes-Barre Steam Heat Authority.
5. The Steam Heat Plant had been abandoned for many years and was determined to be in imminent danger of collapse and thus a hazard to the public in June of 2002. The Plant was demolished under a written order from the City, issued on June 20, 2002. The demolition was thus under an order of a State or local government agency within the meaning of 40 C.F.R. § 61.145(a)(3).¹⁷
6. The City entered into a contract in the amount of \$394,000 for the demolition of the Steam Heat Plant with A.R. Popple, Inc. on June 19, 2002. The City had solicited bids for the demolition of the Steam Heat Plant in October of 2001, and Popple’s bid of \$394,000 was determined to be the lowest. However, no contract was awarded at that time.

¹⁷ Section 61.145 is entitled “Standards for demolition and renovation” and § 61.145(a) provides in pertinent part:

7. Although Popple was responsible for asbestos abatement and removal under its contract with the City, the City arranged for asbestos abatement and removal services by Wyoming S. & P., Inc., a licensed asbestos abatement contractor.¹⁸ There was no contractual relationship between Popple and Wyoming and only an informal arrangement with the City whereby Wyoming would be paid by the City through Popple for the number of employees, including a trained asbestos supervisor, on the job per day. The determination of the number of Wyoming employees needed on the job was made by the City.

8. The City controlled or supervised the facility [Steam Heat Plant] being demolished and controlled or supervised the demolition operation and was thus an owner or operator of a demolition activity within the meaning of 40 C.F.R. § 61.141.

9. A.R. Popple, Inc. operated, controlled or supervised the demolition of the facility (Steam Heat Plant) and thus was an owner or operator of a demolition activity within the meaning of 40 C.F.R. § 61.141.

10. Wyoming S. & P., Inc. operated a demolition activity at the Steam Heat Plant insofar as it involved the identification and disposition of asbestos from the time of its arrival on the Site, June 22, 2002, until completion of the job. The evidence is that Wyoming was hired late on the afternoon of June 21, 2002, and the general rule is that it is the authority to identify and control the disposition of asbestos rather than the exercise of that authority which is the controlling factor in determining whether and when Wyoming became an operator of a demolition activity.¹⁹ That rule is extended beyond reason by attempting to confer operator status on a contractor who has not made an appearance on Site. It is concluded that the controlling factor insofar as Wyoming's status as an operator is concerned is the presence of an asbestos trained supervisor on Site. This did not happen until June 22, 2002.

11. Count I of the complaint alleges that Respondents failed to provide adequate notification of the demolition as required by 40 C.F.R. § 61.145(b).²⁰ The initial Asbestos Abatement and Demolition/ Renovation Notification Form was prepared and signed on behalf of

(3) If the facility is being demolished under an order of a State or local government agency, issued because the facility is structurally unsound and in danger of imminent collapse, only the requirements of paragraphs (b)(1), (b)(2), (b)(3)(iii), (b)(4) except (b)(4)(viii)), (b)(5), and (c)(4) through (c)(9) of this section apply.

¹⁸ According to Popple, this was because the partial demolition of the Steam Heat Plant by Bradaric (finding 7) had changed conditions at the Site between the time of Popple's bid in October of 2001 and the award of the contract at the bid price in June of 2002 (Tr. 416).

¹⁹ *Schoolcraft Construction, Inc.*, CAA Appeal No. 97-1, Remand Order, 7 E.A.D. 501 (EAB 1998).

²⁰ The record is clear and there is no dispute that the quantity of asbestos exceeds the minimum for the applicability of the Standard for demolition and renovation as set forth in 40 C.F.R. § 61.145(a) and the 1 percent asbestos threshold for Category I nonfriable and Category II nonfriable ACM set forth in § 61.141 (findings 28, 31, 35). The definition of regulated-asbestos containing material (RACM) (§ 61.141) makes it clear that Subpart M applies to, inter alia, Category I nonfriable ACM that has become friable and Category I nonfriable ACM that has been or will subject to sanding, grinding, cutting or abrading, or Category II nonfriable ACM that has become or a high probability of becoming crumbled, pulverized, or reduced to powder by forces expected to act on the material during demolition or renovation operations regulated under this Subpart.

the City, was dated June 20, 2002, was mailed to EPA on June 21, 2002, and received by EPA on June 25, 2002. This Notification indicated that a firm known as PDG, Inc. was to be the asbestos abatement contractor. The complaint alleges that this Notification did not contain a description of work practices to be employed in removing RACM from the Site and to prevent asbestos emissions, the name and address of the waste disposal site, a certification that a trained supervisor will be present during demolition, information concerning and a copy of the Demolition Order, and the name and address of the waste transporter. Essentially the same violations are alleged in the Notice of Violation (NOV) issued by PADEP to the City on July 18, 2002. PADEP asserted and the complaint alleges that failure to submit a complete and accurate Asbestos Notification Form was a violation of 40 C.F.R. § 61.145(b)(4).²¹

12. It has been concluded supra that Wyoming S. & P. did not become an operator at the Site until June 22, 2002. As Wyoming alleges and the record establishes, it had nothing to do with the initial Notification, was not named therein and is not responsible for the deficiencies therein. Wyoming is named as the asbestos abatement contractor in the Notification, dated June 27, 2002, as well as in the subsequent Notifications, dated July 12 and July 18, 2002. In fact, the record shows that the second Notification, dated June 27, 2002, was prepared by Wyoming for City Administrator Hayward's signature. Certifications in Section 23 of the Notifications, dated June 27 and July 18, 2002, are to the effect that an individual trained in the provisions of 40 CFR Part 61 Subpart M would be on Site during the demolition and that all work would be done in accordance with all applicable State and local agency rules and regulations, were signed by Bruce S. Postupak, Wyoming's president.

13. A.R. Popple and the City contend that deficiencies in the initial Asbestos Notification were due to the emergency nature of the demolition, i.e., inability to contact and immediately obtain the services of an asbestos-abatement contractor, who, inter alia, would assist in preparation of an Asbestos-Notification Demolition/Renovation Form. Additionally, Popple and the City contend that these deficiencies were substantially cured within a week by the second Notification, dated June 27, 2002. The second Notification included a list of work practices and engineering controls to control asbestos emissions, and identified the waste transporters and the waste disposal site. While the second Notification, like the first, did not include a copy of the Demolition Order, it did, however, include information concerning the Demolition Order, i.e., that the demolition was ordered by the City and that the individual issuing the Order was Gerald Goeckel, Chief of Code Enforcement. Although the date of the Order was stated to be June 21, 2002, rather than June 20, 2002, the actual date of the Order, the Notification indicated that demolition was to begin on the date of the Order. Complainant has conceded that deficiencies in

²¹ Notice Of Violation. The provision cited by PADEP and in the complaint, 40 C.F.R. § 61.145(b)(4), provides in part that the Asbestos Notification Form must include:

- (i) An indication of whether the notice is the original or a revised notification.
- (ii) Name, address, and telephone number of both the facility owner and operator and the asbestos removal contractor owner or operator.
- (iii) Type of operation: demolition or renovation.
- (iv) Description of the facility or affected part of the facility including the size (square meters [square feet] and number of floors), age, and present and prior use of the facility.
- (v) Procedure, including analytical methods, employed to detect the presence of RACM and Category I and Category II nonfriable ACM.

the initial Notification are excusable because of the emergency nature of the demolition (Post-Hearing Brief at 49). The rigid insistence on 100 percent accuracy in the Notifications under the circumstances present here seems perverse. It is concluded that Popple's and the City's contention that deficiencies in the initial Notification were substantially cured by the second Notification will be accepted., and that no penalty will be assessed for Count I. Mr. Ponak apparently did not regard deficiencies in the Notifications as serious (findings 51 and 52). Moreover, the purpose of an Asbestos Demolition/Renovation Notice is to enable regulatory authorities to monitor the demolition which was accomplished by the telephone notice to PADEP.²² The record shows that PADEP did in fact monitor the demolition from the beginning (finding 22).

14. A preponderance of evidence shows that RACM mixed with demolition debris was not adequately wet as required by 40 C.F.R. § 61.145(c)(6)(i) at the time of EPA inspections on July 16 and July 31, 2002, as alleged in Count II of the complaint. Although the City undertook through its Fire Department to wet demolition debris and the Site and the record is clear that the Wilkes-Barre Fire Department applied copious amounts of water to the Site on a regular basis, Mr. Ponak's testimony together with the photos demonstrate that there was dry RACM mixed with demolition debris at the Site on July 16 and July 31, 2002. There is no evidence disputing or refuting Mr. Ponak's testimony that the RACM he observed and photographed at the time of his inspections was not adequately wet as required by § 61.145(c)(6)(i). While the record shows that the City controlled the Site, it is concluded that A. R. Popple operated, supervised or controlled the demolition activity, and is thus an owner or operator within the meaning of 40 CFR § 61.141 and responsible along with the City for this NESHAP violation.

15. The record supports Wyoming's contention that it did not control the Site or the application of water thereto. Wyoming did, however, operate the demolition activity to the extent of the identification and removal of asbestos from the Site beginning on June 22, 2002, and is thus an operator of a demolition activity to that extent. Moreover, Wyoming's president signed the certifications in the second and fourth Notifications that an individual trained in the Asbestos NESHAP would be on Site during demolition and that all work would be done in accordance with all applicable State and local agency rules and regulations. It is concluded that this certification carries with it responsibility for Asbestos NESHAP compliance and that as a matter of law Wyoming S. & P. is responsible along with Popple and the City for the failure to keep RACM adequately wet on July 16, and July 31, 2002. Although this conclusion means that Wyoming must share in the penalty for the failure to keep RACM adequately wet on the days indicated, the record shows that Wyoming had limited control over operations at the Site. In

²² The Asbestos Demolition and Renovation Civil Penalty Policy (C's Exh 39) states that the most important factor for a late, inaccurate, or incomplete notice is the impact the company's action has on the Agency's ability to monitor substantive compliance (Appendix III at 2). There is no evidence in this case that the Notifications were used to trigger inspections or to assist therein (*See* finding 37 for Mr. Ponak's testimony as to how he learned of the Steam Heat Plant demolition; *see also United States v. Trident Seafoods Corporation*, 60 F.3ed 556 (9th Cir. 1995), where the court, while overturning the district court's holding that the failure to give notice of intent to remove asbestos from a cannery site, was a continuing violation, cited with approval the district court's determination that "the self-evident purpose of the notification is to enable the enforcement agency to monitor asbestos removal and assure effective compliance with work rules."). The Ninth Circuit stated that the conclusion only timely notice assures effective compliance is unassailable.

accordance with the General Penalty Policy, the degree of control the violator had over the events constituting the violation is a factor to be considered in determining the degree of willfulness or negligence (*id.* at 16). It is concluded that Wyoming's liability for Count II will be limited to 20% of the penalty claimed for that Count.

16. Count III of the complaint alleges that Respondents failed to have an asbestos trained supervisor or representative on Site on June 20 and 21, 2002, which was prior to the time Wyoming became an owner or operator of the demolition activity. Complainant agrees that Wyoming was not hired until late in the afternoon of June 21, 2002, and likely did not contribute to this violation (Reply Brief at 8). Accordingly, Count III against Wyoming will be dismissed. Popple and the City contend that an asbestos abatement contractor was secured and an individual trained in the Asbestos NESHAP present on Site as soon as possible given the emergency nature of the demolition. Complainant accepted essentially this argument in connection with the initial Asbestos Notification, but rejects it here. Complainant contends that once the unstable wall creating the hazard was taken down on June 20, 2002, the initial emergency had passed and Respondents should have waited until an asbestos trained supervisor was on Site before further disturbing suspected RACM. This contention is deemed to be meritorious and is accepted.

17. Count IV alleges that Respondents violated § 61.150(b) by failing to dispose of all waste material containing asbestos as soon as practical. This count is limited to RACM disposed of by Wyoming, and did not include general demolition debris, which were treated as asbestos-contaminated, and delivered to the Keystone Landfill by Popple. The record shows that Popple did not participate in the identification of RACM and its removal from the Site and had little or no control over its disposition. Popple, however, has been determined to be an operator of the demolition activity at the Steam Heat Plant and it is not appropriate that it escape liability for this violation entirely. Popple's liability for failing to dispose of RACM as soon as practical will be limited 20% of the amount claimed for this Count.

18. Because the initial emergency had passed at the time of his inspections on July 16, and July 31, 2002, Mr. Ponak gave no consideration to that fact. Although it is true that the initial emergency had passed at the time of the EPA inspections on July 16, and July 31, 2002, Mr. Ponak's position fails to consider that the Site was unsafe to enter until early August 2002. Respondents have maintained this position.²³ Complainant appears to recognize this fact and asserts that Wyoming had custody of asbestos-containing waste by August 9, 2002, implying that its obligation to dispose of the waste as soon as practical should be measured from that date (Reply Brief at 8). Wyoming says that it shipped RACM in June and July [2002], and that it was not authorized to dispose of the remaining RACM until it was directed to do so by the City, which did not happen until late November or early December, 2002 (finding 45). Because of Wyoming's limited ability to control events causing the violation, its liability for this violation will be limited to 20% of the amount claimed for Count IV.

19. Mr. Ponak's calculation of the penalty has been explained above (findings 50-56). He determined the seriousness of the violation using the quantity of asbestos involved in the violations (*supra* note 16) and by closely following the Final Revisions to the Asbestos

²³ See finding 33, *supra*. See also City's Proposed Finding of Fact No. 36; Popple's Proposed Finding of Fact No. 72.

Demolition and Renovation Civil Penalty Policy (1992), Appendix III. While he appears to have considered all of the factors which CAA § 113(e) requires be considered in determining a penalty (finding 48), he did not adjust the proposed penalty for the economic benefit of noncompliance nor did he purport to make any adjustments for the full compliance history of Wyoming and the City (finding 53). There is no evidence in the record of economic benefit of noncompliance and this determination is unexceptionable. Although there is evidence of a former violation of the Asbestos NESHAP by the City and Wyoming S. & P., there is no evidence of such a violation by Popple. Mr. Ponak used discretion in not adjusting the penalty upward for the prior violations. There is no reason to disturb Mr. Ponak’s determinations in this regard and comment or discussion herein will be limited to instances where the penalty assessed differs from that determined by Mr. Ponak. Mr. Ponak made no attempt to apportion the penalty among the three Respondents. Apportionment is necessary here, however, because of the dismissal of Count III as to Wyoming. The penalty as apportioned among the Respondents will be as follows:

	City of Wilkes-Barre	A.R. Popple	Wyoming S & P.
Count I	0	0	0
Count II	\$3,666	\$3,666	\$2,200
Count III	\$3,333	\$3,333	0
Count IV	\$3,333	\$2,000	\$2,000

Multiplying these figures by 1.1 to account for the inflation adjustment equals a penalty of \$11,365 for the City, a penalty of \$9,899 for A.R. Popple and a penalty of \$4,620 for Wyoming S. & P.

20. The remaining question is whether any or all of the above figures should be adjusted for the size of business. Mr. Ponak added \$2,000 to the collective penalty otherwise calculated for size of business based on Wyoming’s presumed net worth of \$141,000, pointing out that, where there are multiple respondents, the net worth of the respondent handling or disposing of asbestos was typically used for this determination (finding 53). The \$141,000 net worth figure for Wyoming was based on a Dun & Bradstreet report, dated March 31, 2003, almost two and one-half years prior to the hearing, and does not recognize Mr. Postupak’s testimony that Wyoming has been losing money for the past three years and that its net worth is now less than zero (finding 57). The essentially arbitrary nature of the size of business adjustment under Appendix III is illustrated by Complainant’s assertion that, even if Mr. Postupak’s unsupported testimony that Wyoming’s net worth is now less than zero were accepted, the size of business adjustment would still be \$2,000 (Post-Hearing Brief at 48). It is concluded that the size of business adjustment as computed by Complainant is arbitrary and that no such adjustment will be imposed in this instance.

ADDITIONAL DISCUSSION

Section 112(d) of the CAA, 42 U.S.C. § 7412(d), requires the Administrator to promulgate emissions standards for hazardous air pollutants listed in that section. If, in the judgment of the Administrator, it is not feasible to prescribe or enforce an emission standard for the control of a hazardous air pollutant or pollutants, the Administrator may, in lieu thereof, promulgate a design, equipment, work practice, or operational standard which in the Administrator's judgment is consistent with the provisions of subsection (d) or (f) of this section. Congress specifically included asbestos in the list of pollutants (42 U.S.C. § 7412(b)). The Asbestos NESHAP, found at 40 C.F.R. Part 61, Subpart M, consists primarily of notification and work practice requirements for various sources of asbestos emissions. In order to establish Respondents' liability, Complainant must show by a preponderance of the evidence that the asbestos NESHAP applies and that the standards in Section 61.145 have not been met. *See Allegheny Power Serv. Corp.*, 9 E.A.D. 636, 642 (E.A.B. 2001); *Chippewa Hazardous Waste Remediation & Energy, Inc.*, Docket No. CAA-03-2002-0144, 2004 EPA ALJ LEXIS 17, *21 (ALJ 2004).

It has been determined above that, with respect to the Steam Heat Plant, the City, A.R. Popple and Wyoming S. & P. are owners and/or operators of a demolition activity within the meaning of 40 C.F.R. § 61.141 and thus subject to the standard for demolition and renovation in 40 C.F.R. § 61.145.

Respondents Popple and the City have challenged whether they are subject to the Asbestos NESHAP as "owners or operators" of the facility being demolished or of the demolition activity. Although the Steam Heat Plant was "owned" by the defunct Wilkes-Barre Steam Heat Authority, Respondents actively participated in the demolition. Respondent Popple demolished the Steam Heat Plant and therefore is an "operator of the demolition" and subject to the Asbestos NESHAP. As for the City of Wilkes-Barre, it controlled or supervised not only the facility being demolished, but also the demolition operation. The City accomplished this by funding, awarding and administering the contract by which the demolition was accomplished and also by having a supervisory representative on Site who, inter alia, directed the sequence of operations (finding 49). Moreover, the City's Fire Department participated in the demolition to the extent that it undertook to wet demolition debris and the Site. The City's involvement in the demolition project is sufficient to render it an owner or operator within the meaning of 40 C.F.R. § 61.141.

The record shows that Wyoming S. & P. arrived on the Site on June 22, 2002, and that thereafter it participated in the demolition to the extent that it identified and controlled the removal of asbestos from the Site. Wyoming was thus an owner or operator of a demolition activity or operation to that extent within the meaning of 40 C.F.R. § 61.141 beginning on June 22, 2002.

It has been concluded above that deficiencies in the initial Asbestos Notification Form were attributable the emergency nature of the violation and thus excusable. Moreover, these deficiencies were substantially cured by the second Notification which was submitted to EPA

within one week of the initial Notification and that no penalty would be assessed for the alleged failure to provide adequate notification as alleged in Count I of the complaint.

The City, A.R. Popple, and Wyoming S. & P. have been determined to be liable for the failure to keep RACM adequately wet as alleged in Count II of the complaint. Because of Wyoming S. & P.'s limited ability to control events at the Site including the wetting of RACM, its liability for this violation will be limited to 20% of the amount claimed for this Count.

Count III of the complaint alleging failure to have an asbestos-trained supervisor on Site during demolition on June 20 and June 21, 2002, will be dismissed as to Wyoming S. & P., because the violation alleged occurred before Wyoming S. & P. became an operator of a demolition activity at the Site. The City and A.R. Popple are equally liable for the penalty for this violation.

The City, A.R. Popple and Wyoming S. & P. have been determined to be liable for the failure to dispose of RACM as soon as practical as alleged in Count IV of the complaint. The record shows that A.R. Popple was not involved in and had little or no control over the disposition of asbestos and that Wyoming S. & P. was not authorized to deliver the final quantity of RACM to an authorized landfill until directed to do so by the City. The liability of A.R. Popple and Wyoming S. & P. will be limited to 20 percent of the amount claimed for this violation.

ORDER

1. No penalty will be assessed against the Respondents for the alleged failure to provide adequate notification of the Steam Heat Plant demolition.

2. Count III of the complaint alleging failure to have an asbestos-trained supervisor on Site on June 20 and June 21, 2002, is dismissed as to Wyoming S.& P., Inc.

3. The remaining violations having been established as alleged in the complaint, a penalty totaling \$25,884 accordance with Section 113(e) of the Act is apportioned among the Respondents as follows:

- | | |
|--------------------------|-----------|
| a. City of Wilkes-Barre | \$11,365; |
| b. A.R. Popple, Inc. | \$9,899; |
| c. Wyoming S. & P., Inc. | \$4,620. |

Each Respondent shall pay the penalty assessed by mailing or delivering a certified or cashier's check payable to the Treasurer of the United States to the following address within 60 days of the date of this Order:²⁴

EPA Region 3
(Regional Hearing Clerk)
P.O. Box 360582M
Pittsburgh, PA 15251

Dated this _____ day of November 2006.

Spencer T. Nissen
Administrative Law Judge

²⁴ Unless appealed in accordance with Rule 22.30 of the Consolidated Rules of Practice (40 C.F.R. Part 22), or unless the Environmental Appeals Board elects to review the same sua sponte as therein provided, this decision will become the final order of the EAB and of the Agency in accordance with Rule 22.27(c).