Decisions & Orders
About the Office of Administrative Law Judges
Statutes Administered by the Administrative Law Judges
Rules of Practice & Procedure
Environmental Appeals Board
Employment Opportunities

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
ASBESTOS REMOVAL SPECIALISTS OF ALASKA, INC.,	)	DKT NO. 10-97-0137 CAA
	)	
Respondent	)	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

AND IN THE ALTERNATIVE MOTION FOR ACCELERATED DECISION

On March 13, Respondent filed a Motion to Dismiss, and in the Alternative, Motion for Accelerated Decision (Motion). Complainant opposed the Motion on March 30, 1998 (Opposition). For the reasons which follow, Respondent's Motion will be denied.

I. BACKGROUND

Respondent is an asbestos abatement and removal business headquartered in Fairbanks, Alaska. Respondent contracted with Richard Stanton Construction, Inc., to perform asbestos removal work for the State of Alaska, at the State of Alaska's parking garage located between Fifth and Seventh Avenues and Barnette Street in Fairbanks, Alaska. Respondent submitted a Notice of Demolition and Renovation to EPA on July 11, 1996, estimating the surface area of roofing, which contains asbestos-containing material (ACM), to be 4,500 square feet. Respondent commenced the renovation work at the parking garage on August 8, 1996. On that day, and on the following two days, August 9 and 10, 1996, Roman Gray, an inspector from the Alaska Department of Labor, Occupational Safety and Health Division, conducted inspections of the parking garage.

Based upon information from the inspections, a Complaint initiating this proceeding was filed on August 7, 1997, by Region 10 of the United States Environmental Protection Agency (Complainant). The Complaint alleges that Respondent violated Section 112 of the Clean Air Act (CAA), 42 U.S.C. § 7412, and federal regulations promulgated thereunder, 40 C.F.R. Part 61, known as the National Emission Standards for Hazardous Air Pollutants (NESHAP). Respondent is charged in five counts with violating Subpart M of the NESHAP (Asbestos NESHAP), which governs the emissions, handling and disposal of asbestos. Complainant proposed the assessment of a penalty

of $140,000 for the alleged violations.

Answering the Complaint, Respondent denied the alleged violations, asserted defenses and requested a hearing. The parties exchanged prehearing information as directed by an Order dated September 19, 1997, and thereafter this matter was set for hearing to begin on July 14, 1998. Upon joint motion of the parties, they were granted until March 13, 1998 to file any motions for accelerated decision or to dismiss pursuant to 40 C.F.R. § 22.20(a). An unopposed motion to amend the Complaint was filed by Complainant to reflect new information which more accurately describes the quantity of the asbestos-containing material at issue, and to reduce the proposed penalty to account for new information regarding the economic benefit of Respondent's alleged noncompliance with the Asbestos NESHAP. The proposed penalty was reduced to $58,688.(1)

II. DISCUSSION

Respondent's Motion requests dismissal of the Complaint on grounds that Complainant has not established a prima facie case as to Respondent's liability for any of the alleged violations. In the alternative, Respondent requests an accelerated decision in its favor as to part of the alleged violation in Count I, all of Count II, and part of Counts IV and V of the Complaint.

A. Motion to Dismiss

As to the request for dismissal, Respondent asserts that the minimum threshold requirements, under which asbestos demolition or renovation becomes subject to the Asbestos NESHAP regulations, have not been met. The threshold is stated in terms of the amount of *regulated* ACM (RACM) involved in the renovation. There is no dispute that the renovation project at issue involved Category I non-friable ACM, defined in 40 C.F.R. § 61.141 as including asphalt roofing products containing more than one percent asbestos. The question presented is whether an amount of ACM exceeding the regulatory threshold became regulated ACM, by becoming friable, or by being subjected to sanding, grinding, cutting or abrading.

RACM is defined in 40 C.F.R. § 61.141 as: "(a) Friable asbestos material; (b) Category I nonfriable ACM that has become friable; [or] © Category I non-friable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading . . . ." Friable asbestos material is defined in 40 C.F.R. § 61.141 as "any material containing more than 1 percent asbestos as determined using the method . . . Polarized Light Microscopy, that, when dry, can be crumbled, pulverized or reduced to powder by hand pressure."

The relevant threshold, triggering regulation under standards in 40 C.F.R. Part 61 Subpart M for facilities being renovated, is stated in 40 C.F.R. § 61.145(a)(4) as follows:

> In a facility being renovated . . . all the requirements of paragraphs (b) and © of this section apply if the combined amount of RACM to be stripped, cut, drilled, or similarly disturbed is
>
> (I) At least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (**160 square feet**) on other facility components . . . . (emphasis added)

The question is whether at least 160 square feet of the total 3,634 square feet of ACM at the site became RACM, i.e. friable or subjected to sanding, grinding, cutting or abrading.

The roof of the parking garage was composed of a four-inch layer of concrete, followed by a one-inch layer of rigid foam insulation, followed by built-up roofing (BUR), followed by a three-inch layer of rigid insulation and another four-inch layer of concrete (Stipulations, dated April 30, 1998 ("Stip.") ¶ 8). The BUR is composed of asbestos-containing roofing felt, tar and asphalt. On August 8, 1996, Respondent attempted to use a RB cutter to cut a 12" by 16" piece of roofing felt,

but the RB cutter stalled and could not be restarted (Stip. ¶ 15). On August 9, Respondent's crew cut the roof with axes to manually remove the BUR (Stip. ¶ 28).

Respondent's position is that the methods it used in removing the ACM did not create 160 square feet of RACM by sanding, grinding, cutting or abrading. In support of the latter argument, Respondent cites to Appendix A of Subpart M, the "Interpretive Rule Governing Roof Removal Operations," (Interpretive Rule) which states in pertinent part of Section 1.A.1.:

> EPA has determined that where a rotating blade (RB) roof cutter or equipment that similarly damages the roofing material is used to remove Category I non-friable asbestos-containing roofing material, the removal of 5580 ft^2 of that material will create 160 ft^2 of RACM . . . .
>
> Therefore, it is EPA's interpretation that when an RB roof cutter or equipment that similarly damages the roofing material is used to remove Category I non-friable asbestos-containing roofing material in a roof removal project that is less than 5580 ft^2, the project is not subject to the NESHAP . . . .

Respondent points out that only 3,634 square feet of ACM was to be removed at the parking garage, which would produce less than 160 square feet of RACM if removed by use of an RB roof cutter.

Respondent argues further that it used manual methods to remove the ACM which did not create any RACM, and cites to the Interpretive Rule at Sections 1.A.1. and 1.C.1:

> EPA further construes the NESHAP to mean that if slicing or other methods that do not sand, grind, cut or abrade will be used on Category I non-friable ACM, the NESHAP does not apply, regardless of the area of roof to be removed.
> * * * *
> As EPA interprets the NESHAP, the use of certain manual methods (using equipment such as axes, hatchets, or knives . . .) or methods that slice, shear or punch . . . does not constitute "cutting, sanding, grinding or abrading." This is because these methods do not destroy the structural matrix or integrity of the material such that the material is crumbled, pulverized, or reduced to powder. Hence, it is EPA's interpretation that when such methods are used, assuming the roof material is not friable, the removal operation is not subject to the regulation.

Respondent asserts therefore, that under the Interpretive Rule, the ACM did not become RACM, so the Asbestos NESHAP did not apply regardless of the amount of BUR removed. Respondent asserts further, that even assuming the RB cutter was used to remove the BUR, the project did not meet the threshold amount of RACM to trigger application of the Asbestos NESHAP.

As to the issue of friability, Respondent argues that Complainant also has not established that the BUR was regulated as RACM on the basis of being friable. In its prehearing exchange, Respondent submitted affidavits of employees who were working at the site on the days in question, who stated therein that the BUR was not friable (Respondent's Prehearing Exchange Exhibits ("RX") A, B, C, D, E, F). Respondent points out the absence in the inspection report of any statement that the roofing material was friable, and the lack of any friability testing. (Complainant's Prehearing Exchange, Exhibit ("CX") 1). Thus, Respondent concludes that there is no reliable evidence that the BUR was friable, and therefore it was not subject to regulation under the Asbestos NESHAP.

The Rules of Practice applicable to this proceeding, 40 C.F.R. Part 22, provide at Section 22.20(a) that an action may be dismissed "on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant." In determining whether to dismiss a complaint, "all

factual allegations in the complaint should be presumed true, and all reasonable inferences therefrom should be made in favor of the complainant." *Commercial Cartage Company, Inc.,* 5 E.A.D. 112, 117 (EAB, Feb. 22, 1994); *citing, Bank v. Pitt,* 928 F.2d 1108, 1109 (11th Cir. 1991).

Complainant believes that Respondent has not met such standard for dismissal. Complainant asserts that it is reasonable to assume that at least 160 square feet of roofing felt was removed[(2)] (Complainant's Opposition, dated March 30, 1998, p. 5). Complainant asserts further that an amount of ACM exceeding 160 square feet was subjected to grinding, cutting, and abrading during the renovation operation. Documents in Complainant's prehearing exchange indicate that Respondent used a front-end loader ("bobcat") to lift, cut, smash and tear the roofing felt (CX 1, 5, 31 ¶ 4). The parties stipulated that the front-end loader was used to "break up wet roofing material in the center of the roof and dump it" into an elevated scissor truck (Stip. ¶ 16). Respondent admitted, "Mr. Johnson began the work day at 8:00 a.m. by wetting and cutting the last of the BUR manually with an axe and cutting it into smaller pieces with the bobcat" (Respondent's Memorandum of Law in Support of its Motion, p. 8). Complainant points to documents and photographs showing that Respondent used a buffer to grind off debris, which resulted in "grinding" of ACM roofing material, according to Complainant (CX 1, 23, 32 ¶ 12). Thus, methods other than hand axes were used to remove ACM, which resulted in grinding, cutting, abrading of ACM, rendering it RACM.

Complainant supports its argument that the ACM was friable with an affidavit of the inspector stating that by using hand pressure he easily broke off roofing materials in order to obtain split samples, and that he observed small particles broken off in the sample bag resulting from his handling of the bag (CX 31 ¶ 14). Complainant also cites to an affidavit in its prehearing exchange of the laboratory analyst who describes therein the samples taken from the site. She states that she rubbed her finger across the surface of a sample, dislodging white tiny-fiber bundles, and that the matrix of a sample easily crumbled beneath her fingers, and concludes that the samples are friable. (CX 33 ¶¶ 6, 7, 10).

Complainant has established prima facie that some amount of the ACM was friable and that some amount of the ACM was subjected to grinding, cutting and/or abrading. The amount of such RACM cannot presently be determined. However, Complainant has alleged that the amount of RACM exceeds the regulatory threshold (Complaint ¶¶ 16, 18). Presuming that it is true, and drawing reasonable inferences in favor of Complainant from documents and information in the prehearing exchange, dismissal of the Complaint is not warranted. Although the presence and amount of RACM is contested by Respondent, this issue cannot be resolved on the record as it now stands.

B. Motion for Accelerated Decision

Count I alleges that when Respondent's employees used a shovel and front-end loader to drop ACM into a dumpster, they failed to "[c]arefully lower each unit or section [of facility component that contains RACM] to the floor and to ground level, not dropping, throwing, sliding, or otherwise damaging or disturbing the RACM" as required by 61.145(c)(2)(ii). Respondent requests an accelerated decision in its favor as to the allegation in Count I that this violation occurred on August 8, 1996. The inspector took no bulk samples until the next day, August 9, 1996 (Stip. ¶ 25). Because no samples were taken on August 8, Respondent asserts, there is no evidence that the material going into the dumpster on August 8 was RACM.

Respondent may be entitled to an accelerated decision only if there are no genuine issues of material fact. 40 C.F.R. § 22.20(a). Complainant asserts that such issues exist as to Count I on the basis, *inter alia,* of photographs taken by the inspector on August 8 showing roofing debris being dumped and shoveled into the dumpster, and the inspector's identification, in the photographs of materials in the dumpster, of roofing felts similar to those which were later sampled and tested positive for asbestos (CX 1A, 31 ¶ 5). Complainant has established that genuine issues of material fact exist and therefore Respondent's request for accelerated decision as to Count I is denied.

Count II of the Complaint alleges that on August 8 and 9, 1996, Respondent discharged visible emissions coming from RACM or asbestos-containing waste material. Respondent asserts that there is no evidence, including the inspection report and inspector's photographs, suggesting that anyone saw any visible emissions on the dates at issue. Respondent points to its employees' affidavits stating that the weather was rainy on August 8 and 9, and that they never observed any dust or fibers of asbestos in the air. Respondent cites to air monitoring records taken at the site showing, it asserts, no significant change in air quality, and to its proposed expert witness' opinion that the records indicate that the minimal amounts of fibers detected would not create visible emissions (CX 5; RX F).

In response, Complainant cites to the inspection report, which lists as an apparent violation, "discharge no visible emissions to the outside air," and describes dumping of ACM with front-loader and shovel into the dumpster, scattering of debris, and debris not protected from spilling out of trucks (CX 1). The inspection report does not state specifically that "visible emissions were observed." Only in the affidavit of the inspector, dated March 27, 1998, submitted after the Respondent's Motion, appear statements specifically describing visible emissions. The affidavit states that on August 8, 1996, the inspector observed and photographed "particulate matter emitted into the air as roofing debris was being dumped" via front-end loader and shovels into the dumpster, and on August 9 he observed and photographed "particles of asbestos roofing debris emitted through the air" (CX 31 ¶¶ 6, 10).

Nevertheless, well before the Motion was filed, Complainant stated that the inspector was expected to testify at the hearing that he observed visible emissions from the renovation operation on August 8 and 9 (Complainant's Prehearing Exchange statement, dated November 26, 1997). It is concluded that there is sufficient documentation in the record to show prima facie that visible emissions were observed by the inspector on the dates at issue. Respondent's challenge to Complainant's case shows that there are genuine issues of material fact as to whether visible emissions from RACM were observed. Therefore, an accelerated decision as to Count II is not warranted.

Count IV alleges that Respondent failed to mark, with EPA asbestos hazard warning signs, the vehicles used to transport waste ACM during the loading and unloading of waste on August 8, 9, and 10, in violation of 40 C.F.R. § 61.150(c). Respondent contends that there is no evidence that the inspector saw an unmarked vehicle during loading and unloading. Respondent asserts that the inspector saw the scissor truck at Respondent's shop facility, located at 1189 Van Horn Avenue in Fairbanks, at least four hours after it had been loaded at the parking garage site, which does not prove that it was not properly marked at the site when being loaded.

Complainant characterizes the Respondent's implication that an asbestos hazard warning sign was present during loading and then removed afterward as an "unlikely scenario." The inspection report notes that two days later (August 10), Respondent's foreman at the site placed Department of Transportation placards on the truck when the inspector pointed out the lack of warning labels on the truck; the foreman did not place any asbestos warning labels as required by EPA regulations (CX 1). The inspection report notes further that during conversation with the inspector, the foreman demonstrated that he was unfamiliar with the labeling and transportation regulations (CX 1).

There exist genuine issues of material fact as to whether the scissor truck was marked with the required asbestos hazard warning while it was being loaded on August 8, 1996. Thus, accelerated decision as to Count IV will be denied.

The final count upon which Respondent requests accelerated decision is Count V, which alleges that there were no waste shipment records for transporting loose ACM on August 8, or for bagged ACM debris on August 10, and that waste shipment records for August 9 and 13 were incomplete. Waste shipment records are required by 40 C.F.R. § 61.150(d)(1) for all ACM waste transported off-site. Respondent requests accelerated decision as to August 8, 9 and 13 on the basis that waste shipment

records for those dates, presented in the prehearing exchange as Respondent's exhibit L, were complete.

Complainant contends that the records in Respondent's Exhibit L do not accurately reflect all of the ACM that Respondent disposed of. Complainant cites to discrepancies between Exhibit L and the Respondent's daily log of the renovation, in Complainant's Exhibit 5. Complainant points to specific items in the waste ACM listed in the daily log for August 8, 9 and 13 which were not accounted for in the waste shipment records for August 8, 9 and 13. Complainant has shown specific facts in the record which establish that genuine issues of material fact exist as to the violation alleged in Count V.

In sum, as supported by documents submitted in the prehearing exchange, Complainant has shown prima facie that the Asbestos NESHAP regulations applied to the renovation project at issue. Respondent has not established any grounds which show that Complainant has no right to relief. Furthermore, genuine issues of material fact exist as to Counts I, II, IV and V, and therefore Respondent is not entitled to an accelerated decision.

Accordingly, **IT IS ORDERED THAT:**

1. Respondent's Motion for Extension of Time to File Motion to Dismiss is **GRANTED**.

2. Respondents' Motion to Dismiss is **DENIED**.

3. Respondents' Motion in the Alternative for Accelerated Decision is **DENIED**.

4. The parties shall report on the status of settlement of this proceeding **within thirty (30) days from the date of this Order.**

_____

Susan L. Biro
Chief Administrative Law Judge

Dated: May 6,1998
Washington D.C.

1. The amount of ACM to be removed was amended, based upon information provided by Respondent, to an area of approximately 3,634 square feet rather than the Respondent's earlier estimate of 4,500 square feet. The economic benefit component of the penalty was reduced on the basis of information from Respondent that it was paid $8,688 to conduct asbestos renovation and disposal. Respondent filed an Amended Answer to the Complaint on April 13, 1998, which is substantially similar to the original Answer.

2. It is observed that Respondent's Notification of Demolition and Renovation, dated July 15, 1996, lists in Part VII that the approximate amount of "RACM To Be Removed" is 4,500 square feet, describing "Surface Area Roofing Felts" (CX 2, 3).