UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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MORTON L. FRIEDMAN and SCHMITT CONSTRUCTION COMPANY,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant.

NO. CIV. S-04-0517 WBS DAD

MEMORANDUM AND ORDER

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This case involves the removal of regulated asbestos containing materials ("RACM"). Plaintiffs challenge the finding of the Environmental Appeals Board ("EAB") that plaintiffs are liable for violations of sections 112 and 114 of the Clean Air Act ("CAA"). See 42 U.S.C. §§ 7412, 7414. Plaintiffs and defendant each move for summary judgment.

I. Factual and Procedural History

A. Factual background

This case arises out of plaintiff Friedman's redevelopment of the Town and Country Village shopping complex in Sacramento. In re: Morton L. Friedman and Schmitt Constr. Co.,

CAA Appeal No. 02-07, slip op. at 7-8 (Envtl. App. Bd. 2004)("Friedman"). Before the redevelopment, Town & Country Village was immediately adjacent to Calderwood Apartments. Id. at 8. By 1997, Friedman had obtained zoning changes that allowed him to move forward with a project to combine a portion of the apartment complex with the then existing Town & Country Village. Eleven buildings were demolished during the redevelopment, but only the demolition of four of them is at issue in this case. Id. at 8-9. Those four buildings consist of three apartment buildings within the Calderwood Apartment complex, having addresses of 2805, 2911, and 2931 Calderwood Lane ("the Calderwood buildings"),[1] and one building, known as building #2, that had held retail shops. Id.

Friedman hired co-plaintiff Schmitt Construction Company ("Schmitt") to perform certain renovation and demolition services, including services on the four buildings at issue in this case. Id. at 9-12.

Schmitt hired Action Environmental Management Services ("Action") "'to conduct asbestos surveys and advise [Schmitt] of their responsibilities for the proper removal and transportation of [RACM].'" Friedman, slip op. at 10(quoting answer of Friedman

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[1] Plaintiffs state in their motion that the three Calderwood buildings at issue have addresses of 2901, 2911, and 2931 Marconi Avenue. The EAB decision noted that plaintiffs referred to the same buildings, in their answer presented to the administrative law judge, as 2805, 2911, and 2931 Marconi Avenue. Friedman, slip op. at 9 n.6 Nevertheless, plaintiffs make no argument that a different construction company was responsible for the alleged CAA violations in this case, nor do they argue that defendant and themselves are referring to different buildings. (See Pls.' Mem. in Supp. of Summ. J. and Reply in Supp. of Summ. J.)

and Schmitt). Action prepared an inspection report for the Calderwood buildings dated June 19, 1996 and an inspection report for building #2 dated June 13, 1997. Id. at 10-11.

Action's June 1996 report identified asbestos contained in linoleum within apartments in the 2805, 2911, and 2931 Calderwood Lane buildings, and classified the linoleum as RACM. Id. at 11. The June 1996 report also recommended that a certified asbestos abatement contractor be retained to remove all of the linoleum in the designated apartments prior to any demolition. Id.

Action's June 1997 report identified asbestos contained in the form of "spray-on acoustical ceiling materials" in a number of the retail suites in building #2. Id. The June 1997 report advised that if plans were made to disturb those materials during any renovation, the retention of a certified asbestos abatement contractor was required to remove the materials before the renovation. Id. at 11-12.

Despite these recommendations, Mr. Schmitt, of Schmitt Construction Company, attempted to remove the RACM from building #2 and the Calderwood buildings. Id. at 12. Sacramento Metropolitan Air Quality Management District ("SMAQMD") inspector Darrell Singleton testified before the administrative law judge ("ALJ") that Mr. Schmitt removed about 1600 square feet of RACM from building #2 in August 1997. Id. The RACM removed from building #2 amounted to approximately fourteen cubic feet of material. Id. Mr. Schmitt did not notify U.S. Environmental Protection Agency Region IX (the "Region") nor the SMAQMD before attempting the removal of the RACM. Id. Mr. Schmitt transported

the RACM from building #2 to his place of business at 2900 Heinz Street without preparing a waste shipment record. Id. at 12-13. Friedman and Schmitt later submitted a form to SMAQMD acknowledging that Schmitt had removed the RACM in building #2. Id. at 12. SMAQMD inspector Singleton, during his inspection of building #2, found a small quantity of the acoustic ceiling material remaining on the floor, the door frames, the door window, and some beams. Id. Tests revealed that this remaining material was RACM. Id.

Mr. Schmitt also removed a total of 264 square feet of linoleum containing asbestos from the three Calderwood buildings. Id. at 13. Mr. Schmitt did not provide prior notice to either the Region or to the SMAQMD before doing so. Id. Plaintiffs were not, however, charged with work practice violations in connection with the removal and storage of the Calderwood buildings' RACM. Id. at 45.

B. The hearing before the ALJ

The Region filed an administrative complaint (the "complaint") against plaintiffs on November 4, 1999 alleging that plaintiffs had violated sections 112 and 114 of the CAA and the notice and work practice requirements of the National Emissions Standards for Hazardous Air Pollutants for asbestos ("asbestos NESHAP").[2] Id. at 13; see 42 U.S.C. §§ 7412, 7414; 40 C.F.R. §

[2] The sections at issue from the code of federal regulations interpret the CAA, so any violation of 40 C.F.R., Part 61, subpart M is also a violation of the CAA. Neither party has argued that the EPA lacked the power to pass the regulations at issue.

61.145 (also known as 40 C.F.R., Part 61, subpart M).[3] The complaint requested a civil administrative penalty of $134,300 against plaintiffs. Id. The complaint alleged that the Calderwood buildings and building #2 are one "facility" within the meaning of the asbestos NESHAP. Id. at 13-14. Count I of the complaint alleged that plaintiffs failed to provide 10 working days written notice of their intention to remove RACM from the facility in violation of 40 C.F.R. § 61.145(b). Id. at 14. Count II alleged that plaintiffs did not maintain waste shipment records documenting the transportation of asbestos in violation of 40 C.F.R. § 61.150(d). Id. Count III alleged that plaintiffs failed to keep RACM at the facility adequately wet until collected, contained, and treated, in violation of 40 C.F.R. §§ 61.145(c)(6) and 61.150(d). Id.

The ALJ issued his decision in August 2002. Id. First, the ALJ found that each of the three Calderwood buildings must be considered separately; the buildings were not to be combined with each other or with building #2 as one "facility." (Administrative R., part 25 (Initial Decision) at 12-13). The ALJ also concluded that plaintiffs were not liable on any of the counts because they did not have fair notice that they were to comply with the federal regulations. (Id. at 18). He found that the EPA had delegated its CAA enforcement authority, at least in part, to SMAQMD. (Id.).

The SMAQMD regulation at issue is less stringent than

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[3] All citations to the C.F.R. are to the 1996 version of the code unless otherwise noted, as that was the current version of the code at the time of the violations.

the federal regulation. The relevant SMAQMD regulation, in effect at the time of the events in this case, stated that the reporting and work practice requirements for the renovation of facilities containing RACM do not apply when "the combined amount of RACM is less than 260 lineal feet or less than 160 square feet, or less than 35 cubic feet. (Id. at 2)(quoting § 110.10 of the SMAQMD regulations)(emphasis added by ALJ). The relevant federal regulation states that the reporting and work practice requirements are triggered when the combined amount of RACM is 260 linear feet on pipes or 160 square feet on other facility components. 40 C.F.R. § 61.145(a)(4)(i). The only time the 35-cubic-feet-of-RACM threshold is the standard under the federal regulations is "where the length or area could not be measured previously." 40 C.F.R. § 61.145(a)(4)(ii). The ALJ found that there was confusion as to whether the local regulation or the federal regulation applied to plaintiffs' conduct, and thus plaintiffs did not receive fair notice of the conduct that was proscribed. (Administrative R., part 25 (Initial Decision) at 15-18). The ALJ found no liability on any of the counts. (Id. at 45).

The ALJ nevertheless proceeded to provide his analysis of the appropriate penalty, and found that an appropriate penalty would have been $3,500. (Id.).

B. Environmental Appeals Board ruling

The Region appealed the ALJ's holding to the EAB. The EAB reversed the ALJ's decision and held that plaintiffs had received fair notice that the federal asbestos NESHAP would apply to them. Friedman, slip op. at 32. The EAB also held that

building #2 and the three Calderwood buildings should all be considered one "installation" - that is, they were appropriately regarded as a single renovation or demolition site.[4] Friedman, slip op. at 39. The EAB found plaintiffs liable on all three counts. Friedman, slip op. at 47-51.

The EAB proceeded to calculate the penalty. First, the EAB quoted or cited the relevant statutory provisions outlining the procedure by which a penalty is to be assessed. Id. at 51-53; see 42 U.S.C. § 7413(d) & (e). The EAB also noted that the EPA has prepared a general penalty policy, known as the Clean Air Act Stationary Source Civil Penalty Policy ("Penalty Policy"), applicable to violations of the CAA. Id. at 55. Since all parties requested that the EAB follow the policy, and since the EAB found that the Penalty Policy had proven to provide a sound framework in the past, the EAB announced that it would generally follow the Penalty Policy. Id.

The Calderwood buildings were not considered in assessing the penalty. Id. at 45-46. The Penalty Policy allows for an increase in the penalty for work practice violations depending on by how much the quantity of RACM exceeds the threshold. Id. at 45. However, the Penalty Policy does not allow for a similar increase in the penalty for failure to

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[4] Facility means any institutional, commercial, public, industrial or residential structure, installation, or building . . .

Installation means any building or structure or any group of buildings or structures at a single demolition or renovation site that are under the control of the same owner or operator (or owner or operator under common control).

40 C.F.R. § 61.141.

notify. Id. The EPA did not request, and the EAB did not grant, any penalty for plaintiffs' work practice with regard to the Calderwood buildings. Id. Therefore, since the threshold of RACM necessary for a notice violation had already been met by plantiffs' handling of building #2, and since any increased quantity of RACM would not increase that penalty, the RACM in the Calderwood buildings was irrelevant for purposes of the penalty.

Under the Penalty Policy, the first step is to calculate a "preliminary deterrence amount" by assessing an economic benefit component and a gravity component. Id. at 56. Under the Penalty Policy, the Region's Coordinator, Mr. Trotter, requested the court to assess a $15,000 gravity-based penalty assessment for plaintiffs' failure to give notice, a $2,000 penalty for failure to maintain waste shipment records, and a $13,500 penalty for failure to keep the RACM wet. Id. at 56-57. Plaintiffs did not challenge the $2,000 assessment for failure to maintain records. Id. at 58. The EAB found a $15,000 penalty to be an appropriate gravity-based penalty for failure to give notice. Id. at 61. The EAB, following an EPA memorandum, raised by 10%, to account for inflation, the gravity-based penalties for the failure to give notice and the failure to maintain records, so that $16,500 was the final figure for failure to give notice and $2,200 was the final figure for failure to maintain records. Id. at 59, 61. The EAB found that an appropriate gravity-based penalty for the wetting violation was $7,100. Id. at 66.

Region Coordinator Trotter calculated the economic benefit to plaintiffs as $32,000. Id. Trotter came to this initial calculation by multiplying $20 by 1600, the square feet

of RACM removed from building #2. The EAB heard evidence regarding the actual cost of removing the RACM properly from building #2, and concluded that these services could be obtained for $3 a square foot. Id. at 67. Therefore, the EAB assessed an economic benefit component of $4,800. Id.

The next penalty component under the Penalty Policy is the size-of-violator component. Region Coordinator Trotter recommended a size-of-violator assessment of $62,500, based on the net worth of plaintiff Friedman. Id. at 68. The EAB did not follow that recommendation, and instead applied the Penalty Policy's size-of-violator assessment to the net worth of plaintiff Schmitt to arrive at a figure of $5,000 Id. at 70. Finally, the EAB reduced all components of the penalty, except the economic benefit component, by 15% to account for plaintiffs' cooperation with the EPA after becoming aware of their potential violation. Id. at 72. Computing the sum, the penalty assessed was (0.85)($2,200 + $16,500 + $7,100 + $5,000) + $4,800 = $35,600. Id.

II. Discussion

A. Summary judgment standard

Both plaintiffs and defendant now move for summary judgment pursuant to Federal Rule of Civil Procedure 56. The court must grant summary judgment to a moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party adverse to a motion for summary

judgment may not simply deny generally the pleadings of the movant; the adverse party must designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Simply put, "a summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). The non-moving party must show more than a mere "metaphysical doubt" as to the material facts. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

In this case, the court is called upon to review the findings of an agency adjudication. "Judicial review of an agency decision typically focuses on the administrative record in existence at the time of the decision and does not encompass any part of the record that is made initially in the reviewing court." Southwest Ctr. for Biological Diversity v. United States Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996). Extra-record materials may be allowed under three exceptions:

> (1) if necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) when the agency has relied on documents not in the record, or (3) when supplementing the record is necessary to explain technical terms or complex subject matter.

Id. (quotation marks and citation omitted). The parties have not asked the court to look outside the record developed in the EAB adjudication, and the court finds that none of the three Southwest Center exceptions applies in this case. Therefore, the record will not be developed further and this case is ripe for summary adjudication.

B. Standard of Review

The standard of review to be applied to decisions of the EAB is laid out in the CAA. The reviewing court "shall not set aside or remand such [agency] order or assessment unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the order or penalty assessment constitutes an abuse of discretion." 42 U.S.C. § 7413(d)(4).

A court reviewing an agency decision for substantial evidence supporting its judgment must take into account both record evidence in support of and against the agency's holding. Universal Camera v. NLRB, 340 U.S. 474, 487-88 (1951). The substantial evidence standard remains, however, a deferential one. In Consolo v. Federal Maritime Commission, the statute at issue, like the statute in this case, allowed a reviewing court to set aside agency action either because the agency action was arbitrary and capricious or because it was unsupported by substantial evidence. 383 U.S. 607, 619 (1966); see 5 U.S.C. § 706. The Court noted:

> Congress was very deliberate in adopting this standard of review. It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute.

Id. at 620. If it would have been possible for a reasonable jury to reach the EAB's conclusion, then the court must find that the EAB decision is supported by substantial evidence. See Allentown Mack Sales and Serv., Inc. v. NLRB, 522 U.S. 359, 366-67 (1998).

Plaintiffs argue that "even if an agency decision is supported by substantial evidence, the decision may still be

determined to be arbitrary and capricious." (Pls.' Reply in Supp. of Summ. J. at 2). This argument amounts to no more than semantics. "When the arbitrary and capricious standard is performing that function of assuring factual support, there is no substantive difference between what it requires and what would be required by the substantial evidence test." Wileman Bros. & Elliott, Inc. v. Espy, 58 F.3d 1367, 1374-75 (9th Cir. 1995)(quotation marks and citation omitted).

The fact that an ALJ initially concluded that plaintiffs were not liable carries no special weight when the court reviews the EAB's determination; the ALJ's decision is on equal footing with all other parts of the record. Comm. for an Indep. P-I v. Hearst Corp., 704 F.2d 467, 475 n.4 (9th Cir. 1983)("When the agency disagrees with the ALJ, deference still runs in favor of the agency; the ALJ's contrary findings will simply be weighed along with the other evidence opposing the agency's decision.").

C. Fair notice

Plaintiffs argue that the EAB did not have substantial evidence to support its finding that plaintiffs received fair notice of the regulation. See Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)(due process requires that parties receive fair notice before being deprived of property). The fair notice doctrine applies in the civil administrative context. See Stillwater Mining Co. v. Fed. Mine Safety & Health Review Comm., 142 F.3d 1179, 1182 (9th Cir. 1998)(conducting fair notice analysis where civil penalty assessed by agency). The regulation at issue must give fair warning of the conduct it

prohibits or requires. Id. The fair notice standard is objective:

> the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the . . . industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.

Id. (quotation marks and citation omitted). A regulated party is assumed to have read the regulations that apply to him. See Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

At issue in this case is the federal regulation regarding the amount of RACM necessary to trigger the reporting and work practice requirements and the federal statute regarding the procedure the EPA must follow to delegate its enforcement authority to SMAQMD. The regulation is clear: the reporting and work practice requirements are triggered when the amount of RACM is greater than 160 square feet. 40 C.F.R. § 61.145(a)(4).[5] The RACM is to be measured in cubic feet only when "the length or area could not be measured previously." Id. § 61.145(a)(4)(ii). If there were no local regulation at all, this federal regulation

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[5] In a facility being renovated, including any individual nonscheduled renovation operation, all the requirements of paragraphs (b) [reporting requirements] and (c) [work practice requirements] of this section apply if the combined amount of RACM to be stripped, removed, dislodged, 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, or

(ii) At least 1 cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously.

40 C.F.R. § 61.145(a)(4).

would suffice to give fair notice to plaintiffs that their activity was covered.

The relevant federal statute is 42 U.S.C. § 7412(*l*), subparts (1), (7), and (8).[6] Subpart (8) permits the EPA administrator to approve a program developed by a local agency such as SMAQMD. 42 U.S.C. § 7412(8). Importantly, nothing in that subpart indicates that a local regulation will supplant a federal regulation in the absence of action by the EPA administrator. Id. The process for approval is found at 40 C.F.R. §§ 63.90 and 63.91. A local agency seeking approval of its rules must consult with its state prior to making a request

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[6] Each state may develop and submit to the Administrator for approval a program for the implementation and enforcement (including a review of enforcement delegations previously granted) of emission standards and other requirements for air pollutants subject to this section or requirements for the prevention and mitigation of accidental releases pursuant to subsection (r) of this section. A program submitted by a State under this subsection may provide for partial and complete delegation of the Administrator's authorities and responsibilities to implement and enforce emissions standards and prevention requirements but shall not include authority to set standards less stringent than those promulgated by the Administrator under this chapter.

42 U.S.C. § 7412(*l*)(1).

Nothing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard or requirement under this section.

42 U.S.C. § 7412(*l*)(7).

The Administrator may, after notice and opportunity for public comment, approve a program developed and submitted by a local air pollution control agency (after consultation with the State) pursuant to this subsection and any such agency implementing an approved program may take any action authorized to be taken by a State under this section.

42 U.S.C. § 7412(*l*)(8).

for approval. 40 C.F.R. § 63.90(b). "A State or Territorial Agency may submit requests for approval on behalf of a local agency after consulting with that local agency." Id. It is not clear from this language whether a local agency may submit proposed CAA modifications to the EPA directly, or whether its state must act as its proxy. Once a local regulation is submitted to the EPA for approval, the EPA must review a request and notify the state whether the request is complete. Id. § 63.91(a)(1). After receiving a complete request, the EPA administrator is bound to seek public comment for a minimum of 30 days on the proposed regulation. Id. § 63.91(a)(2). After the notice and comment period, if the EPA administrator finds that the regulation meets the necessary criteria, the administrator shall approve it and the regulation will be published in the Federal Register. Id. § 63.91(a)(3). If the regulation does not meet the necessary criteria, then the EPA administrator shall disapprove the regulation. Id. § 63.91(a)(5).[7]

Plaintiffs introduced no evidence to the EAB that the SMAQMD or California submitted SMAQMD regulation 110 to the EPA. Plaintiffs also did not present any evidence showing that there

[7] Plaintiffs cite two EAB cases for the proposition that the EPA had delegated its authority to promulgate rules to the SMAQMD. (Pls.' Mem. in Supp. of Summ. J. at 13-14); see In re Encogen Cogeneration Facility, 8 E.A.D. 244 (Envtl. App. Bd. 1999); In re Milford Power Plant, 8 E.A.D. 670 (Envtl. App. Bd. 1999). However, those cases involved Prevention of Significant Deterioration of Air Quality ("PSD") Permits. "[The] EPA can delegate its authority to operate the PSD program to a state, in which case the state issues PSD permits as federal permits on behalf of the EPA." Milford, 8 E.A.D. at 673(citing 40 C.F.R. § 52.21(u)(1998)). The CAA sections at issue in the present case have no analogous delegation provisions, and thus these cases do not show that, in the present case, the SMAQMD regulations acted as EPA regulations.

was a notice and comment period on SMAQMD regulation 110, nor did they present any evidence that regulation 110 was printed in the Federal Register. See 40 C.F.R. § 63.91.

In short, plaintiffs argue that the EPA was obligated to monitor the activities of all local environmental agencies across the nation to prevent deviation from CAA standards. (See Pls.' Mem. in Supp. of Summ. J. at 13). By plaintiffs' theory, a local agency could pass a regulation in direct conflict with EPA standards, such as one doing away with the reporting requirements for RACM altogether, and, as long as the EPA did not find and take action to correct that regulation, a local contractor would be justified in following the local regulation. Plaintiffs cite 42 U.S.C. § 7412(*l*)(5)(D)[8] for the proposition that Congress imposed this onerous monitoring and correction function on the EPA. (See Pls.' Mem. in Supp. of Summ. J. at 14). But this statute only applies when the regulation in question has been submitted to the EPA in the first place. 42 U.S.C. § 7412(*l*)(5). Plaintiffs have not pointed the court to any documents or other evidence contained in the record, nor has the court found any such documentation, that SMAQMD regulation 110(d) was ever presented to the EPA for approval. Absent this submission, the EPA has no affirmative duty to disapprove the local regulation. Id. The absence in the record of any showing of publication in the Federal Register of SMAQMD regulation 110 is conclusive proof that the regulation did not garner the EPA administrator's

[8] Plaintiffs actually cite "42 U.S.C. 7412(5)(D)" for the proposition. The court assumes they meant 42 U.S.C. § 7412(*l*)(5)(D).

approval. See 40 C.F.R. § 63.91(a)(3), (5).

There are two reasons why the federal regulation would still govern the conduct at issue even if SMAQMD regulation 110 had been approved by the EPA administrator. First, "delegation of the [EPA] Administrator's authorities and responsibilities to implement and enforce emissions standards and prevention requirements . . . shall not include authority to set standards less stringent than those promulgated by the Administrator [under the CAA]." 42 U.S.C. § 7412(*l*)(1). Second, "nothing in [42 U.S.C. § 7412(*l*)] shall prohibit the Administrator from enforcing any applicable emission standard or requirement under [the CAA]." 42 U.S.C. § 7412(*l*)(7). From the federal statutes and regulations at issue it is clear that the notification and work practice requirements were triggered in this case. If plaintiffs had read the CAA and regulations, they would have been aware that their conduct was governed by federal law.

The court finds that a reasonably prudent person familiar with the demolition industry and the protective purposes of the RACM standard would have read the federal law and not just relied on local regulations. See Stillwater, 142 F.3d at 1182. Therefore, plaintiffs' fair notice defense was properly rejected by the EAB. See Friedman, slip op. at 19-33(discussing plaintiffs' fair notice arguments).[9]

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[9] Plaintiffs claim General Electric v. EPA is analogous to this case. (Pls.' Mem. in Supp. of Summ. J. at 10); see 53 F.3d 1324 (D.C. Cir. 1995). In that case, the court held that "it is unlikely that regulations provide adequate notice when different divisions of the enforcing agency disagree about their meaning." Gen. Elec., 53 F.3d at 1332. In the present case, there is no evidence in the record of an interagency dispute

D. Equitable estoppel

Plaintiffs' next argument is that the EAB should have found that the EPA was equitably estopped from charging plaintiffs with violations of the CAA. (Pls.' Mem. in Supp. of Summ. J.). "[I]t is well settled that the government may not be estopped on the same terms as any other litigant." Heckler v. Cmty. Health Servs. of Crawford County, Inc., 467 U.S. 51, 60 (1984). A party seeking to estop the government bears a heavy burden. United States v. Henmen, 51 F.3d 883, 892 (9th Cir. 1995). Plaintiffs must show that the government engaged in "affirmative misconduct going beyond mere negligence" and that "the government's act will cause a serious injustice and the imposition of estoppel will not unduly harm the public interest." Pauly v. United States Dep't of Agric., 348 F.3d 1143, 1149 (9th Cir. 2003)(omitting citation). These requirements are in addition to other, traditional elements of estoppel. See United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978)(outlining additional four elements). Plaintiffs have not met their burden in showing affirmative misconduct by the government; all that plaintiffs allege in this case is that the EPA negligently allowed SMAQMD regulation 110 to survive. Therefore, plaintiffs' equitable estoppel argument must fail.

E. The definition of "facility"

Plaintiffs argue that the Calderwood buildings should not have been considered by the EAB as part of the same

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about the meaning of the federal statutes and regulations and their relationship to local regulations. General Electric is not analogous to this case.

"facility" along with building #2. Nevertheless, the EAB's decision that the three Calderwood buildings and building #2 comprise one "facility" is supported by the record. There is ample evidence that building #2 and the Calderwood buildings comprise a group of buildings or structures at a single demolition or renovation site that are under the control of the same owner or operator. See 40 C.F.R. § 61.141. It is undisputed that Friedman owned all of these buildings and that the buildings were being demolished and/or renovated to make way for an improved shopping center. (See Pls.' Mem. in Supp. of Summ. J. at 2)("The project involved a total of twelve different buildings, including retail shops and the demolition of some adjacent apartment buildings to make way for a new grocery store tenant."). Therefore, plaintiffs' "facility" argument must fail.[10]

F. The EAB's Penalty Assessment

Plaintiffs were assessed a total penalty of $30,980 by the EAB. Friedman, slip op. at 72. Plaintiffs make four arguments as to why that penalty should be overturned. First, they argue that the EAB did not show the proper deference to the ALJ. Second, they argue that Region Coordinator Trotter improperly considered Friedman's wealth instead of Schmitt's in calculating the EPA's proposed penalty. Third, plaintiffs argue that this is not a case where there existed a major environmental hazard. Finally, plaintiffs argue that they acted in good faith

[10] Even if the court were to determine the "facility" issue was decided against the great weight of evidence and law, it would be of no importance because the penalty assessed was not based in any way on the Calderwood buildings.

and that the fine was therefore excessive.

The EAB acknowledged that in cases where the ALJ assesses a penalty within the range of the penalty guidelines, the EAB will generally not substitute its judgment for that of the ALJ absent a showing of abuse of discretion. Friedman, slip op. at 53. However, the EAB also noted that, where the ALJ assesses a penalty outside the range of the penalty guidelines, as occurred in this case, id. at 55, the EAB reserves the right to closely scrutinize such a penalty award. Id. at 53(citing EAB cases). Indeed, the EAB has the power to review any ALJ penalty determination de novo. Id.; 40 C.F.R. § 22.30(f)(2003). The court finds that the EAB amply supported the standard of review it applied to the ALJ's decision by citing numerous EAB precedents. See id.

Plaintiffs' second argument, that Region Coordinator Trotter improperly considered Friedman's wealth instead of Schmitt's, is easily dismissed. The Region Coordinator did use Friedman's wealth as the basis for the size-of-violator penalty recommendation. Friedman, slip op. at 57. However, the EAB did not accept this recommendation. Id. at 70("we decline to overturn the ALJ's conclusion that the size-of-business penalty factor in this case should be based on the size of Mr. Schmitt's business"). The personal wealth of the plaintiffs was not considered for any component of the total penalty other than the size-of-violator component, see Friedman, slip op. at 51-72, and therefore plaintiffs' second argument is moot.

Plaintiffs' third argument, that the removal of the RACM does not represent a major hazard, and thus should not be

subject to the EPA's "full arsenal of punitive weapons," is also without merit. (See Pls.' Mem. in Supp. of Summ. J. at 21). The record contains no indication that, under the CAA, the regulations passed in furtherance of the CAA, or the Penalty Policy, the quantity of RACM involved in this case de minimis. Further, the EAB noted that asbestos is dangerous to human health in small amounts. See Friedman, slip op. at 62(citing cases in which courts have recognized the serious health consequences of being exposed to asbestos fibers).

Plaintiffs' fourth argument is that they acted in good faith from the outset. The EAB, in considering this issue, split the inquiry in two: (1) plaintiffs' good faith belief that they were following the appropriate regulation, and (2) plaintiffs' cooperation with the EPA during its investigation. The EAB considered and rejected the first as a basis for a penalty reduction. Id. at 70-72. The EAB noted that

> the [Penalty Policy] recommends that the violator's degree of willfulness or negligence only be used to increase the amount of penalty since the CAA is a strict liability statute. In other words, the statute contemplates that a significant penalty may be imposed even in the absence of any proof of intent or negligence.

Id. at 71(emphasis in original)(citation omitted). Plaintiffs have not argued, nor could they argue, that the CAA is not a strict liability statute, and therefore their argument for leniency due to their good faith in this regard must fail. (See Pls.' Mem. in Supp. of Summ. J. at 27). Plaintiffs' cooperation with the EPA, on the other hand, was considered by the EAB, and the EAB found this to be a proper basis to reduce the gravity-based portion of the penalty by 15%. Friedman, slip op. at 72.

The court finds the amount of this reduction to be supported by the record, and neither plaintiffs nor defendants argue otherwise.

IT IS THEREFORE ORDERED that:

(1) plaintiffs' motion for summary judgment be, and the same hereby is, DENIED;

(2) defendants' motion for summary judgment be, and the same hereby is, GRANTED.

DATED: February 24, 2005

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE