IN RE MORTON L. FRIEDMAN AND SCHMITT CONSTRUCTION COMPANY

CAA Appeal No. 02-07

FINAL DECISION

Decided February 18, 2004

Syllabus

The U.S. EPA Region IX (the "Region") filed an administrative complaint against Morton L. Friedman ("Mr. Friedman") and Richard Schmitt ("Mr. Schmitt") (collectively, "Friedman & Schmitt"). The complaint requested a civil administrative penalty of $134,500 for three alleged violations of sections 112 and 114 of the Clean Air Act ("CAA") and the notice and work practice requirements of the National Emissions Standards for Hazardous Air Pollutants for asbestos, 40 C.F.R. Part 61, subpart M (the "Asbestos NESHAP"). The alleged violations concerned Mr. Schmitt's removal of regulated asbestos-containing material ("RACM") from several buildings during redevelopment of a shopping center owned by Mr. Friedman. Administrative Law Judge William B. Moran (the "ALJ") found that Friedman & Schmitt were not liable for the alleged violations on the grounds that they did not have fair notice that applicability of the notice and work practice requirements would be determined under the federal Asbestos NESHAP's provisions, rather than under the provisions of a local rule.

The Asbestos NESHAP provides that the notice and work practice requirements are applicable if a renovation will disturb at least 260 linear feet of RACM on pipes or at least 160 square feet of RACM on other facility components, or at least 35 cubic feet of RACM taken from facility components that cannot be readily measured. 40 C.F.R. § 61.145(a)(4)(i), (ii) (1996). The evidence in the record showed that Friedman & Schmitt's activity involved removal of 1600 square feet of RACM from a location known as Building #2, and a total of 264 square feet of asbestos-containing linoleum from three other buildings known as the Calderwood Apartments. The ALJ, however, held that Friedman & Schmitt did not have fair notice that they were required to measure the RACM as square feet on the facility components because a rule promulgated by the local government would have allowed the RACM to be measured as cubic feet. The 1600 square feet of acoustic ceiling material removed from Building #2 consisted of less than 14 cubic feet after it was removed.

The ALJ also held that, because the local government required a demolition permit for each separately addressed building, Friedman & Schmitt did not have fair notice that the "facility" for which the combined amount of RACM must be measured was the whole redevelopment project, rather than the individual buildings to be demolished in that project. For this reason, the ALJ concluded that the RACM removed from the Calderwood Apartments fell outside the reach of regulatory coverage because the amount of linoleum removed did not exceed the threshold of 160 square feet. The ALJ also concluded that the

record did not establish that the linoleum was RACM and that the Region failed to effectively plead its claims regarding the Calderwood Apartments.

The Region requested that the Board reverse the ALJ and assess a significant penalty.

Held: The Board reverses the ALJ's finding of no liability and assesses a penalty of $30,980 for Friedman & Schmitt's three violations of the CAA and Asbestos NESHAP:

1. *Fair Notice - Measurement Method*. The Asbestos NESHAP provides fair notice, in plain unambiguous language, that RACM must be measured in linear feet "on pipes" or square feet "on other facility components" and may only be measured in cubic feet "off facility components, *where the length or area could not be measured previously*." While a parallel local rule may be ambiguous in how it frames the regulatory threshold, Friedman & Schmitt have not cited any cases where a court looked to ambiguity in a *state or local rule* as evidence that a *federal regulation* is ambiguous or otherwise fails to give fair notice of its requirements. The federal regulations governing delegation and approval of local rules, 40 C.F.R. §§ 63.90-.93, do not support Friedman & Schmitt's lack of fair notice argument. The regulatory text of 40 C.F.R. § 63.90(c) (1996) and the statutory text of CAA § 112(*l*) provided Friedman & Schmitt fair notice that the Region may enforce the Asbestos NESHAP's requirements notwithstanding any delegation of authority to the local government. Furthermore, Friedman & Schmitt had fair notice that the Agency had not approved the local rules in any event.

2. *RACM in the Calderwood Apartments:*

a. *Fair Notice - Scope of Facility*. By including "installation" within the definition of "facility" and by defining an installation as "any group of buildings," the regulations found at 40 C.F.R. § 61.141 specifically contemplated that a group of buildings may be a single facility. The regulatory text therefore provided fair notice that a group of buildings, such as the "major renovation project" at issue in the present case, may be treated as a single facility. The project at issue, which included the removal of 264 square feet of linoleum from the Calderwood Apartments -apartments that were subsequently demolished to allow Mr. Friedman to construct a grocery store as an anchor tenant - was a single "installation" and therefore a "facility" within the meaning of the Asbestos NESHAP, 40 C.F.R. § 61.141. These conclusions flow fairly and proximately from the plain language of the regulatory definition, as supported by examples EPA provided in the 1990 Preamble.

b. *Evidence that Linoleum was RACM*. The ALJ erred in holding that "EPA did not establish that the material removed [from the Calderwood Apartments] was regulated asbestos." Parts (a) and (b) of the definition of RACM provides that asbestos containing material that has become friable prior to the renovation or demolition activity is RACM, without regard for how it is handled during the renovation. 40 C.F.R. § 61.141. There is ample evidence in the record showing that the linoleum removed from the three Calderwood Apartments contained asbestos and had become friable prior to the removal.

c. *Pleading of the Complaint*. The ALJ erred in holding that the Region failed to "charge or pursue" its claim that Friedman & Schmitt's removal of RACM from the Calderwood Apartments exceeded the 160 square foot threshold under 40 C.F.R. § 61.145(a)(i). The Region's Complaint was more than adequate to provide notice to Friedman & Schmitt that the Region intended to introduce evidence regarding the Calderwood Apartments, and the record shows that Friedman & Schmitt were not surprised at trial by the Region's effort to introduce this evidence. The Board also rejects the ALJ's suggestion

that RACM may not be counted towards the applicability threshold under 40 C.F.R. § 61.145(a)(i) where the Region has not expressly identified such RACM as the basis for an upward adjustment of the proposed penalty. The question of NESHAP applicability logically arises prior to, and independent of any penalty determination.

3. *Finding of Violations.* The record shows that Friedman & Schmitt committed three violations of the Asbestos NESHAP's notice and work practice requirements: (1) Friedman & Schmitt admitted in their Answer that they did not provide the notice required by 40 C.F.R. § 61.145(b) prior to removing RACM from both the Calderwood Apartments and Building #2; (2) the evidence shows that Friedman & Schmitt failed to keep RACM adequately wet after removal from facility components in Building #2 in violation of 40 C.F.R. §§ 61.145(c)(3), (6)(i), 61.141 (1996); and (3) the evidence shows that Friedman & Schmitt did not maintain waste shipment records for the RACM stripped from Building #2 as required by 40 C.F.R. §§ 61.145(c)(6)(i), 61.150(d)(1) (1996).

4. *Penalty*. The Board adopts certain aspects of a penalty analysis offered, in the alternative, by the ALJ and rejects other aspects of that analysis. The Board assesses a penalty of $30,980 for Friedman & Schmitt's three violations of the Asbestos NESHAP.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

This is an appeal by the Director, Air Division, U.S. EPA Region IX (the "Region") from an Initial Decision, dated August 28, 2002, by Administrative Law Judge William B. Moran (the "ALJ"). This matter arises out of an administrative enforcement action by the Region against Morton L. Friedman ("Mr. Friedman"), the owner of the property at issue in this case, and Richard Schmitt, owner of the Schmitt Construction Company ("Mr. Schmitt") (hereinafter Mr. Friedman and Mr. Schmitt are referred to collectively as "Friedman & Schmitt").

The Region brought this administrative enforcement action against Friedman & Schmitt for three alleged violations of sections 112 and 114 of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7412, 7414, and the notice and work practice requirements of the National Emissions Standards for Hazardous Air Pollutants for asbestos, 40 C.F.R. Part 61, subpart M (the "Asbestos NESHAP"). The Region requested a civil administrative penalty of $134,500 for the three alleged violations of the CAA.

In his Initial Decision, the ALJ found that Friedman & Schmitt were not liable for violating the CAA and Asbestos NESHAP. The ALJ based this determination on his conclusions that Friedman & Schmitt did not have fair notice that the federal Asbestos NESHAP's applicability provisions would govern their CAA obligations and that they thus reasonably relied on the applicability provisions of a local rule in determining that they were not required to follow the Asbestos NESHAP's notice and work practice requirements. The ALJ held that, because the local rule did not specify when regulated asbestos containing material at the

site must be measured in square feet and when it may be measured in cubic feet, Friedman & Schmitt were not given fair notice that applicability would be determined based on the square foot measurement as required by the Asbestos NESHAP. Initial Decision at 17-18. The ALJ held that this lack of fair notice prevented a finding that Friedman & Schmitt are liable for the three alleged violations. Although the ALJ held that Friedman & Schmitt are not liable, he nevertheless provided in the alternative a penalty analysis to be used in the event his liability determination is reversed on appeal. The Region timely appealed from the ALJ's Initial Decision, requesting that we reverse the ALJ, find Friedman & Schmitt liable, and assess a penalty significantly greater than the alternative penalty recommended by the ALJ.

For the following reasons, we find Friedman & Schmitt liable for three violations of the Asbestos NESHAP and CAA sections 112 and 114. Pursuant to CAA section 113, we impose a civil administrative penalty of $30,980 for these violations.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

Section 112(b)(1) of the CAA identifies pollutants that Congress determined present, or may present, a threat of adverse human health or environmental effects. CAA § 112(b)(1), 42 U.S.C. § 7412(b)(1). Asbestos is one of those pollutants. *Id.* Section 112 authorizes the Administrator of the United States Environmental Protection Agency (hereinafter, "EPA") to adopt emission standards and, in some circumstances, work practice standards for the listed pollutants. *Id.; see also In re Echevarria*, 5 E.A.D. 626, 631-32 (EAB 1994). Pursuant to this authority, EPA promulgated the Asbestos NESHAP. *Echevarria*, 5 E.A.D. at 632.

In past decisions, we have recognized that proof of liability under the Asbestos NESHAP requires a "two-fold showing: first, the Agency must show that the NESHAP requirements apply, and second, that the work practice standards of the NESHAP have not been satisfied." *Id*. at 63 (citing *United States v. MPM Contractors, Inc.*, 767 F.Supp. 231, 233 (D. Kan. 1990)). Applicability of the Asbestos NESHAP's various notice and work practice requirements is governed by 40 C.F.R. § 61.145(a). In circumstances in which the Asbestos NESHAP applies, section 61.145(b), (c), and (d) sets forth, respectively, notice requirements, work practice requirements, and record-keeping requirements.

As will be discussed in greater detail below, the Asbestos NESHAP notice and work practice provisions at issue in this case apply where a renovation involves removal of at least 260 linear feet of regulated asbestos containing material

("RACM")[1] on pipes, or at least 160 square feet of RACM on other facility[2] components, or 35 cubic feet of RACM if it is not otherwise measurable in lineal feet on pipes or square feet on other facility components. 40 C.F.R. § 61.145(a)(4). One of the central issues in this case concerns whether Friedman & Schmitt had fair notice that the federal Asbestos NESHAP's applicability provisions would be looked to as controlling in the circumstances at hand. Friedman & Schmitt contend that they did not receive fair notice that this provision would govern their CAA obligations and that they had therefore appropriately looked to the applicability provisions of a local rule promulgated by the Sacramento Metropolitan Air Quality Management District ("SMAQMD") to determine what notice they were required to give and what work practice standards they were required to follow. Friedman & Schmitt state that they "reasonably believed they were exempt from notice and filing requirements because the amount of material removed fell below the threshold amount as defined in SMAQMD rule 110.2." Appellee's Brief in Opposition to EPA's Appeal at 1 (Jan. 6, 2004) (herinafter "Friedman and Schmitt's Brief").

This "fair notice" issue will be discussed below in part II.B.2, and another related "fair notice" issue concerning the meaning of the term "facility" will be discussed in part II.B.3.a. In part II.B below, we conclude that Friedman & Schmitt's activities in this case disturbed more RACM than the 160 square foot threshold for application of the Asbestos NESHAP, and further that Friedman & Schmitt had fair notice that the Asbestos NESHAP's applicability provisions would govern whether they were required to follow the notice and work practice standards. As explained below in part II.C, we find that the Region proved that Friedman & Schmitt are liable for three violations of the Asbestos NESHAP and CAA § 113. Finally, in part II.D, we explain our reasons for assessing a civil penalty of $30,980 for these violations.

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[1] The Asbestos NESHAP defines the term RACM as follows:

> Regulated asbestos-containing material (RACM) means (a) Friable asbestos material, (b) Category I nonfriable ACM [asbestos containing material] 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.

[2] The Asbestos NESHAP defines the term "facility" in 40 C.F.R. § 61.141. As discussed below in part II.B.3.a, Friedman & Schmitt argue that the activities at issue in this case involved several, rather than one, "facility."

B. *Factual Background*

This proceeding arises out of Mr. Friedman's redevelopment of the Town & Country Village shopping complex in Sacramento California. In the summer of 1997, Mr. Friedman owned or controlled[3] the various parcels of property and buildings that formed the Town & Country Village. Answer to Complaint and Request for Hearing at 2 (hereinafter "Answer"). at the time, the Town & Country Village was approximately 50 years old and consisted of specialty retail shops and one larger store of approximately 20,000 square feet. Transcript of Evidentiary Hearing at 295-96 (Oct. 26-27, 2000) (hereinafter "Evidentiary Tr. at __"). The Town & Country Village is located on Marconi Avenue in Sacramento, immediately adjacent to a complex of apartment buildings known as the Calderwood Apartments. *Id.* at 297-98. Prior to summer 1997, there was a road, known as Calderwood Lane, that ran from Marconi Avenue through the Calderwood Apartments. *Id.* at 298-99, Resp. Ex. 5; *see also* Answer, Ex. A.

The alleged violations of the Asbestos NESHAP arise out of Mr. Friedman's redevelopment of the Town & Country Village. Evidentiary Tr. at 296. In 1994, Mr. Friedman began the redevelopment in order to bring "a large anchor grocery store" to the Town & Country Village. *id.* The term "anchor" store is used to describe a major retailer that is prominently located in a shopping mall to attract customers who are then expected to patronize the other shops in the mall.[4] By 1997, Mr. Friedman had obtained necessary zoning changes to move forward with the project. *Id.* The zoning changes allowed Mr. Friedman to combine a portion of the Calderwood Apartment complex with the Town & Country Village, *Id.* at 298, and to demolish the Calderwood Apartment buildings that were located on the side of Calderwood Lane adjacent to the Town & Country Village, *id.* at 300.

In total, "there were 11 separate buildings that were demolished to make way for the new site plan." *Id.* at 299.[5] In the Calderwood Apartment complex, three apartment buildings with separate addresses were demolished as part of the

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[3] The Answer states that Mr. Friedman was the owner of the property forming the Town & Country Village. Answer at 2. At the evidentiary hearing, Mr. Friedman's son, Mark Friedman, testified that the Town & Country Village "was comprised of separate - several separate legal parcels that were acquired over time by my father or by partnerships that he controlled." Evidentiary Tr. at 295. The precise legal ownership of each of the parcels need not be determined since this evidence establishes that Mr. Friedman had control over all of the parcels. *See* below part II.B.3.a (discussing definition of "facility," which includes separate buildings under a common ownership or control).

[4] Merriam-Webster's Collegiate Dictionary 43 (10th ed. 1999).

[5] Friedman & Schmitt's Answer indicated that the project affected ten buildings. Answer at 2. Friedman & Schmitt also state in their appellate brief that there were 12 buildings affected by the project. Friedman & Schmitt's Brief at 4. These discrepancies are not material to our decision.

project. *Id.* at 300. The addresses of the demolished apartment buildings included 2805 Calderwood Lane, 2911 Calderwood Lane, and 2931 Calderwood Lane. *Compare id. with* Resp. Ex. 5; *see also* Resp. Ex. 6 at 1.[6] Another building located at the Town & Country Village that was demolished contained a number of retail suites with addresses of 2640 to 2650 Marconi Avenue, one of which had been a Tuxedo Rental Shop. Gov't Ex. 6 at 1. We will refer to this building as "Building #2."[7] The demolition efforts at the Calderwood Apartments and the renovation of Building #2 are the activities of primary focus in this case.

Friedman & Schmitt's counsel succinctly described the redevelopment project as follows: "Back in the summer of 1997, there was a major renovation project that was going on at the Town & Country Village. * * * There were * * * either 10 or 12 buildings, actually, that were going through renovation or demolition stage to make way for some larger buildings." Evidentiary Tr. at 38.

Mr. Friedman hired Mr. Schmitt to perform certain renovation and demolition services in connection with the project. Answer at 2. In particular, Mr. Friedman hired Mr. Schmitt to do "some of the tenant renovation work and some of the demolition jobs." Evidentiary Tr. at 303. Mr. Friedman hired another company, Sunsuri Construction, to "do the site work and build a new building * * * to relocate several of the tenants in." *Id.* "[T]here was a third general contractor that built a new 60,000-foot grocery store that these buildings were demolished to accomplish." *Id.* Mr. Friedman also hired Valley Demolition as another demolition contractor. *Id.* at 302.

Mr. Friedman entrusted the management of the Town & Country Village redevelopment to his son, Mark Friedman. at the evidentiary hearing, Mark Friedman testified that he works with his father in the real estate development and management business. *Id.* at 292-93. He testified that, in connection with the renovation and redevelopment of the Town & Country Village, he "worked with the architects in terms of figuring out what the site layout for the new buildings should be." *Id.* at 297. Mark Friedman stated that he "interfaced with the general contractors to just monitor the progress of construction." *Id.* He also testified that he was aware of the requirement to check for the presence of asbestos before doing any demolition or renovation, *id.* at 302, stating that "we instructed the contractors to go out and hire consultants to determine whether or not we had asbes-

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[6] In their Answer, Friedman & Schmitt refer to these buildings as 2805, 2911, and 2931 Marconi Avenue. Answer at 3; *see also* Friedman & Schmitt's Brief at 12-16. Nevertheless, it is evident that Friedman & Schmitt's reference to 2805, 2911, and 2931 Marconi Avenue is intended to refer to the same buildings that the Region refers to as 2805, 2911 and 2931 Calderwood Lane. *Compare* Answer, Exs. A, D *with* Evidentiary Tr. at 173-74, 300 *and with* Resp. Exs. 5, 6 *and with* Gov't Ex. 5.

[7] Throughout the record of this proceeding, Friedman & Schmitt and the Region have sometimes referred to Building #2 as either the Marconi Avenue Building or the Tuxedo Building.

tos containing materials in these facilities," *id.* Sunsuri Construction and Mr. Schmitt hired asbestos consultants during the course of their work. *Id.* at 303.[8]

Mr. Schmitt hired Lawrence "Mack" Hussey, an environmental consultant doing business as Action Environmental Management Services, "to conduct asbestos surveys and to advise Respondents of their responsibilities for the proper removal and transportation of regulated asbestos containing material." Answer at 2. Before the demolition and renovation of the Calderwood Apartments and Building #2, Action Environmental Management Services performed inspections and prepared reports identifying the location in those buildings of asbestos containing material, including Category I and Category II RACM. Action Environmental Management Services also inspected the Calderwood Apartments and Building #2 and prepared reports after Mr. Schmitt removed the identified RACM in those buildings.

Action Environmental Management Services' inspection report for Building #2 that was prepared before any renovation or demolition activity is dated June 13, 1997 (hereinafter the "June 1997 Report"). Resp. Ex. 10; Evidentiary Tr. 336-38 (Resp. Ex. 10 admitted into evidence).[9] This June 1997 Report identified asbestos containing material in the form of "spray-on acoustical ceiling materials" in a number of the retail suites in Building #2. The June 1997 Report stated that "[a]ll of the spray-on acoustical ceiling materials above the suspended ceiling panels on the north half of this structure * * * are classified as friable, regulated asbestos containing materials (RACM)." Resp. Ex. 10 at 3.

Action Environmental Management Services' inspection report for the Calderwood Apartments that was prepared before any renovation activity is dated June 19, 1996 (hereinafter the "June 1996 Report"). Gov't Ex. 5; Evidentiary Tr. 173-74 (Gov't Ex. 5 admitted into evidence). This June 1996 Report identified asbestos containing material in the form of linoleum in 2805, 2911, and 2931 Calderwood Lane. Gov't Ex. 5 at 2-3. The June 1996 Report stated "[a]ll of the asbestos containing linoleum in the designated apartments of each structure are classified as friable, regulated asbestos containing materials (RACM)." *Id.* at 3.

The June 1996 Report for the Calderwood Apartments provided Friedman & Schmitt the following advice regarding removal of the RACM:

> Action Environmental Management Services, Inc., recommends that a certified asbestos abatement contractor be

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[8] Mr. Schmitt is not himself a certified asbestos abatement contractor. Evidentiary Tr. at 403.

[9] Another copy of the June 1997 Report was admitted as Gov't Ex. 6. Evidentiary Tr. at 174, 338.

> retained to remove all of the linoleum in the designated apartments prior to initiating any demolition activities.

Id. The June 1997 Report for Building #2 provided the following advice:

> If the future plans involve the disturbance of the RACM, Category I, and/or Category II asbestos containing materials in the designated areas of this structure, a certified asbestos abatement contractor must be retained to remove these materials prior to initiating any demolition, renovation, or restoration activities.

Resp. Ex. 10 at 4.

Notwithstanding this advice from Action Environmental Management Services, Mr. Schmitt, who is not a certified asbestos abatement contractor, took it upon himself to attempt to remove the RACM from Building #2 and the Calderwood Apartments. Specifically, the SMAQMD inspector, Mr. Darrell Singleton, testified that approximately 1600 square feet of crumbly and flaky acoustic ceiling material was removed by Mr. Schmitt from Building #2 in August 1997. Evidentiary Tr. at 74-75.[10] During his inspection after Mr. Schmitt had undertaken to remove the RACM, Mr. Singleton found a small quantity of this material lying on the floor, on door frames and the door window, and on some beams in Building #2. *Id.* at 73. Mr. Singleton took samples of this acoustic ceiling material, which subsequently tested positive as ACM. *Id.* at 74. This acoustic ceiling material was dry at the time of Mr. Singleton's inspection. *Id.* Subsequently, Friedman & Schmitt submitted a form to SMAQMD verifying that Mr. Schmitt had removed the RACM in Building #2. Gov't Ex. 4; Evidentiary Tr. at 77-79 (Gov't Ex. 4 admitted into evidence). Although 1600 square feet of RACM was removed from Building #2, after removal this RACM amounted to only approximately 14 cubic feet of material. Evidentiary Tr. at 105. Mr. Schmitt transported this RACM to his place of business at 2900 Heinz Street. Evidentiary Tr. at 80. Mr. Schmitt did not provide notice of his RACM removal activities at Building #2 to the Region or SMAQMD prior to undertaking them, nor did he prepare a waste shipment record for this transport of RACM from Building #2 to 2900 Heinz Street. *Id.*

Mr. Schmitt also removed asbestos containing material in the form of linoleum from the Calderwood Apartments in May or June 1997 prior to the demolition of those buildings. Evidentiary Tr. at 118-20, 399; *see also* Fried-

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[10] On August 21, 1997, SMAQMD performed a compliance inspection of the project. Mr. Darrell Singleton, an Associate Air Quality Specialist with SMAQMD, performed the inspection. Evidentiary Tr. at 52. Mr. Singleton prepared a report of his inspection, which was admitted into evidence. *Id.* at 53-55; Gov't Ex. 1. Mr. Singleton was assisted in the inspection by Mr. Ahmad Najjar. Evidentiary Tr. at 75.

man & Schmitt's Brief at 4.[11] Mr. Schmitt removed a total of 264 square feet of linoleum from three of the Calderwood Apartment buildings (80 square feet from 2901 Calderwood Lane, 94 square feet from 2911 Calderwood Lane, and 90 square feet from 2931 Calderwood Lane). Resp. Ex. #6, Evidentiary Tr. 64, 119-20, 124; *see also* Friedman & Schmitt's Brief at 5. Here again, Mr. Schmitt did not provide notice to the Region or SMAQMD prior to removing the RACM.[12]

C. *Procedural Background*

The Region filed an administrative complaint against Friedman & Schmitt on November 4, 1999 (hereinafter, the "Complaint") alleging that Friedman & Schmitt committed three violations of the Asbestos NESHAP and sections 112 and 114 of the CAA arising out of their redevelopment of the Town & Country Village in 1997. The Complaint requested that a civil administrative penalty of $134,300 be imposed, pursuant to section 113(d) of the CAA, 42 U.S.C. § 7413(d), for the alleged violations.

The Complaint alleged that the Calderwood Apartments and Building #2 are a "facility" within the meaning of the Asbestos NESHAP. Complaint ¶ 8. The Complaint alleged in Count I that Friedman & Schmitt failed to provide 10 working days written notice of their intention to remove RACM from the facility prior to the commencement of demolition or renovation activities. *Id.* ¶ 20. The Complaint further alleged that this failure to give notice violated 40 C.F.R. § 61.145(b) and sections 112 and 114 of the CAA, 42 U.S.C. §§ 7412, 7414. *Id.* ¶ 21.

The Complaint alleged in Count II that Friedman & Schmitt did not maintain waste shipment records documenting the transportation of asbestos containing material from the facility to 2900 Heinz Street. *Id.* ¶ 23. According to the Complaint, this alleged failure to maintain waste shipment records violated 40 C.F.R. § 61.150(d) and sections 112 and 114 of the CAA, 42 U.S.C. §§ 7412, 7414. *Id.* ¶ 24.

The Complaint alleged in Count III that Friedman & Schmitt failed to keep RACM at the facility adequately wet and failed to ensure that the RACM remained adequately wet until collected and contained or treated in preparation for disposal. *Id.* ¶ 26. The Complaint alleged that this failure to adequately wet the

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[11] One of the issues Friedman & Schmitt raise in this appeal is whether the Region has sustained its burden of showing that this linoleum is in fact RACM. The ALJ held that the Region did not sustain its burden of proof on this issue. Initial Decision at 12, 24 n.21. As discussed below in part II.B.3.b, we find that the ALJ erred on this issue.

[12] It is not clear from the record what Mr. Schmitt did with the RACM removed from the Calderwood Apartment Buildings.

RACM and to ensure that the RACM remained adequately wet violated 40 C.F.R. §§ 61.145(c)(6) and 61.150 of the Asbestos NESHAP and sections 112 and 114 of the CAA, 42 U.S.C. §§ 7412, 7414. *Id.* ¶ 27.

On November 4, 1999, Friedman & Schmitt filed their Answer to the Region's Complaint. In their Answer, Friedman & Schmitt requested an evidentiary hearing and argued, among other things, that they were not required to comply with the Asbestos NESHAP's notice requirements, wetting requirements, and record-keeping requirements on the grounds that the amount of RACM removed was less than the threshold amount for application of the local SMAQMD rule. Answer at 4. The ALJ held an evidentiary hearing on October 26 and 27, 2000. Five witnesses testified at the evidentiary hearing, and 17 exhibits were admitted into evidence. Evidentiary Tr. at 3-5, 236-37.

The ALJ issued his Initial Decision on August 28, 2002. The ALJ concluded that Friedman & Schmitt were not liable for violating the Asbestos NESHAP on the grounds that they did not have fair notice that they were required to comply with the federal Asbestos NESHAP as well as the local rule. Initial Decision at 17-18. The ALJ concluded that no violation of the notice requirements, record-keeping requirements, and wetting requirements had been shown because the amount of asbestos removed did not exceed the threshold under the local rule. *Id.* at 19, 21, 23.

More specifically, the ALJ concluded that the Town & Country Village project consisted of separate facilities at each separately addressed building because, in the ALJ's view, the local requirement for obtaining demolition permits for each building address controlled the identification of the facility at issue in this case. *Id.* 12-13. With respect to Building #2, the ALJ concluded that, because the local rule did not state when RACM must be measured in square feet rather than cubic feet, Friedman & Schmitt "did not receive fair notice that it was impermissible to use cubic feet as the measure" of whether the threshold amount of RACM was exceeded. *Id*. at 12. The ALJ thus concluded that since the 1600 square feet of acoustic ceiling material was less than 35 cubic feet once removed from the ceiling, Friedman & Schmitt did not have fair notice that they were required to comply with the Asbestos NESHAP. *Id.*

With respect to the Calderwood Apartments, the ALJ concluded that the amount of linoleum removed from each of the separately addressed buildings did not exceed the threshold of 160 square feet. *Id.* The ALJ also concluded that the Region had failed to "effectively charge" and "pursue" its claims with respect to the Calderwood Apartments and that, in particular, the Region had failed to estab-

lish that the linoleum was RACM. *Id.*[13]

Although the ALJ concluded that Friedman & Schmitt were not liable for the alleged violations, the ALJ proceeded to offer his opinion as to what penalty should be imposed for the alleged violations in the event that his liability determination is reversed on appeal. *Id*. at 23-45. The ALJ stated that he would reject the Region's proposed penalty of $134,300 and instead impose a penalty of $3,500.

The Region appealed from the ALJ's Initial Decision. *See* Notice of Appeal By the Director, Air Division, United States Environmental Protection Agency, Region IX and Brief in Support of Notice of Appeal (Oct. 28, 2002) (hereinafter "Region's Brief"). The Region argues, among other things, that the ALJ erred in concluding that Friedman & Schmitt lacked fair notice of their obligation to comply with the federal Asbestos NESHAP, that Friedman & Schmitt should be found liable for three violations of the Asbestos NESHAP and the CAA, and that a substantial penalty should be imposed on Friedman & Schmitt for their violations. Friedman & Schmitt filed a brief in opposition to the Region's appeal. *See* Friedman & Schmitt's Brief. Friedman & Schmitt did not, however, file a cross-appeal.[14] The Board held oral argument in this matter on July 26, 2003. *See* Transcript of Oral Argument (July 26, 2003) (hereinafter "Oral Argument Tr. at ___").

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[13] In the course of his ruling on liability, the ALJ rejected Friedman & Schmitt's argument that the Region should be equitably estopped from enforcing the Asbestos NESHAP's applicability provisions in this case. Initial Decision at 18-20. Specifically, the ALJ held that Friedman & Schmitt had not shown the requisite misconduct by the Region or EPA necessary to sustain an equitable estoppel claim against the government. *Id.* at 20.

[14] In their appellate brief, Friedman & Schmitt renew an argument they made before the ALJ that the ALJ rejected. They argue that the Region should be equitably estopped from enforcing the Asbestos NESHAP in this case. However, since the ALJ rejected this defense and Friedman & Schmitt did not file an appeal or cross appeal raising this issue, we will not consider it on appeal. Nevertheless, even if Friedman & Schmitt had properly filed a notice of appeal raising this issue, we would not have reversed the ALJ's decision in this regard because the ALJ correctly held that Friedman & Schmitt did not show the requisite "affirmative misconduct" necessary for finding an estoppel against the government, nor did they show that EPA intended Friedman & Schmitt to believe that the SMAQMD regulations controlled the applicability of the NESHAPs to the activities at issue here. *See* Initial Decision at 18-20 & n.22; *accord In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 196-204 (EAB 1997), *appeal dismissed as untimely*, 192 F.3d 917 (9th Cir. 1999), *dismissal as untimely vacated and dismissed as moot due to settlement*, 200 F.3d 1222 (9th Cir. 2000); *In re Newell Recycling Co.*, 8 E.A.D. 598, 631 n.24 (EAD 1999), *aff'd*, 231 F.3d 204 (5th Cir. 2000), *cert. denied*, 534 U.S. 813 (2001).

II. *DISCUSSION*

A. *Standard of Review*

We review the ALJ's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.31(f) (2002);[15] *see also In re Richner*, 10 E.A.D. 617, 619 (EAB 2002); *In re LVI Envtl. Servs.*, 10 E.A.D. 99, 101 (EAB 2001); *In re City of Marshall, Minnesota*, 10 E.A.D. 173, 180 (EAB 2001); *In re Billy Yee*, 10 E.A.D. 1, 10 (EAB 2001), *petition dismissed*, 23 Fed. Appx. 636, 2002 WL 87636 (8th Cir. 2002).

Among other things, the applicable part 22 regulations implement the authority under section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 557(b), which provides that "[o]n appeal from or review of the initial decision, the agency has all the powers [that] it would have in making the initial decision." *See In re Coast Wood Preserving, Inc.*, 11 E.A.D. 59, 69 (EAB 2003); *In re Chem Lab Prod. Inc.*, 10 E.A.D. 711, 724 (EAB 2002); *In re City of Salisbury*, 10 E.A.D. 263, 276 (EAB 2002); *In re Everwood Treatment Co.*, 6 E.A.D. 589, 612 n.39 (EAB 1996), *aff'd*, No. 96-1159-RV-M (S.D. Ala. Jan. 21, 1998). In issuing the Initial Decision, the ALJ was required to resolve matters in controversy based on a preponderance of the evidence in the record. 40 C.F.R. § 22.24(b); *see In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 217 (EAB 1997), *appeal dismissed as untimely*, 192 F.3d 917 (9th Cir. 1999), *dismissal as untimely vacated and dismissed as moot due to settlement*, 200 F.3d 1222 (9th Cir. 2000). Accordingly, our *de novo* review must apply this same standard.

The preponderance of the evidence standard is intended to "'instruct the fact finder concerning the degree of confidence society thinks he should have in the correctness of his factual conclusion.'" *In re Echevarria*, 5 E.A.D. 626, 638 (EAB 1994) (quoting *In re Winship*, 397 U.S. 358, 370 (1970)). This means that the ALJ in issuing the Initial Decision, and this Board in reviewing the ALJ's conclusions and issuing our decision on appeal, should conclude "'that [each] factual conclusion is more likely than not.'" *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998) (quoting *Echevarria*, 5 E.A.D. at 638); *see also In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 363 n. 20 (EAB 1994) (preponderance of the evidence means that a fact is more probably true than untrue); *In re*

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[15] The Board, however, may defer to an ALJ's factual findings where credibility of witnesses is at issue "because the presiding officer had the opportunity to observe the witnesses testify and to evaluate their credibility." *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998); *accord In re Advanced Elecs., Inc.*, 10 E.A.D. 385, 392 n.17 (EAB 2002), *appeal voluntarily dismissed*, No. 02-1868 (7th Cir. May 21, 2003). The Board may also apply a deferential standard of review to the ALJ's decisions regarding discovery and certain penalty determinations. *See In re Chempace Corp.*, 9 E.A.D. 119, 133-34 (EAB 2000). The Board's standard for reviewing penalty determinations will be discussed further in part II.D below.

City of Detroit Pub. Lighting Dep't, 3 E.A.D. 514 (CJO 1991); Koch, Administrative Law and Practice at 491 (1985).

In circumstances of competing evidence, our decision is informed by the burdens of proof. "The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R. § 22.24(a); *see also, Richner*, 10 E.A.D. at 619; *City of Marshall*, 10 E.A.D. at 180. Once complainant's prima facie case has been established, "respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief." 40 C.F.R. § 22.24(a). For "affirmative defenses," the respondent bears the burdens of presentation and persuasion. *Id.*; *see also, Richner*, 10 E.A.D. at 619; *City of Marshall*, 10 E.A.D. at 180.

Where liability has been established, the statutory and regulatory provisions governing this proceeding impose additional considerations for the determination of an appropriate penalty. These additional considerations will be discussed below in part II.D where we explain our penalty analysis.

In the present case, the Region's appeal raises issues regarding both the ALJ's conclusion that Friedman & Schmitt are not liable for the three alleged violations and the ALJ's analysis, offered in dicta, regarding the penalty in the event his liability finding is reversed on appeal. For the following reasons, we overrule the ALJ's Initial Decision on the liability issue, finding that Friedman & Schmitt are liable for three violations of the CAA and Asbestos NESHAP. As we explain below in part II.D, we further reject portions of the ALJ's penalty analysis and defer to other portions of that analysis. We assess a penalty of $30,980 for Friedman & Schmitt's three violations of the CAA and Asbestos NESHAP.

B. *Liability Issues: Applicability of the Asbestos NESHAP*

In its Complaint, the Region alleged that Friedman & Schmitt are liable for three violations of the Asbestos NESHAP and sections 112 and 114 of the CAA. As noted above in part I.A, we have held that proof of liability under the Asbestos NESHAP requires a "two-fold showing: first, the Agency must show that the NESHAP requirements apply, and second, that the work practice standards of the NESHAP have not been satisfied." *Echevarria*, 5 E.A.D. at 633 (citing *United States v. MPM Contractors, Inc.*, 767 F. Supp. 231, 233 (D. Kan. 1990)). In this part, we will discuss the Asbestos NESHAP's applicability requirements and Friedman & Schmitt's related affirmative defense that they did not have fair notice that applicability would be governed by the terms of the Asbestos NESHAP.

1. *Background: Criteria for Federal Asbestos NESHAP Applicability and Friedman & Schmitt's "Fair Notice" Argument*

The Asbestos NESHAP imposes different requirements depending on whether an activity is a renovation or a demolition and depending on the amount of regulated asbestos containing material, or RACM, the activity disturbed. *See* 40 C.F.R. § 61.145(a) (1996). The ALJ determined that the regulations applicable to renovations, rather than demolitions, govern the activity at issue in this case. Initial Decision at 11-12. This distinction is not material to our decision since we find that the threshold amount of RACM was exceeded in this case (as we explain in part II.B.2 below) and the notice requirements for demolitions that exceed this threshold are the same as the notice requirements for renovations that exceed the threshold. 40 C.F.R. § 61.145(a)(1), (4).[16]

For renovation activities, the Asbestos NESHAP states in relevant part as follows:

> (4) In a facility being renovated, * * * all the requirements of (b) and (c) 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.

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[16] Friedman & Schmitt argue that the Region's frequent references to renovation in its filings before the ALJ show that the Region's cause of action was limited to the activities at Building #2, which they contend was the only building being "renovated." Friedman & Schmitt's Brief at 11. The ALJ appears to have based his decision in part on this wording choice as reflected by those portions of the Region's post-hearing brief the ALJ identified. Initial Decision at 11. However, contrary to Friedman & Schmitt's suggestion, the Complaint in count I expressly alleges that Friedman & Schmitt failed to provide the required notice "prior to the commencement of *demolitio*n or renovation activities." Complaint at 5 ¶ 20 (emphasis added). Thus, the Complaint clearly was not limited to renovation activities. Moreover, in view of the absence of any material distinction between characterizing the activity as renovation or demolition for purposes of the notice obligation (when the threshold amount of RACM is exceeded), we find that the ALJ read more into the Region's use of the term "renovation" in certain portions of its brief than the terms themselves bear in this context, particularly in light of the Region's express statements elsewhere in its briefs clearly indicating that it viewed the Calderwood related activities as relevant to its cause of action. *See, e.g.*, Complainant's Post Hearing Brief at 6, 8-9, 10-11, 12, 14, 23 (Jan. 8, 2001).

40 C.F.R. § 61.145(a)(4)(i), (ii) (1996).

In the present case, the evidence in the record shows that Friedman & Schmitt's renovation activity disturbed more than 160 square feet of RACM on facility components. In particular, Mr. Schmitt removed 1600 square feet of RACM in the form of acoustic ceiling material from Building #2 in August 1997. Evidentiary Tr. at 73-75, 77-78; Gov't Ex. 4.[17] The evidence in the record also shows that Mr. Schmitt removed a total of 264 square feet of asbestos containing linoleum from three of the Calderwood Apartment buildings in June 1997 (80 square feet from 2901 Calderwood Lane, 94 square feet from 2911 Calderwood Lane, and 90 square feet from 2931 Calderwood Lane). Resp. Ex. 6; Evidentiary Tr. at 64, 119-20, 124, 399. Although these amounts greatly exceed the above-referenced square footage threshold for application of the Asbestos NESHAP's notice and work practice standards, the ALJ nevertheless held that he would not apply the Asbestos NESHAP's requirements to establish liability in this case because Friedman & Schmitt did not have fair notice that applicability would be determined based on the provisions of the federal Asbestos NESHAP. Initial Decision at 12, 15-18.[18]

Specifically, the ALJ concluded that the provisions of a local rule SMAQMD promulgated made ambiguous the notice that Friedman & Schmitt would otherwise have received from the Asbestos NESHAP. at the time of the violations, the applicability provision of the local SMAQMD rule, Rule 902-3 § 110.10(b),[19] provided that notice and compliance with the work practice standards is not required for:

> renovations where the combined amount of RACM is less than 260 lineal feet or less than 160 square feet, or less than 35 cubic feet.

See Resp. Ex. 1. The ALJ held that this SMAQMD rule did not provide any express priority among the three ways to measure RACM. Initial Decision at 13. The ALJ therefore held that, because the local rule did not specify when RACM

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[17] Government Exhibit 3 identifies the amount of removed acoustic ceiling material as 3200 square feet, rather than the 1600 square feet that appears to be the correct figure. This discrepancy is not material for the applicability question, since 1600 square feet still greatly exceeds the threshold of 160 square feet. We note as well that the Region used the 1600 square feet measurement to calculate the penalty that it requested.

[18] The ALJ specifically held that "absent the imposition of other defenses, EPA is not bound by less stringent state or local standards and may proceed to enforce the NESHAP regulations. However, such other defenses include whether a regulated party has been given 'fair warning.'" Initial Decision at 15.

[19] *See* Resp. Ex. 1.

must be measured in square feet and when it may be measured in cubic feet, Friedman & Schmitt were not given fair notice that applicability would be determined based on the square feet of RACM on the components of Building #2, rather than the cubic feet of the material after it was removed. *Id.* at 17-18. The record shows that the 1600 square feet of acoustic ceiling material removed from Building #2, consisted of less than 14 cubic feet after it was removed. Evidentiary Tr. at 105. Thus, in this case, the choice of measurement method determines whether or not the threshold was exceeded.

The ALJ also held that, because SMAQMD required a demolition permit for each separately addressed building, Friedman & Schmitt did not have fair notice that the "facility" for which the combined amount of RACM must be measured was the whole Town and Country Village redevelopment project, rather than the individual buildings to be demolished in that project. Initial Decisionat 14-15. For this reason, the ALJ concluded that he would look to the local demolition permit requirements, rather than the Asbestos NESHAP's, to define the relevant facility in this case. He therefore concluded that the RACM removed from the Calderwood Apartments fell outside the reach of regulatory coverage because the amount of linoleum removed from each of the separately addressed buildings did not exceed the threshold of 160 square feet at any one address. *Id.*[20]

Upon review, we conclude, as explained below, that the ALJ erred in relying on the local rule as undercutting the notice given the regulatory community regarding the requirements of the federal Asbestos NESHAP both with respect to whether RACM must be measured as square feet on facility components and as to the identification of the facility at issue.

2. *Fair Notice Regarding Method for Measuring the RACM in Building #2*

Generally, the fair notice doctrine may in some circumstances provide a defense where a regulation "fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n,* 790 F.2d 154, 156 (D.C. Cir. 1986).[21] Although this principle arises most often in the criminal context, the fair notice concept has been recognized in the civil administrative context as well. *See, e.g., Satellite Broad. Co. v. FCC,* 824 F.2d 1, 3 (D.C. Cir. 1987); *see also Trinity Broad. of Fla., Inc. v. FCC,* 211 F.3d 618 (D.C.

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[20] As noted, the aggregate amount of linoleum removed from the Calderwood Apartments was 264 square feet, with 80 square feet removed from 2901 Calderwood Lane, 94 square feet from 2911 Calderwood Lane, and 90 square feet from 2931 Calderwood Lane. Resp. Ex. 6.

[21] The U.S. Supreme Court has explained that regulations must be sufficiently definite so that ordinary people exercising common sense know what they mean. *Boyce Motor Lines v. United States,* 342 U.S. 337 (1952).

Cir. 2000); *United States v. Chrysler Corp.*, 158 F.3d 1350 (D.C. Cir. 1998); *United States v. Hoechst Celanese Corp.*, 128 F.3d 216 (4th Cir. 1997), *cert. den.*, 524 U.S. 952 (1998); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995); *Beazer East, Inc. v. EPA*, 963 F.2d 603 (3rd Cir. 1992); *Rollins Envtl. Serv., Inc. v. EPA*, 937 F.2d 649 (D.C. Cir. 1991); *Fluor Constructors, Inc. v. OSHRC*, 861 F.2d 936 (6th Cir. 1988); *Tex. E. Prods. Pipeline Co. v. OSHRC*, 827 F.2d 46 (7th Cir. 1987); *In re Metro-East Mfg. Co.*, 655 F.2d 805 (7th Cir. 1981); *Kropp Forge Co. v. Sec'y of Labor*, 657 F.2d 119 (7th Cir. 1981); *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645 (5th Cir. 1976).

In one of the earliest cases to recognize the fair notice doctrine in the administrative context, the Fifth Circuit stated, "[i]f a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express * * * . [The agency] has the responsibility to state with ascertainable certainty what is meant by the standards [the Agency] has promulgated." *Diamond Roofing*, 528 F.2d at 649 (citations omitted). The phrase "ascertainable certainty" is often quoted as expressing the underlying standard of what degree of notice must be given to be fair. For example, the D.C. Circuit described the test as follows:

> [W]e must ask ourselves whether the regulated party received, or should have received, notice of the Agency's interpretation in the most obvious way of all: by reading the regulations. If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainable certainty," the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.

Gen. Elec., 53 F.3d at 1329.

Courts often consider a number of factors when evaluating whether a regulation provides fair notice. In some cases, the plain language of the regulation may suffice to show fair notice. *See, e.g., Gates*, 790 F.2d at 156 (focusing on the actual language of the regulation at issue to conclude that defendant did not have fair notice of OHSA's interpretation). The agency's other public statements also bear on the fair notice inquiry. *See Gen. Elec.*, 53 F.3d at 1329 (stating that notice can come from "regulations and *other public statements* issued by the agency") (emphasis added); *Sekula v. FDIC*, 39 F.3d 448, 457 (3rd Cir. 1994) (concluding that agency's long-standing, consistent, public interpretation of regulation provided fair notice); *Fed. Election Comm'n v. Arlen Specter '96*, 150 F. Supp. 2d

797, 814 (E.D. Pa. 2001) (reasoning that although actual language of regulation was ambiguous, numerous public statements that clearly and consistently stated agency's interpretation provided fair notice). Likewise, an "agency's pre-enforcement efforts to bring about compliance * * * [may also] provide adequate notice." *Gen. Elec.*, 53 F.3d at 1329. Significant difference of opinion within the agency as to the proper interpretation of the agency's regulation may also be considered in evaluating whether the regulatory text provides fair notice. *See id*. at 1332; *see also Rollins*, 937 F.2d at 653.

In addition, courts often consider whether or not an allegedly confused defendant inquires about the meaning of the regulation at issue. *See, e.g., Tex. E. Prods. Pipeline Co.*, 827 F.2d at 50 (finding fault with company's failure to make any inquiry of the administrative agency responsible for the regulations at issue); *In re Tenn. Valley Auth.*, 9 E.A.D. 357, 411-16 (EAB 2000), *appeals dismissed for lack of jurisdiction*, 336 F.3d 1236(11th Cir. 2003). Friedman & Schmitt bear the burden of establishing a lack of notice, as the issue is raised as an affirmative defense to liability. *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 886 (S.D. Ohio. 2003).

In the present case, there is nothing ambiguous or unascertainable in the federal regulations regarding when the threshold amount of RACM must be measured in square feet and when the RACM may be measured in cubic feet. The Asbestos NESHAP, in plain unambiguous language, states that RACM must be measured in linear feet "on pipes" or square feet "on other facility components" and may be measured in cubic feet "off facility components *where the length or area could not be measured previously*." 40 C.F.R. § 61.145(a)(1)(i), (ii) (1996) (emphasis added). The italicized text makes clear that the cubic foot measurement may be used only where RACM cannot be measured in linear or square feet. Indeed, Friedman & Schmitt acknowledge in their brief on appeal that "40 C.F.R. § 61.145(a)(i) specifically indicates that cubic foot measurement should be used when the material cannot be measured in square feet or lineal feet." Friedman & Schmitt's Brief at 16.

Ordinarily, this would end the fair notice inquiry since the text of the regulation provides notice of the relevant standard. Indeed, Friedman & Schmitt's concession regarding the clarity of the Asbestos NESHAP takes out of play the following cases they cite to support their contention that they were not given fair notice: *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986); *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1 (D.C. Cir. 1987); and *Rollins Environmental Services, Inc. v. EPA*, 937 F.2d 649 (D.C. Cir. 1991). These cases are plainly distinguishable from the present case because the federal regulations at issue in these cases were facially ambiguous. Friedman & Schmitt argue that "SMAQMD rule 110.2 was unclear and ambiguous." Friedman & Schmitt's Brief at 23. However, none of the cases Friedman & Schmitt cite show a court looking to ambigu-

ity in a *state or local rule* as evidence that a *federal regulation* is ambiguous or otherwise fails to give fair notice of its requirements.

Although not so clearly articulated by Friedman & Schmitt, their arguments appear to contend, in essence, that the alleged lack of fair notice does not arise from the regulatory text of the Asbestos NESHAP, but instead arises from the federal regulations authorizing the Agency to approve local rules. Friedman & Schmitt's Brief at 27-28.[22] Although Friedman & Schmitt do not argue that the Agency made a specific decision to approve SMAQMD's local rule 902-3 § 110.10(b), they do argue that "[b]y turning a blind eye to the implementation of non-conforming local rules, the EPA ratified and accepted the local standards." *Id.* at 29. In this sense, Friedman & Schmitt's fair notice argument invites us to consider not only the clarity of the Asbestos NESHAP's applicability provisions, but also the clarity of the federal regulations governing delegation and approval of local rules, namely 40 C.F.R. §§ 63.90-.93 (1996).

Friedman & Schmitt contend that 40 C.F.R. §§ 63.91-.92 (1996) impose a duty on the Agency to disapprove any local rule that does not comply with federal standards. Friedman & Schmitt's Brief at 28. They argue that a failure to disapprove the local regulation has the effect of delegating authority to implement and enforce the local rule in lieu of the otherwise applicable federal rules. Friedman & Schmitt's Brief at 28. Viewed in this light, according to Friedman & Schmitt, the lack of clarity reflected in the local rule also infects the meaning of the federal regulation. *Id.*[23] As explained below, this lack-of-fair-notice argument fails for two independent reasons: (1) Friedman & Schmitt were provided fair notice that EPA retains authority to enforce the federal Asbestos NESHAP even where enforcement authority has been delegated to a state or local government or a local rule has been approved; and (2) Friedman & Schmitt were provided fair notice that EPA had not approved the local SMAQMD rule at issue.

As instructed by the fair notice caselaw discussed above, we begin by reviewing whether the regulatory text provides fair notice. We conclude that the text of the federal regulations provided Friedman & Schmitt fair notice that the Region retained authority to enforce the federal Asbestos NESHAP. The regulatory sections upon which Friedman & Schmitt relied, sections 63.91-.92 (1996), are part of 40 C.F.R. part 63, subpart E, which specifically provides in section

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[22] Friedman & Schmitt do, for example, specifically refer to the regulations that implement the CAA's authorization for the Agency to delegate enforcement to state and local governments and to approve local regulations.

[23] Notably, Friedman & Schmitt do not contend that they were, in fact, mislead by 40 C.F.R. §§ 63.91-.92 (1996), nor do they contend that they read or were even aware of these rules prior to the violations at issue in this case.

63.90(c)[24] that "[n]othing in this subpart shall prohibit the Administrator from enforcing any applicable rule, emission standard or requirement established under section 112" of the CAA. 40 C.F.R. § 63.90(c) (1996).[25] This regulatory reservation of the Administrator's enforcement authority derives from a comparable reservation of enforcement authority in the CAA itself. *See* CAA § 112(*l*)(7), 42 U.S.C. § 7412(*l*)(7). Thus, section 63.90(c) provided fair notice in unambiguous terms that, notwithstanding approval of a local rule or delegation of authority to enforce a local rule under sections 63.91-.92, the EPA Administrator retained authority at all times to enforce otherwise applicable federal rules, like the Asbestos NESHAP.[26]

It is important to note that the ALJ correctly held, based on the CAA's reservation of EPA's enforcement authority pursuant to sections 112(*l*) and 114, "EPA is not bound by less stringent state or local standards and may proceed to enforce the NESHAP regulations," even where some enforcement authority has been delegated to the state or locality. Initial Decision at 14-15 (citing *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1091 (W.D. Wis. 2001); *United States v. LTV Steel Co.*, 118 F. Supp. 2d 827, 832-35 (N.D. Ohio 2000); *United States v. SCM Corp.*, 615 F. Supp. 411, 418-20 (D. Md. 1985); *United States v. Harford Sands, Inc.*, 575 F. Supp. 733, 735 (D. Md. 1983)); *see also* CAA § 112(*l*)(1), 42 U.S.C. § 7412(*l*)(1). The ALJ, however, erred in failing to recognize that this reservation of authority to enforce the Asbestos NESHAP served as notice to Friedman & Schmitt that the clear and unambiguous federal regulations had continued vitality irrespective of the presence of arguably ambiguous local rules.

The text of the federal regulations also provided Friedman & Schmitt fair notice that the local SMAQMD rule upon which they rely had not been approved by the EPA under 40 C.F.R. §§ 63.91-.92 (1996). Sections 63.91-.92 (1996) are very specific concerning the sequence of the approval process, which is com-

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[24] Subpart E of Part 63 sets forth the rules governing approval of state programs and delegation of federal authorities to the states, and section 63.90(c) identifies authorities that the Administrator retains and may not delegate.

[25] The version of 40 C.F.R. part 63, subpart E applicable to this case was promulgated in 1992 and subsequently replaced by amendments published in July 1996. *See* 61 Fed. Reg. 36,245 (July 10, 1996); 57 Fed. Reg. 28,087 (June 24, 1992). After the violations at issue in this case, the part 63, subpart E rules were amended and replaced by the version currently published in the Code of Federal Regulations. *See* 65 Fed. Reg. 55,810 (Sept. 14, 2000). The language quoted above is now found at 40 C.F.R. § 63.90(d)(2) (2003).

[26] The Asbestos NESHAP is a rule established under section 112 of the CAA. *See* 49 Fed. Reg. 13,661 (Apr. 5, 1984) (stating that authority for Asbestos NESHAP regulations is 42 U.S.C. § 7412, among other sections). As discussed above, pursuant to the express terms of the Asbestos NESHAP, it is applicable to renovations that disturb 160 square feet of RACM on facility components other than pipes.

pleted by notice published in the Federal Register if approval of a local rule is granted. *See* 40 C.F.R. § 63.91(a)(3) (1996). By requiring approval to be published in the Federal Register, these regulations provide a clear and ascertainably certain method for the regulated community to determine whether a state's request for approval has been granted - the regulated community need only check whether an approval has been published in the Federal Register. Moreover, publication in the Federal Register is required under the Administrative Procedure Act for amendment of a federal rule, such as the Asbestos NESHAP, 5 U.S.C. § 553, and such publication is legally sufficient notice to the regulated community. 44 U.S.C. §§ 1501-1511 (Federal Register Act).[27, 28]

In the present case, Friedman & Schmitt have not identified any notice published in the Federal Register stating that the 1994 amendment to SMAQMD rule 902-3 § 110.10(b) was approved pursuant to 40 C.F.R. §§ 63.91-.92 (1996). Without any such Federal Register notice, Friedman & Schmitt's argument dissolves into the unsupportable contention that mere existence of a process under the federal regulations for the Agency to approve state regulations created ambiguity or confusion regarding whether Friedman & Schmitt could appropriately look solely to the local rules. We conclude that there is no fair notice issue, where, as here, it

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[27] *See also Yakus v. United States*, 321 U.S. 414, 435 (1944) (Notice published in the Federal Register is sufficient, under the Federal Register Act, to afford notice to all affected persons.). Thus, we also reject Friedman & Schmitt's argument, *see, e.g.*, Oral Argument Tr. at 50-51, that they should not be charged with knowledge of the Asbestos NESHAP as a body of law separate from the local SMAQMD rules. *Id.; Fed. Crop Ins. v. Merrill*, 332 U.S. 380, 384-85 (1947) ("Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives notice of their contents.").

[28] The cases Friedman & Schmitt cite involving the federal prevention of significant deterioration ("PSD") program are distinguishable from the present case on this point. *See* Friedman & Schmitt's Brief at 29 (citing *In re Milford Power Plant*, 8 E.A.D. 670 (EAB 1999); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244 (EAB 1999)). In these PSD cases, EPA delegated to the particular state the authority to issue *federal* PSD *permits*. In this PSD setting, the state-issued permit is the federal permit; there is no federal permit other than the permit issued by the state under its delegated federal authority. Accordingly, these cases do not provide meaningful guidance for a circumstance like the one at hand involving parallel and independent federal and local requirements.

Likewise lacking force is Friedman & Schmitt's argument that "[w]hen the EPA delegated its authority to *promulgate* and enforce rules and regulations, local authorities *promulgated* them on behalf of the EPA." Friedman & Schmitt's Brief at 30 (emphasis added). Friedman & Schmitt neither cited nor introduced into the record of this case any evidence or authority showing that EPA, in fact, sought to delegate *rulemaking* authority to SMAQMD, Evidentiary Tr. at 248, and we are unaware of any authority in the CAA or its implementing regulations that would allow for such a delegation. Indeed, if we were to accept Friedman & Schmitt's argument that SMAQMD promulgated its rules on behalf of EPA, it would be tantamount to approving a process for promulgating changes to federal regulations (i.e., the Asbestos NESHAP) under procedures that violate the Administrative Procedure Act, 5 U.S.C. § 553. Central to those requirements is publication of the rule making in the Federal Register. *Id.* Such publication is also required by 40 C.F.R. §§ 63.91-.92 (1996) and is conspicuously absent in the present case for SMAQMD local rule 902-3 § 110.10(b).

is readily ascertainable and certain from the unambiguous regulatory text defining the process for approving local rules and from a review of the Federal Register that the final step in the regulatory prescribed process for such approval had not been completed during the relevant time frame. In short, Friedman & Schmitt cannot argue that they reasonably believed that EPA had approved the local SMAQMD rule since there was no Federal Register notice granting such approval.

Further, even assuming arguendo that the federal regulatory text was ambiguous, Friedman & Schmitt's fair notice defense would fail on the grounds that they did not show any effort to seek clarification from either the EPA or SMAQMD. The courts and this Board have noted that a member of the regulated community, when confused by a regulatory text and confronted by a choice between alternative courses of action, assumes a calculated risk by failing to inquire about the meaning of the regulations at issue. *See, e.g., DiCola v. FDA*, 77 F.3d 504, 508 (D.C. Cir. 1996); *Tex. E. Prods. Pipeline Co.*, 827 F.2d at 50 (finding fault with company's failure to make any inquiry of the administrative agency responsible for the regulations at issue); *In re Tenn. Valley Auth.*, 9 E.A.D. 357, 411-16 (EAB 2000), *appeals dismissed for lack of jurisdiction*, 336 F.3d 1236 (11th Cir. 2003); *see also Hoechst Celanese*, 128 F.3d at 224 ("A claim of lack of notice 'may be overcome in any specific case where reasonable persons would know their conduct is at risk.'" (quoting *Maynard v. Cartwright*, 486 U.S. 356, 361, (1988))). Friedman & Schmitt provided no testimony, nor did they identify any other evidence in the record of this proceeding, showing that they had attempted to obtain clarification from SMAQMD or from the EPA regarding whether the SMAQMD rule had been approved or whether the Region may enforce the Asbestos NESHAP in any event.

Moreover, although Friedman & Schmitt elicited some testimony from the SMAQMD inspector to the effect that other members of the regulated community may have been confused by the local rule, they submitted no evidence indicating confusion by the inspector, any other SMAQMD personnel, or EPA personnel, Regional offices, or EPA's headquarters office regarding whether EPA had approved the SMAQMD rule or whether the federal Asbestos NESHAP had continuing vitality separate and apart from the local rule.

Thus, we reject as error, the ALJ's conclusion that the D.C. Circuit's holding in the *General Electric* case is analogous to the present case. Initial Decision at 17. In *General Electric*, the evidence in the record showed that EPA's Regional offices held conflicting interpretations of the regulation at issue in that case. *Gen. Elec.*, 53 F.2d at 1332. There is no similar evidence in the record of this case showing conflicting Agency opinion (or even conflicting opinion within SMAQMD) regarding the interplay between the SMAQMD local rule and the Asbestos NESHAP. Indeed, Friedman & Schmitt's own environmental consultant testified that he was not confused and knew that the local rule should be inter-

preted in light of the federal requirements and that the RACM threshold was to be measured in square feet on facility components (other than pipes). Evidentiary Tr. at 373, 381.

Specifically, Friedman & Schmitt's consultant, who they hired to advise them regarding the RACM in Building #2, testified as follows regarding SMAQMD's 1994 amendments to its local rules (which changed the RACM threshold to 160 lineal feet, 260 square feet or 35 cubic feet):

> JUDGE MORAN: So in 1994, that's when you first had this confusion as to what triggers the application of the requirements?
>
> THE WITNESS: I didn't have any confusion. My clients did.
>
> JUDGE MORAN: Okay. And then you were certain - you had your own clear interpretation of it, but your clients had some confusion?
>
> THE WITNESS: That's correct.

Evidentiary Tr. at 373. Friedman & Schmitt's consultant testified further that "It's part of my inspection protocol [in] determining surface materials, floor material and the like, those areas are measured in square footage." *Id.* at 379. Thus, notwithstanding Friedman & Schmitt's failure to seek advice from the Region regarding the applicability standard, had Friedman & Schmitt merely sought the advice of their own contractor, they would have been told that RACM in the form of the acoustic ceiling material in Building #2 was required to be measured in square feet for determining whether the applicability threshold would be exceeded.

Accordingly, for the foregoing reasons, we conclude that (1) the regulatory text of 40 C.F.R. § 63.90(c) (1996) and the statutory text of CAA § 112(*l*) provided Friedman & Schmitt fair notice that the Region may enforce the Asbestos NESHAP's requirements notwithstanding any delegation of authority to SMAQMD; (2) the regulatory text of 40 C.F.R. §§ 63.91-.92 provided Friedman & Schmitt fair notice that the Agency had not approved the local SMAQMD rules and Friedman & Schmitt have not shown any notice of approval published in the Federal Register; (3) Friedman & Schmitt failed to show that they made any effort to seek clarification from the Region regarding the applicability of the Asbestos NESHAP; and (4) Friedman & Schmitt failed to show any conflicting Agency opinion (or even conflicting opinion within SMAQMD) of whether the SMAQMD local rule had been approved or whether the Region may enforce the Asbestos NESHAP in any event, and the evidence shows that Friedman & Schmitt's own environmental consultant was not confused regarding the

requirement that the material at issue in this case was to be measured in square feet. For these reasons, we reject Friedman & Schmitt's argument that they lacked fair notice of the meaning and continued vitality of the Asbestos NESHAP.

We also find, as discussed above, that Friedman & Schmitt disturbed through their activities at Building #2 more than 160 square feet of RACM in the form of acoustic ceiling material. Accordingly, we find that the Asbestos NESHAP's notice and work practice requirements for renovations disturbing more than 160 feet of RACM on facility components were applicable to Friedman & Schmitt's activities at the facility at issue in this case.[29]

3. *RACM in the Calderwood Apartments: Issues of Fair Notice, Evidence that Linoleum was RACM, and Pleading of the Complaint*

Before leaving the question of applicability, we also must consider whether evidence concerning Friedman & Schmitt's renovation activities at the Calderwood Apartments is an independent basis for finding that the Asbestos NESHAP's notice and work practice standards apply in this case. Specifically, in addition to the 1600 square feet of RACM that was removed from Building #2 in August 1997, the evidence in the record also shows that Mr. Schmitt removed a total of 264 square feet of linoleum from three of the Calderwood Apartments in June 1997. Resp. Ex. 6, Evidentiary Tr. 64, 119-20, 124, 399.

In essence, Friedman & Schmitt argue, and the ALJ held, that the removal of this linoleum from the Calderwood Apartments should not be looked to as satisfying the applicability threshold under the federal Asbestos NESHAP for three independent reasons. Friedman & Schmitt's Brief at 9-16; Initial Decision at 12. First, Friedman & Schmitt argue that each building must be viewed as a separate facility and, since the amount of linoleum removed from each building was less than 160 square feet, that their activities did not exceed the threshold at any one facility. Friedman & Schmitt's Brief at 12-16. Second, Friedman & Schmitt argue that the record does not show that the linoleum removed from the Calderwood Apartments was RACM. *Id.* at 11-12. Third, they argue that the Region's Complaint did not effectively charge violations based on the activity at the Calderwood Apartments. *Id.* at 10-11. We reject each of these arguments for the following reasons.

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[29] As discussed below in part II.B.3.a, we conclude that the "facility" in this case is the "installation" consisting of the Town & Country Village redevelopment project, which included Building #2 and the Calderwood Apartments.

a. *Scope of Facility*

Friedman & Schmitt argue that the threshold of 160 square feet of RACM was not disturbed at the Calderwood Apartments because each apartment building must be viewed as a separate "facility." Friedman and Schmitt's Brief at 12-16. They note that the 264 square feet of linoleum was removed from three separate, free-standing buildings - 80 square feet was removed from 2901 Calderwood Lane, 94 square feet was removed from 2911 Calderwood Lane, and 90 square feet was removed from 2931 Calderwood Lane. *Id.* at 12.[30]

Friedman & Schmitt argue that they were entitled to rely on SMAQMD's demolition permitting process in determining the scope of "facility" for purposes of the asbestos renovation notice requirements. Specifically, they argue that, under the local SMAQMD rules "[i]ndividual demolition permits were required for each [building], and separate permit fees required as well." *Id.* 12. Further, Friedman & Schmitt argue that "[b]y imposing distinct fees for each unit, SMAQMD has recognized that each unit should be regarded separately for reporting purposes." *Id.* at 14. Friedman & Schmitt maintain that treating each building as a separate facility is a more reasonable application of the regulations and that they did not have fair notice of the Region's interpretation that multiple buildings may be treated as a single facility. *Id.* Friedman & Schmitt submit that "[t]here is nothing in the definition [of facility] that indicates or suggests in any way the government may combine buildings, structures or installations when determining the amount of RACM subject to the regulation." *Id*. 13. Friedman & Schmitt's argument, however, must fail.

For determining both the appropriate application of the term "facility" in this case and whether Friedman & Schmitt received fair notice, we begin with the text of the regulations. The Asbestos NESHAP defines the term "facility" as including any "installation,"[31] which in turn is further defined as including "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 operators under common control)." 40 C.F.R. § 61.141. By including "installation" within the scope of "facility"

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[30] As we observed in footnote 6 above, Friedman & Schmitt refer to these buildings as 2901, 2911, and 2931 Marconi Avenue. Nevertheless, it is evident that they are referring to the same buildings the Region identified as 2901, 2911, and 2931 Calderwood Lane.

[31] Section 61.141 provides in relevant part as follows:

> *Facility* means any institutional, commercial, public, industrial, or residential structure, *installation*, or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having four or fewer dwelling units).

40 C.F.R. § 61.141 (emphasis added).

and by defining an installation as "any group of buildings," the regulations specifically contemplated that a group of buildings may be a single facility.[32] We therefore reject Friedman & Schmitt's general argument that the term "facility" is limited to a single building or structure. We also reject Friedman & Schmitt's argument that they did not have notice that a group of buildings may be treated as a single facility - the regulatory text provided adequate notice in plain and unambiguous language.

The regulations, however, do not allow the Agency to treat all groups of buildings as a single facility. Instead, they require that, in order to be an installation, the group of buildings must be both part of "a single renovation or demolition site" and "under the control of the same owner or operator (or owner or operators under common control)." 40 C.F.R. § 61.141 (definition of installation). The ALJ stated that the phrase "single demolition or renovation site" is not defined in Agency regulations or policy statements and, "[a]s such it was reasonable for [Friedman & Schmitt] to conclude that such demolition or renovation sites were limited by the scope of the demolition permits they applied for, which were specific to each separately addressed structure." Initial Decision at 12. On this issue the ALJ erred. Agency statements regarding the meaning of the terms "facility" and "installation" contain examples showing the Agency's intended application of those terms in contexts similar to this case.

Specifically, the preamble to the 1990 revisions of the Asbestos NESHAP provided two examples of demolition or renovation projects involving multiple buildings that the Agency intended to be treated as a single facility. *See* 55 Fed. Reg. 48,406, 48,412 (Nov. 20, 1990) (hereinafter "1990 Preamble"). Notably, the courts view a regulatory preamble as an authoritative Agency interpretation of the regulation: "'[w]hile language in the preamble of a regulation is not controlling over the language of the regulation itself * * * the preamble to a regulation is evidence of an agency's contemporaneous understanding of its proposed rules,' and therefore provides guidance in evaluating whether the agency's interpretation of its regulation is consistent with the structure and language of the rule." *HRI, Inc. v. EPA*, 198 F.3d 1224, 1244 n.13(10th Cir. 2000) (citing *Wyoming Outdoor Council v. United States Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999)); *see also Vermont v. Thomas*, 850 F.2d 99, 103 (2nd Cir. 1988). Therefore, we look to the examples set forth in the 1990 Preamble as providing instruction regarding what may appropriately be considered within the scope of the term "facility" and as providing fair notice to Friedman & Schmitt of EPA's interpretation.

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[32] Friedman & Schmitt argue that the definitions of facility and installation are inconsistent in that, according to Friedman & Schmitt, "the definition of 'facility' clearly contemplates a building or structure, while the definition of 'installation' contemplates a group of buildings or structures." Friedman & Schmitt's Brief at 13-14. The error in this argument is that the definition of "facility" not only referred to a "building or structure," but also expressly included "installation." 40 C.F.R. § 61.141.

The 1990 Preamble provided this example in discussing the regulatory definition of "installation":

> As an example, several houses located on highway right-of-way that are all demolished as part of the same highway project would be considered an "installation," even when the houses are not proximate to each other. In this example, the houses are under the control of the same owner or operator, i.e., the highway agency responsible for the highway project.

55 Fed. Reg. at 48,412. In addition, in explaining the EPA's interpretation of the term "facility," which as previously noted includes "any installation," the Agency explained as follows:

> [T]he demolition of one or more houses as part of an urban renewal project, a highway construction project, or a project to develop a shopping mall, industrial facility, or other private development, would be subject to the NESHAP.

Id. The first example emphasizes that multiple buildings under the control of the same owner or operator and affected by the same project may be treated as an installation even if the buildings are not proximate to each other. The second example shows that the development of a shopping mall is among the types of projects that should be considered a single facility even when multiple buildings are involved.

In the present case, Friedman & Schmitt's Answer states as follows:

> The allegations giving rise to this action * * * concern the renovation and/or demolition of property forming part of Town & Country Village, a shopping complex in Sacramento, California. Respondent MORTON FRIEDMAN was the owner of the property in August, 1997, when the alleged violations occurred. * * * Altogether, there were ten buildings involved in the development project in the summer and fall of 1997, as indicated on the attached map.

Answer at 2. From this statement in their Answer, Friedman & Schmitt have admitted that the work performed at the 10 to 11 buildings was part of a single construction project for the development of a shopping mall.

The record also demonstrates that Schmitt's removal of the linoleum from the Calderwood Apartments was part of Friedman & Schmitt's overall Town & Country Village redevelopment project undertaken in the summer of 1997. In particular, Mr. Friedman demolished the Calderwood Apartments on the side of Calderwood Lane adjacent to the Town & Country Village, Evidentiary Tr.at 300, and combined that portion of the Calderwood Apartments with the Town & Country Village, *id.* at 298, in order to construct a larger building to attract an anchor grocery store to the Town & Country Village, *id.* at 296. As noted in the factual background above, Friedman & Schmitt's counsel succinctly described the development project as follows: "Back in the summer of 1997, there was a major renovation project that was going on at the Town & Country Village. * * * There were * * * either 10 or 12 buildings, actually, that were going through renovation or demolition stage to make way for some larger buildings." Evidentiary Tr. at 38.

We find that Friedman & Schmitt's "major renovation project" at the Town & Country Village - which included the removal of 264 square feet of linoleum from those Calderwood Apartments subsequently demolished to allow Mr. Friedman to construct a larger building as an anchor grocery store - was a single "installation" and therefore a "facility" within the meaning of the Asbestos NESHAP, 40 C.F.R. § 61.141. In particular, the Calderwood Apartments and Building #2 were all part of a "development project," Answer at 2, at the Town & Country Village that was similar to the examples of covered projects in the 1990 Preamble. 55 Fed. Reg. 48,406, 48,412 (Nov. 20, 1990). As such, the Town & Country Village development project is appropriately regarded as a single renovation or demolition site. In addition, the Calderwood Apartments and Building #2 were under the common ownership or control of Mr. Friedman. Answer at 2; Evidentiary Tr. at 295. In particular, Mark Friedman testified that the project "was comprised of separate — several separate legal parcels that were acquired over time by my father or by partnerships that he controlled." Evidentiary Tr. at 295. Accordingly, we find that both conditions for a group of buildings to be considered an "installation" within the Asbestos NESHAP's definition were satisfied in this case.

These conclusions flow fairly and proximately from the plain language of the regulatory definition, as supported by the examples EPA provided in the 1990 Preamble. Thus, we reject Friedman & Schmitt's argument that they did not have fair notice that the term "facility" may be applied to the Town & Country Village development project. *See Gates*, 790 F.2d at 156; *Gen. Elec.*, 53 F.3d at 1329 (stating that notice can come from "regulations and *other public statements* issued by the agency")(emphasis added). Further, Friedman & Schmitt have not identified any inconsistent interpretation or contradictory statements by the EPA or its Regional offices regarding the scope of "facility." *See Sekula v. Fed. Deposit Ins. Corp.*, 39 F.3d 448, 457 (3rd Cir. 1994) (concluding that agency's long-standing, consistent, public interpretation of regulation provided fair notice); *Fed. Election*

Comm'n v. Arlen Specter '96, 150 F. Supp. 2d 797, 814 (E.D. Pa. 2001) (reasoning that although actual language of regulation was ambiguous, numerous public statements that clearly and consistently stated agency's interpretation provided fair notice).[33]

Accordingly, for all of the foregoing reasons, we reject Friedman & Schmitt's argument that they lacked fair notice that the Calderwood Apartments and Building #2, along with the other buildings in the Town & Country Village development project, were a single "facility" within the meaning of the Asbestos NESHAP.

b. *Evidence that the Linoleum Removed from the Calderwood Apartments was RACM*

As noted above, Friedman & Schmitt argue that the record does not show that the linoleum removed from the Calderwood Apartments was RACM. *Id.* at 11-12. On this issue, the ALJ held that "EPA did not establish that the material removed [from the Calderwood Apartments] was regulated asbestos." Initial Decision at 12. We reject Friedman & Schmitt's argument and find that the ALJ erred in this holding.

The term "RACM" is defined by the Asbestos NESHAP as follows:

> Regulated asbestos-containing material (RACM) means (a) Friable asbestos material,[34] (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

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[33] We also reject Friedman & Schmitt's effort to look to the local SMAQMD permitting process as defining the scope of "facility." The record merely contains testimony that demolition permits are required for each separately addressed building. *See* Evidentiary Tr. at 126, 301. The record, however, does not contain a copy, or any citation, to the local regulations requiring such individual permits; and the record does not show whether this requirement for demolition permits is part of the same body of regulations governing notice and work practices for asbestos removal under the local regulations. There is also no information whatsoever in the record showing that the regulations governing such demolition permits were submitted to the EPA for approval under 40 C.F.R. §§ 63.91-.92, much less any evidence that EPA published notice of approval in the Federal Register. Accordingly, Friedman & Schmitt have failed to sustain their burden of showing that they reasonably relied on the local permitting practice as somehow defining the scope of "facility" for the Asbestos NESHAP's notice and work practice requirements.

[34] Under the regulations, "friable asbestos material" is material that can be "crumbled, pulverized, or reduced to powder by hand pressure." 40 C.F.R. § 61.141.

> 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. Friedman & Schmitt's Answer to the Complaint admits that the linoleum removed from the Calderwood Apartments was "linoleum containing asbestos." Answer at 3. In addition, the June 1996 Report, prepared by Friedman & Schmitt's consultant (prior to the removal of the linoleum), stated that "All of the asbestos-containing linoleum in the designated apartments of each structure are classified as friable, regulated asbestos-containing materials (RACM)." Gov't Ex. 5 at 3.[35] This report specifically referred to Units 7, 22, and 37 with addresses of 2901, 2911, and 2931 Calderwood Lane, which are the buildings referenced in the Region's Complaint, in paragraph 1. The June 1996 Report sets forth in an attachment the specific test results for the samples taken from the linoleum. Thus, there is ample evidence in the record showing that the linoleum removed from the three Calderwood Apartments was RACM.

Notwithstanding this evidence, Friedman & Schmitt argue that "vinyl floor is Category I ACM, but not necessarily RACM, depending upon how it is removed. * * * The EPA offered no evidence on the method of removal for the Calderwood linoleum." Friedman & Schmitt's Brief at 12. In other words, Friedman & Schmitt argue that the linoleum can fall under part (c) or (d) of the above-referenced definition of RACM only if the Region submitted evidence showing that the asbestos containing linoleum was subject to sanding, grinding, cutting or abrading, or was crumbled, pulverized or reduced to powder in the course of the renovation activity. *See* 40 C.F.R. § 61.141 (definition of RACM, parts c and d). We reject this argument, however, because parts (c) and (d) of the definition relate to "nonfriable" asbestos containing material, and the evidence in the record of this case shows that the linoleum was, in fact, "friable." In particular, as noted above, Friedman & Schmitt's consultant stated in the June 1996 Report that "[a]ll of the asbestos-containing linoleum in the designated apartments of each structure are classified as *friable*, regulated asbestos-containing materials (RACM)." Gov't Ex. 5 at 3. There is no contrary evidence in the record that would suggest that the linoleum in question had not become friable.[36]

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[35] Further, the Answer refers on page 5 to an inspection report dated June 11, 1997, prepared by Friedman & Schmitt's asbestos consultant (after Friedman & Schmitt removed the linoleum), which was attached to the Answer as Exhibit D. That report specifically states that "the ACM linoleum in the 3 units were the only regulated asbestos-containing materials (RACM) that was discovered in each of the units." Answer, Ex. D at 1.

[36] The ALJ noted that the definition of "Category I nonfriable asbestos-containing material" includes "resilient floor covering," which in turn is defined as including "asbestos-containing floor tile, including * * * vinyl floor tile." Initial Decision at 21 n.24 (citing 40 C.F.R. §§ 61.141, .142). This led the ALJ to conclude that the linoleum in this case was nonfriable. The ALJ, however, apparently

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Parts (a) and (b) of the definition of RACM provides that asbestos containing material that has become friable prior to the renovation or demolition activity is RACM, without regard for how it is handled during the renovation. 40 C.F.R. § 61.141. Accordingly, we find that the Region sustained its burden of proving that the 264 square feet of linoleum Mr. Schmitt removed from the Calderwood Apartments was RACM. We therefore reverse the ALJ's decision on this issue.

c. *Effective Pleading of Calderwood Claims*

As noted above, Friedman & Schmitt argue that the Region's Complaint is limited to events arising from Building #2 and that they had thus objected to the introduction of any evidence concerning the Calderwood Apartments in the proceeding below. Friedman & Schmitt's Brief at 10-11. The ALJ held that "EPA did not effectively charge nor pursue its Calderwood claims." Initial Decision at 12. In a footnote, the ALJ explained further that "Although, at the hearing, Respondents' objection to receiving evidence concerning Calderwood, on the grounds that it was not part of the Complaint, was overruled, the Court advised that if EPA based its penalty only on [Building #2], [the Court] would only consider that site. Upon review of the record, the Court now agrees that EPA's penalty was derived from [Building #2] alone." *Id.* (citation omitted). By these rulings, the ALJ dismissed from further consideration evidence concerning RACM removed from the Calderwood Apartments. Thus, the ALJ did not look to whether such RACM factored into the applicability of the Asbestos NESHAP.

We, however, conclude that the ALJ erred in holding that the Region failed to "charge or pursue" its contention that Friedman & Schmitt's removal of RACM (in the form of linoleum) from the Calderwood Apartments exceeded the 160 square foot threshold under 40 C.F.R. § 61.145(a)(i), thereby triggering the notice and work practice requirements of the Asbestos NESHAP for Friedman & Schmitt's activities at the facility (i.e., the Town & Country Village redevelopment project). The Region's Complaint was in our view more than adequate to provide notice to Friedman & Schmitt that the Region intended to introduce evidence regarding the Calderwood Apartments, and the record shows that Friedman & Schmitt were not surprised at trial by the Region's effort to introduce this evidence. We also reject the ALJ's suggestion that the admissibility of evidence for determining applicability should turn on whether that evidence is also key to the proposed penalty analysis.

(continued)
failed to note that the definition of RACM includes "Category I nonfriable asbestos containing material that has become friable," and, as noted, the definition of "friable asbestos material" looks to whether the material can be "crumbled, pulverized, or reduced to powder by hand pressure." 40 C.F.R. § 61.141. As noted in the text, the evidence in this case shows that Friedman & Schmitt's consultant determined that the linoleum removed from the Calderwood Apartments had become friable prior to the renovation. Gov't Ex. 5 at 3.

The Region's Complaint identified the "Facility" as consisting of both Building #2[37] and the Calderwood Apartments identified as 2901, 2911, and 2931 Calderwood Lane. Complaint ¶ 1. It stated further that the units located in Building #2 and the Calderwood Apartments were an "installation" and "facility" within the meaning of the federal Asbestos NESHAP. *Id.* ¶¶ 8, 9. The Complaint alleged that Friedman & Schmitt removed over 160 square feet of RACM from this Facility, "including floor linoleum backing and ceiling texturing." *Id.* ¶ 12. Thus, the Region clearly stated in its Complaint that the linoleum removed from the Calderwood Apartments exceeded the 160 square foot threshold for application of the Asbestos NESHAP.

In addition, the transcript of the evidentiary hearing shows that, at the commencement of the hearing, before any witnesses were called or evidence introduced, Friedman & Schmitt's attorney made an oral motion to "eliminate any testimony with respect to the Calderwood Apartments, because basically that's in the Complaint for no purpose other than prejudicial purposes." Evidentiary Tr. at 18. Friedman & Schmitt's attorney also stated that he had a meeting with the Region's attorney "back shortly after this was filed" during which they discussed Friedman & Schmitt's argument that evidence regarding the Calderwood Apartments should be excluded from consideration. *Id.* at 17. He also stated that "The way the Complaint is framed, your Honor, the Calderwood Apartments are part and parcel of the proof or evidence that the government would expect to present here." *Id.* Thus, the Region's effort to introduce evidence at trial concerning the Calderwood Apartments did not surprise Friedman & Schmitt.

We also reject any suggestion that RACM may not be counted towards the applicability threshold under 40 C.F.R. § 61.145(a)(i) in circumstances in which the Region has not expressly identify such RACM as the basis for an upward adjustment of the proposed penalty.[38] The question of NESHAP applicability logically arises prior to, and independent of any penalty determination. Agency guidance provides the Region discretion to propose a penalty based on the amount of RACM handled improperly, rather than the total amount of RACM handled in the project. The Agency's penalty policy for violations of the Asbestos NESHAP provides the following guidance: "Where there is evidence indicating that only part of a demolition or renovation project involved improper stripping, removal, disposal

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[37] In the Complaint, the Region referred to Building #2 as 2640, 2642, and 2650 Marconi Avenue (which are separate addresses of retail suites in Building #2).

[38] The ALJ appears to have rejected the evidence from the Calderwood Apartments on this ground. *See* Initial Decision at 12 ("the Court advised that if EPA based its penalty only on [Building #2], [the Court] would only consider that site. Upon review of the record, the Court now agrees that EPA's penalty was derived from [Building #2] alone."). Indeed, this appears to have been the basis for Friedman & Schmitt's request to exclude the Calderwood Apartment evidence at trial. *See* Evidentiary Tr. at 17("[t]he apartments, though, your Honor, do not come into play at all with respect to the penalty - the proposed penalty that EPA is seeking.").

or handling, the Region may calculate the number of [asbestos] units based upon the amount of asbestos reasonably related to such improper practice." *See* CAA Stationary Source Civil Penalty Policy, app. III at 3 (Rev. May 5, 1992) (hereinafter "Asbestos Penalty Policy").[39] Notably, the Asbestos Penalty Policy uses the concept of asbestos "unit" as a basis for increases in the amount of the penalty for work practice violations, but it does not employ this concept for notice violations. *See* Asbestos Penalty Policy at 15, 17 (charts showing recommended penalties for notice violations and work practice violations). In the present case, the Region alleged both a notice violation and work practice violations, but since the work practice violations only related to work at Building #2, the Region did not include the RACM from the Calderwood Apartments when calculating the number of Asbestos Units in establishing the recommended penalty for the work practice violations. This approach was consistent with the guidance of the Agency's Asbestos Penalty Policy, and explains why the Region's penalty analysis did not focus on the RACM removed from the Calderwood Apartments, even though that RACM is relevant to its claims in this case.

In summary, we conclude that the ALJ erred in holding that the Region failed to adequately plead or pursue its contention that Friedman & Schmitt's removal of RACM from the Calderwood Apartments exceeded the 160 square foot threshold under 40 C.F.R. § 61.145(a)(i), thereby triggering the notice and work practice requirements for Friedman & Schmitt's activities. We also conclude for the reasons stated above that the evidence in the record shows that this 160 square foot threshold was exceeded both with respect to RACM in the form of linoleum removed from the Calderwood Apartments and with respect to RACM in the form of acoustic ceiling material removed from Building #2. In addition, we hold that, because the applicability threshold was exceeded, Friedman & Schmitt were required to comply with the Asbestos NESHAP's notice and work practice standards for their activities in 1997 at the "Facility" - the Town & Country Village development project.

C. *Question Whether Friedman & Schmitt Violated the Asbestos NESHAP's Notice and Work Practice Standards*

In circumstances in which the Asbestos NESHAP applies (i.e., where it is shown that a renovation activity disturbed the threshold amount of RACM), the Asbestos NESHAP, at section 61.145(b), (c), and (d) sets forth notice requirements, work practice standards, and record-keeping requirements. The Region alleged in its Complaint that Friedman & Schmitt violated these notice requirements, work practice standards, and waste shipment record requirements by

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[39] In our penalty discussion below in part II.D, we refer to the CAA Stationary Source Civil Penalty Policy as the "General CAA Penalty Policy" and we refer to Appendix III of that policy as the "Asbestos Penalty Policy."

1) failing to provide 10 working day written notice of their intention to remove RACM from the facility in violation of 40 C.F.R. § 61.145(b), Complaint ¶¶ 20, 21; 2) failing to maintain waste shipment records documenting the transportation of asbestos containing material from the facility to 2900 Heinz Street, in violation of 40 C.F.R. §§ 61.145(c)(6), 61.150(d), Complaint ¶¶ 23, 24; and 3) failing to keep RACM at the facility adequately wet, in violation of 40 C.F.R. §§ 61.145(c)(6), 61.150. Complaint ¶¶ 26, 27. Because the ALJ based his finding of no liability on his conclusion that Friedman & Schmitt were not given fair notice that applicability would be determined as set forth in the Asbestos NESHAP, the ALJ did not make specific findings regarding whether Friedman & Schmitt complied with the 10-day notice requirement of 40 C.F.R. § 61.145(b). The ALJ did, however, find that Friedman & Schmitt failed to maintain waste shipment records and failed to keep RACM in Building #2 adequately wet as required by 40 C.F.R. §§ 61.145(c)(6) and 61.150. These violations are discussed below.

1. *Failure to Give Notice*

In renovations that exceed the threshold discussed in part II.B, the Asbestos NESHAP requires each owner or operator of a renovation activity to provide the Administrator written notice of the intention to renovate, with such notice postmarked or delivered "[a]t least 10 working days before asbestos stripping or removal work or any other activity begins (such as site preparation that would break up, dislodge or similarly disturb asbestos material) * * * ." 40 C.F.R. § 61.145(b)(3)(i)(1996). In the present case, Friedman & Schmitt admitted in their Answer that they did not provide the notice required by 40 C.F.R. § 61.145(b) prior to removing RACM from both the Calderwood Apartments and Building #2. Answer at 3, 7. Accordingly, we find that Friedman & Schmitt violated 40 C.F.R. § 61.145(b) (1996).

2. *Failure to Keep RACM Adequately Wet*

The Asbestos NESHAP establishes the following work practice standard requiring RACM to be kept adequately wet:

> (c) *Procedures for asbestos emission control*. Each owner or operator of a demolition or renovation activity * * * shall comply with the following procedures:
>
> * * *
>
> (3) When RACM is stripped from a facility component while it remains in place in the facility, adequately wet the RACM during the stripping operation.

> * * *
>
> (6) For all RACM, including material that has been removed or stripped:
>
> > (i) Adequately wet the material and ensure that it remains wet until collected or treated in preparation for disposal in accordance with § 61.150[.]

40 C.F.R. § 61.145(c)(3), (6)(i) (1996). In essence, these work practice standards require a person engaged in the removal of RACM to adequately wet the material prior to removal and then to keep the material adequately wet until it is collected for disposal. *Echevarria*, 5 E.A.D. at 633; *accord In re Lyon County Landfill*, 10 E.A.D. 416, 432 n.17 (EAB 2002).

The regulations define the term "adequately wet" to mean:

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

40 C.F.R. § 61.141 (1996). We have held that the uncontroverted testimony of Agency inspectors regarding their personal observations is sufficient to establish that RACM was not adequately wet at the time of the inspection. *See In re Schoolcraft Constr., Inc.*, 8 E.A.D. 476, 487 (EAB 1999)(citing *United States v. MPM Contractors, Inc.*, 767 F. Supp. 464, 469 (E.D. Ark. 1990)); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 531 (EAB 1998); *Echevarria*, 5 E.A.D. at 639-40; *see also Lyon County Landfill*, 10 E.A.D. at 434, 435-37, 442, 446-48.

The record in the present case shows that Friedman & Schmitt failed to keep RACM adequately after removal from facility components in Building #2. Specifically, the Region's inspector, Mr. Darrell Singleton, inspected Building #2 on August 21, 1997. During that inspection, he observed "dry" acoustic ceiling material on a door frame and window, and small pieces of "dry," "flaky," "crumbly" acoustic ceiling material on a carpet and the top of a beam in Building #2.

Evidentiary Tr. at 52, 73-74, 140; Gov't Ex. 1 at 7, 11, 12.[40] Mr. Singleton took samples of this "dry" acoustic ceiling material, and those samples tested positive for the requisite amount of asbestos. Evidentiary Tr. at 74; Gov't Ex. 1 at 8-15. Accordingly, evidence in the record shows that RACM in the form of acoustic ceiling material that had been stripped from the ceiling in Building #2 and remaining in Building #2 was not adequately wet at the time of Mr. Singleton's inspection.

Friedman & Schmitt submitted a report prepared by Friedman & Schmitt's consultant, Lawrence Hussey, which stated that as of August 6, 1997, "all * * * asbestos containing materials were properly removed from the individual suites and roof * * * no visual evidence of suspected asbestos containing debris wer [sic] observed in the areas where abatement activity occurred. All hazardous wastes were properly contained and removed from the site * * * ." Resp. Ex. 11; Evidentiary Tr. at 363-64.[41] Friedman & Schmitt argue that this report shows that all RACM was properly removed from Building #2. This report, however, contains numerous errors. For example, although the evidence at the hearing established that Mr. Schmitt removed the RACM from Building #2, the report asserted that the RACM was removed by a certified asbestos abatement contractor. *Compare* Resp. Ex. 11 *with* Gov't Ex. 4; Evidentiary Tr. at 80. Mr. Schmitt is not a certified asbestos abatement contractor. Evidentiary Tr. at 403. The report also inaccurately stated that notice was given prior to the removal of the RACM and that the RACM was properly removed from the site. Resp. Ex. 11 at 1. However, as discussed above, no notice was given prior to the removal of RACM from Building #2, and as discussed below, Mr. Schmitt transported the RACM from Building #2 to 2900 Heinz Street and improperly stored the RACM in torn trash bags. Evidentiary Tr. at 80. at trial, Mr. Hussey admitted that these statements in his report were not accurate. *Id.* at 386. The ALJ held that Mr. Hussey's report should be discounted due to these errors. *See* Initial Decision at 22 n.29. We agree with the ALJ's conclusion in this regard and, accordingly, we do not find Mr. Hussey's report to be credible evidence that would overcome Mr. Singleton's tes-

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[40] The ALJ noted that there was some dispute as to whether the acoustic ceiling material on the floor was there when Mr. Singleton arrived or whether it was originally located on top of a beam and Mr. Singleton knocked it to the floor. Initial Decision at 10 n.8. However, the ALJ correctly held that the RACM on the beam had in any case been stripped from the facility by Mr. Schmitt and was not adequately wet at the time of the inspection. *Id.* at 22-23. These findings are sufficient to establish liability.

[41] As we note above in the summary of the factual background, Mr. Hussey prepared several reports for Friedman & Schmitt, including the June 1996 Report and the June 1997 Report discussed earlier in this decision. Both the June 1996 Report and the June 1997 Report were prepared prior to any demolition or renovation and identified the location of RACM and ACM at the Facility. Respondent's Exhibit 11, discussed in the text above, is one of the reports prepared by Mr. Hussey after Friedman & Schmitt conducted demolition or renovation activities and asserts that those activities were properly completed.

timony. Accordingly, we find that Friedman & Schmitt violated 40 C.F.R. § 61.145(c)(3) and (6)(i) (1996) by failing to keep RACM adequately wet after it was stripped from the ceiling in Building #2 and prior to disposal.

3. *Failure to Maintain Waste Shipment Records*

The Asbestos NESHAP requires all RACM stripped from a facility's components to be disposed in accordance with section 61.150. 40 C.F.R. § 61.145(c)(6)(i) (1996). Among other things, section 61.150 requires each owner or operator to maintain waste shipment records for all RACM removed from the facility, including the name and physical site location of the disposal site. 40 C.F.R. § 61.150(d)(1) (1996). The evidence in the record of this case shows that Friedman & Schmitt did not maintain waste shipment records for the RACM stripped from Building #2. In particular, Mr. Schmitt transported the RACM stripped from Building #2 to his place of business at 2900 Heinz Street. Evidentiary Tr. at 80. Mr. Schmitt did not prepare a waste shipment record for this transport of RACM from Building #2 to 2900 Heinz Street. *Id.*; *see also* Answer at 9. Accordingly, we find that Friedman & Schmitt violated 40 C.F.R. §§ 61.145(c)(6)(i) and 61.150(d)(1) (1996).

D. *Penalty Issues*

Although the ALJ concluded that Friedman & Schmitt were not liable for the alleged violations of the Asbestos NESHAP, the ALJ nevertheless provided an analysis of what he believed an appropriate penalty would be in the event that the Board disagreed with his liability determination. Initial Decision at 23-45. In this alternative analysis, the ALJ rejected the Region's proposed penalty of $134,300, determining instead that $3,500 would be an appropriate penalty. *Id.* at 45. For the following reasons, we adopt certain aspects of the ALJ's analysis and reject others. As explained below, we assess a penalty of $30,980 for Friedman & Schmitt's three violations of the Asbestos NESHAP.

1. *Statutory and Regulatory Penalty Criteria*

Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1), authorizes the Administrator to assess civil administrative penalties for violations of the CAA or its implementing regulations. That section provides in relevant part as follows:

> (1) The Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to $25,000, per day of violation, whenever, on the basis of any available information, the Administrator finds that such person -
>
> * * *

> (B) has violated or is violating any other requirement or prohibition of subchapter I of this chapter * * * .

CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1). Congress subsequently passed the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, which requires the EPA to adjust maximum civil penalties to take into account inflation. On June 27, 1997, EPA promulgated the Adjustment of Civil Monetary Penalties for Inflation Rule, 40 C.F.R. part 19, which sets the maximum allowable administrative penalty per day of violation of the CAA at $27,500. 40 C.F.R. § 19.4.

The statute also provides general criteria that the Agency must consider in assessing a civil administrative penalty. Those criteria in relevant part are as follows:

> In determining the amount of any penalty to be assessed under this section * * * , the Administrator * * * shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence * * * , payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

CAA § 113(e), 42 U.S.C. § 7413(e).

In addition, the regulations governing this proceeding impose several considerations for the determination of an appropriate penalty. In particular, the regulations provide as follows:

> Amount of civil penalty. If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complaint, the Pre-

> siding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

40 C.F.R. § 22.27(b).

In implementing these requirements, the Board has noted that, while the regulations do grant the Board *de novo* review of a penalty determination, in cases where the ALJ assessed a penalty that "falls within the range of penalties provided in the penalty guidelines, the Board will generally not substitute its judgment for that of the [ALJ] absent a showing that the [ALJ] has committed an abuse of discretion or a clear error in assessing the penalty." *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994); *accord In re Chempace* Corp., 9 E.A.D. 119, 131 (EAB 2000); *In re B & R Oil Co.*, 8 E.A.D. 39, 64 (EAB 1998); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 536 (EAB 1998); *In re Pac. Ref. Co.*, 5 E.A.D. 520, 524 (EAB 1994).

However, the Board also "reserves the right to closely scrutinize substantial deviations from the relevant penalty policy and may set aside the ALJ's penalty assessment and make its own *de novo* penalty calculations where the ALJ's reasons for deviating from the penalty policy are not persuasive or convincing." *In re Capozzi*, 11 E.A.D. 10, 32 (EAB 2003); *see also In re CDT Landfill Corp.*, 11 E.A.D. 88, 118 (EAB 2003); *In re Chem Lab Prods.*, 10 E.A.D. 711, 724 (EAB 2002) (rejecting ALJ's penalty assessment where ALJ's reason for departure was based on an impermissible comparison of penalties derived in a settlement context with the penalty to be assessed in a fully litigated case); *In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 610 (EAB 2002) (rejecting ALJ's penalty assessment where ALJ's departure from penalty policy was based on ALJ's misunderstanding as to how the penalty policy should be applied); *In re Carroll Oil Co.*, 10 E.A.D. 635, 656 (EAB 2002); *Birnbaum*, 5 E.A.D. at 124.[42]

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[42] The ALJ in the present case characterized the *Bruder* and *Carroll Oil* decisions as representing a "sharp turn" in which he contends that the Board "revoked its deference towards an ALJ's power to disregard penalty policies." Initial Decision at 34. As we have explained in other decisions more recently issued, we do not so regard the *Bruder* and *Carroll Oil* decisions. *Bruder* stated that, "in reviewing an ALJ's penalty assessment in circumstances where the ALJ has chosen not to apply the policy at all - rather than, for example, applying the policy differently than advocated by the complainant - we will closely scrutinize the ALJ's reasons for choosing not to apply the policy to determine if they are compelling." *Bruder*, 10 E.A.D. at 611; *Carroll Oil Co.*, 10 E.A.D. at 656. As we have more recently explained, "The term 'compelling,' as used in the *Bruder* and *Carroll Oil* cases, * * * is meant to convey the seriousness of the inquiry, recognizing the value that penalty policies provide, while simultaneously protecting the ALJ's discretion to depart from penalty policy guidelines where the totality of the circumstances warrant." *Chem Lab*, 10 E.A.D. at 724.

This precedent is consistent with the regulatory mandate that we "conduct a *de novo* penalty determination in accordance with [our] authority under 40 C.F.R. § 22.30(f)." *Id.*; *accord CDT Landfill*, 11 E.A.D. at 118. As we noted in part II.A above, 40 C.F.R. § 22.30(f) implements the authority

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As we noted above, the Agency has prepared a general penalty policy applicable to violations of the CAA, known as the Clean Air Act Stationary Source Civil Penalty Policy (October 25, 1991) (the "General CAA Penalty Policy"). Attached to the General CAA Penalty Policy as Appendix III is the Asbestos Penalty Policy, which provides specific guidance for violations of the Asbestos NESHAP. We have frequently followed the Asbestos Penalty Policy's guidance in determining the amount of penalties to assess in contested cases appealed to this Board. *See, e.g., Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 534-59 (EAB 1998).[43] We have also held that the General CAA Penalty Policy "facilitate[s] the application of the statutory penalty factors to individual cases in a systematic fashion, and thus provide[s] a sound framework for the exercise of an appellate tribunal's discretion." *In re House Analysis & Assoc.*, 4 E.A.D. 501, 509 n. 29 (EAB 1993) (citing *In re Alm Corp.*, 3 E.A.D. 688 (CJO 1991)). Moreover, in the present case, both parties have requested that we generally follow the guidance of the Asbestos Penalty Policy. *See* Friedman & Schmitt's Brief at 39 n. 5. Accordingly, our analysis in this case will generally follow the guidance of the Agency's Asbestos Penalty Policy and the General CAA Penalty Policy. However, we will also consider the ALJ's reasons for rejecting these policies' framework to determine whether we find those reasons persuasive or convincing. *Capozzi*, 11 E.A.D. at 32; *accord CDT Landfill*, 11 E.A.D. at 118-19.

2. *Region's Penalty Evidence and Friedman & Schmitt's Arguments*

at the evidentiary hearing, the Region introduced the testimony of Robert Trotter, the Region 9 Asbestos NESHAP Coordinator, to explain the Region's rationale for requesting a civil administrative penalty of $134,500. Evidentiary Tr. at 170-71, 183-95. Mr. Trotter explained that the Region's proposed penalty was

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(continued)
under section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 557(b), which provides that "[o]n appeal from or review of the initial decision, the agency has all the powers [that] it would have in making the initial decision." *See In re Coast Wood Preserving, Inc.*, 11 E.A.D. 59, 69 (EAB 2003); *Chem Lab*, 10 E.A.D. at 724; *In Re City of Salisbury*, 10 E.A.D. 263, 276 (EAB 2002); *In re Everwood Treatment Co.*, 6 E.A.D. 589, 612 n.39 (EAB 1996), *aff'd*, No. 96-1159-RV-M (S.D. Ala. Jan. 21, 1998). Our substantial deference to an ALJ decision to assess a penalty that falls within the range of penalties provided by a penalty policy is justified in large measure by our determination "that penalty policies serve to facilitate the application of statutory penalty criteria and, accordingly, offer a useful mechanism for ensuring consistency in civil penalty assessments." *See CDT Landfill Corp.*, 11 E.A.D. at 117; *see also In re House Analysis & Assoc.*, 4 E.A.D. 501, 509 n. 29 (EAB 1993) (citing *In re Alm Corp.*, 3 E.A.D. 688, 692 (CJO 1991)). Substantial deference to an ALJ's decision departing altogether from a penalty policy's systematic framework, however, cannot be justified on these grounds. Accordingly, the Board's recent precedents on this question simply recognize that Board review, without such deference, is appropriate when the ALJ rejects the penalty policy in its entirety.

[43] As in the present case, none of the parties in *Ocean State* disputed the applicability of the Asbestos Penalty Policy or the General CAA Penalty Policy. *Ocean State*, 7 E.A.D. at 535 n.11.

calculated in accordance with the Asbestos Penalty Policy. *Id.* at 183. The Asbestos Penalty Policy recommends first calculating a "preliminary deterrence amount" by assessing an economic benefit component and a gravity component. Asbestos Penalty Policy at 1. Under the Asbestos Penalty Policy's guidance, the preliminary deterrence amount is then adjusted upwards or downwards to take into account a variety of other factors. *Id.*[44]

The Asbestos Penalty Policy contains a chart at pages 15-17 with recommended initial gravity-based penalties for different types of violations of the Asbestos NESHAP. *Id.* at 2, 15-17. The chart for work-practice violations includes adjustments for the amount of RACM involved in the violation, with higher penalties as the amount of RACM increases. *Id.* at 3, 17. The increases are based on the number of asbestos "units" involved in the project, with a "unit" being equal to the threshold for NESHAP applicability (i.e., 260 linear feet, 160 square feet or 35 cubic feet). Using these charts, Mr. Trotter calculated a recommended gravity-based penalty of $15,000 for Friedman & Schmitt's failure to provide notice prior to removal of RACM, a $2,000 gravity-based penalty for the failure to maintain waste shipment records, and a $13,500 gravity-based penalty for the failure to keep RACM wet until collected for disposal.[45] Evidentiary Tr. at 188-89; Asbestos Penalty Policy at 15-17. Under the Asbestos Penalty Policy guidance, the initial gravity-based penalty that is derived from the charts provided in the policy is then adjusted upward to take into account the size of the violator and any economic benefit obtained from the violations. Asbestos Penalty Policy at 6-7.

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[44] The General CAA Penalty Policy suggests that three components should be included in the penalty: (1) the violator's economic benefit of noncompliance component, (2) a gravity-based component, and (3) adjustment factors to take into account other circumstances of the case. General CAA Penalty Policy at 3. The Asbestos Penalty Policy supplements the guidance on the first two of these components to take into account unique circumstances involved in the handling of asbestos. We describe this supplemental guidance in the text.

The General CAA Penalty Policy divides the gravity component into further considerations: actual or possible harm of the violation, importance to the regulatory scheme, and size of the violator. These considerations assist in assessing a penalty that properly reflects the seriousness of the violation - one of the CAA statutory factors. *Id.* at 8. After the initial gravity component of the penalty is assigned, the General CAA Penalty Policy then calls for the Agency to adjust this initial penalty by considering certain additional factors. These factors are: degree of willfulness or negligence, degree of cooperation, history of noncompliance, and environmental damage. *Id.* at 15-19. Consideration of these factors allows the Agency to increase or decrease the gravity component of the penalty depending on the case's specific facts. In addition to these factors, the General CAA Penalty Policy also calls for the Agency to consider a respondent's ability to pay a penalty in adjusting the gravity and economic benefit components of a penalty. *Id.* at 20.

[45] He calculated this work practice violation based on $5,000 for the first day of the violation for less than 10 asbestos units, plus $500 for each of the 17 additional days that the violation continued. Evidentiary Tr. at 188-89.

Mr. Trotter calculated the economic benefit Friedman & Schmitt obtained in this case as equal to $32,000. Evidentiary Tr. at 188-189, 209-212. Mr. Trotter multiplied 1,600 square feet of RACM removed from Building #2 by $20 per square foot as recommended by the Asbestos Penalty Policy to arrive at the $32,000 economic benefit component of his proposed penalty. Evidentiary Tr. at 189, 208-09. Using a chart set forth in the General CAA Penalty Policy, Mr. Trotter calculated the penalty increase for the size-of-violator to be $62,500 to take into account Mr. Friedman's net worth. *Id.* at 189-90.

Thus, Mr. Trotter calculated the total preliminary deterrence amount of the penalty to be $125,0000. Mr. Trotter testified further that this preliminary deterrence amount should be adjusted upward by $9,300 to take into account inflation. *Id.* at 188. This inflation adjustment is calculated in accordance with a memorandum EPA issued to revise its penalty policies to take into account the increased maximum statutory penalties required by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and the adjusted penalties published in 40 C.F.R. part 19. *See* Memorandum on Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (May 9, 1997). Adding the inflation adjustment to the preliminary deterrence amount produces the $134,300 penalty proposed by the Region in this case.

Friedman & Schmitt challenge Mr. Trotter's testimony supporting the Region's requested penalty on the following grounds: (1) that the $15,000 initial gravity-based penalty for the notice violation is high and fails to take into account that Friedman & Schmitt believed that they did not have to give notice and did not attempt to hide their removal of the RACM, Friedman & Schmitt's Brief at 40-42; (2) the $5,000 initial gravity-based penalty for the first day of the wetting violation does not take into account the small amount of RACM remaining in Building #2 and that "no one from the government ever told [them] that they had to wet the material," *id.* at 42-43; (3) the $8,500 initial gravity-based penalty for the subsequent 17 days of the continuing wetting violation fails to take into account that this was Friedman & Schmitt's first violation and that they sought guidance from SMAQMD on how to come into compliance and were told to wait for a subsequent meeting, *id.* at 43-45; (4) the $32,000 economic benefit component of the preliminary deterrence amount was erroneously based on a $20 per square foot cost of removing RACM when testimony in the record shows that the cost is between $2.50 and $4.50 per square foot, *id.* at 45-46; (5) the $64,500 size-of-violator increase based on Mr. Friedman's net worth fails to recognize that the Asbestos Penalty Policy contains an example suggesting that the size of the contractor, not the size of the property owner, should be used in circumstances similar to the present case, *id.* at 46-50; (6) the inflation adjustment of $9,300 should be reduced consistent with any reductions in the other components of the penalty, *id.* at 50; and (7) the penalty should be reduced to take into account the totality of the circumstances of this case, *id.* at 50-52.

Our analysis of each component of the Region's proposed penalty and Friedman & Schmitt's related arguments is set forth in the following parts of this decision. As noted, Friedman & Schmitt do not contend that the Asbestos Penalty Policy's structure is inappropriate; nor do they contend that a 10% inflation-based upward adjustment of the Asbestos Penalty Policy's charts is inappropriate. In addition, Friedman & Schmitt do not challenge the $2,000 initial gravity-based penalty for the record-keeping violation, except to the extent that they argue that they should not be found liable for that violation. *Id.* at 2. Since we have concluded that Friedman & Schmitt are liable for failing to maintain waste shipment records, this $2,000 initial gravity-based penalty, along with an appropriate 10% inflation adjustment of $200, shall be assessed as part of the total penalty.

3. *Initial Gravity-Based Penalty for the Notice Violation*

Mr. Trotter testified that a $15,000 initial gravity-based penalty should be assessed for Friedman & Schmitt's violation of the requirement to give notice ten days prior to beginning a renovation that would disturb the threshold amount of RACM. Evidentiary Tr. at 188. Mr. Trotter testified that the Asbestos Penalty Policy recommends a high penalty for this type of violation because lack of notice "really makes it difficult for an inspector to make a determination if there was compliance" with the work practice standards. Id. Tr. at 192. The Asbestos Penalty Policy explains further, however, that a reduced penalty may be appropriate "only if the Agency can conclude, from its own inspection, a State inspection, or other reliable information, that the source probably achieved compliance with all substantive requirements." Asbestos Penalty Policy at 2. Mr. Trotter testified that, in the present case, it was impossible for the inspector to determine whether RACM in the Calderwood Apartments was fully and correctly removed prior to the demolition. *Id.*

Friedman & Schmitt argue that the initial gravity-based penalty for the notice violation should be adjusted to take into account Friedman & Schmitt's belief that they did not have to give notice and their contentions that they fully cooperated with the government investigators, that the amount of asbestos left in Building #2 was small, that Friedman & Schmitt had no prior violations and that the case did not involve a "significant environmental problem." Friedman & Schmitt's Brief at 40-41. We reject Friedman & Schmitt's contention that the initial gravity-based penalty for the notice violation should be reduced on these grounds at this stage of our analysis.[46]

As Mr. Trotter noted, a failure to give notice significantly impairs the Agency's and states' ability to enforce the substantive requirements of the Asbes-

[46] As discussed below, several of these considerations do factor into our decision to mitigate the aggregate gravity-based penalty for this case.

tos NESHAP. Evidentiary Tr. at 192. Thus, a failure to provide notice represents harm to the regulatory scheme, and a significant penalty helps ensure that the regulated community has the proper incentive to avoid negligent or even merely mistaken notice violations. Indeed, Friedman & Schmitt's argument that they believed that they were not required to give notice highlights the need for a significant penalty for this type of violation in view of the fact that the evidence shows that Friedman & Schmitt formed their belief without seeking advice from SMAQMD or EPA and their belief conflicted with advice given to them by their consultant, who advised them to hire a licensed asbestos abatement contractor for removal of the RACM from the Calderwood Apartments. Gov't Ex. 5 at 3. A downward departure from the Asbestos Penalty Policy's recommended penalty for notice violations is, in our view, not warranted in circumstances such as these where Friedman & Schmitt have demonstrated no effort to ensure that their belief was correct.

Moreover, the allegedly small amount of RACM that Mr. Schmitt failed to remove from Building #2 does not justify a downward adjustment to the penalty under the Asbestos Penalty Policy's guidance. *See* Asbestos Penalty Policy at 2. Mr. Trotter testified that the inspectors were unable to determine whether there was compliance with the work practice standards during the demolition work at the Calderwood Apartments. Evidentiary Tr. at 192. Thus, the lack of notice, in fact, impaired the inspector's ability to monitor compliance with the work practice requirements for handling RACM removed from the Calderwood Apartments. The inspectors also were not able to inspect Mr. Schmitt's compliance with the work practice standards when he stripped RACM from Building #2. Indeed, the fact that the inspectors found dry, flaky RACM left behind at various locations in Building #2, apart from raising safety issues in its own right, also raises significant questions regarding Mr. Schmitt's handling of the RACM in Building #2 during the renovation work. Accordingly, no downward adjustment is warranted on this ground.

Friedman & Schmitt's cooperation and their lack of prior violations, however, may properly be considered as adjustments to the gravity component of *all three violations*. General CAA Penalty Policy at 15-19 (listing adjustments to the gravity component of the penalty); *see also* Asbestos Penalty Policy at 1 (referring to adjustment factors listed in the General CAA Penalty Policy). Accordingly, we will consider these issues as they bear upon the total gravity-based penalty, not as adjustments to the penalty for each violation. Our analysis of cooperation and history of violations is set forth below in part II.D.7.

Finally, we must reject the ALJ's reasons for departing from the Asbestos Penalty Policy's gravity-based penalty chart. We find the ALJ's reasons inadequate and unconvincing as they relate to the notice violation. The ALJ's explanation appears to focus exclusively on the recommended penalties for work practice violations, which includes adjustments for the amount of asbestos in three broad

categories. Initial Decision at 39-40. Other than a single reference to Mr. Trotter's testimony that the Asbestos Penalty Policy recommends no downward adjustment for notice violations, the ALJ did not consider or express any reason why the policy's approach to notice violations fails to adequately take into account the seriousness of those violations. *Id.* As discussed above, we conclude that notice violations are far from inconsequential. For these reasons, we determine that Friedman & Schmitt's failure to give the required notice in this case warrants the gravity-based penalty of $15,000 that the Asbestos Penalty Policy recommends. We adjust this amount upwards by 10%, or $1,500, to take inflation into account. *See* Memorandum on Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (May 9, 1997).

4. *Initial Gravity-Based Penalty for the Wetting Violation*

Mr. Trotter calculated a recommended gravity-based penalty of $13,500 for Friedman & Schmitt's failure to keep RACM wet until collected for disposal. Evidentiary Tr. at 188-89; Asbestos Penalty Policy at 15-17. He calculated this penalty based on $5,000 for the first day of the violation for less than 10 asbestos units, plus $500 for each of 17 additional days that the violation allegedly continued. Evidentiary Tr. at 188-89. Friedman & Schmitt argue that the $5,000 initial gravity-based penalty for the first day of the wetting violation does not take into account the small amount of RACM remaining in Building #2 and that "no one from the government ever told [them] that they had to wet the material." Friedman & Schmitt's Brief at 42-43. Friedman & Schmitt also argue that the $8,500 initial gravity-based penalty for the subsequent 17 days of the continuing wetting violation fails to take into account that this is Friedman & Schmitt's first violation and that they sought guidance from SMAQMD on how to come into compliance and were told to wait for a subsequent meeting. *Id.* at 43-45.

We reject Friedman & Schmitt's contention that the allegedly small amount of dry RACM the inspector found warrants a downward departure from the guidance for the initial gravity-based penalty for the first day of the wetting violation.

Numerous courts have recognized the seriousness of exposure to asbestos fibers. *See, e.g., Envtl. Encapsulating Corp. v. City of New York,* 855 F.2d 48 (2d Cir. 1988) ("Exposure to airborne asbestos fibers - often one thousand times thinner than a human hair - may induce several deadly diseases: asbestosis, a nonmalignant scarring of the lungs that causes extreme shortness of breath and often death; lung cancer; gastrointestinal cancer; and mesothelioma, a cancer of the lung lining or abdomen lining that develops 30 years after the first exposure to asbestos and that, once developed, invariably and rapidly causes death."); *Reserve Mining Co. v. EPA,* 514 F.2d 492, 508-09 n.26 (8th Cir. 1975); *United States v. MPM Contractors, Inc.,* 767 F. Supp. 231 (D. Kan. 1990); *United States v. Tzavah Urban Renewal Corp.,* 696 F. Supp. 1013 (D. N.J. 1988).

We have held that "Because exposure to airborne asbestos poses such a serious risk to human health, violations of the regulations set forth in the Asbestos NESHAP, which are intended to reduce the potential for such exposure, must be considered potentially serious violations of the Clean Air Act, which can warrant a substantial penalty." *In re Schoolcraft Constr., Inc.*, 8 E.A.D. 476, 492-93 (EAB 1999). We have also noted that "[w]etting to prevent the release of particulates is the primary method of controlling asbestos emissions during demolition or renovation work." *In re Echevarria*, 5 E.A.D. 626, 633 (EAB 1994).

Accordingly, it would be inappropriate to treat a violation of the wetting requirement as less than serious[47] even where, as here, the inspectors found a relatively small amount of dry RACM at the time of the inspection.[48] In our view, a $5,000 penalty for the first day of the wetting violation, as the Asbestos Penalty Policy recommends, is appropriate for the seriousness of the violation and will provide an appropriate incentive for full compliance in the future. We adjust this amount upwards by 10%, or $500, to take into account inflation. *See* Memorandum on Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (May 9, 1997).

We also reject Friedman & Schmitt's contention that there should be no additional penalty for the subsequent days of the continuing wetting violation. The

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[47] The Asbestos Penalty Policy recognizes the seriousness of work practice violations involving even small amounts of friable asbestos by recommending a *minimum* penalty of $5,000 for demolitions or renovations involving less than 10 units of RACM. *See* Asbestos Penalty Policy at 17.

[48] Notably, the wetting violation relates only to RACM present at the time of the inspection. Generally, RACM not only must be wetted at the time of removal; it also must be kept adequately wet until collected for disposal. *Echevarria*, 5 E.A.D. at 633. There is no proof one way or the other regarding wetting violations during the prior demolition work; indeed, the inspectors were effectively deprived of the opportunity to assess compliance with wetting requirements at that time by virtue of Friedman & Schmitt's failure to provide notice of such activity.

Although the ALJ focused exclusively on the small amount of dry RACM the inspectors identified at the time of their inspection in mid-August, the record contains additional evidence that other RACM contaminated material remained in Building #2. In particular, Mr. Singleton reported that the certified asbestos abatement contractor, who Friedman & Schmitt subsequently hired in mid-September to decontaminate Building #2, stated that there remained a lot of RACM to remove from the site, and, when inspecting the progress of the decontamination work in mid-September, Mr. Singleton observed multiple bags this contractor had marked as containing asbestos waste. Gov't Ex. 1 at 6. In short, while, as discussed in the text above, we hold that the small amount of dry RACM identified by the inspectors in mid-August, on its own, supports a nontrivial penalty, we also conclude that the ALJ's penalty reduction cannot in any event be sustained since it was based on the faulty assumption that the small amount of sampled material was the only remaining RACM at the site and the record contains other unrebutted evidence suggesting additional RACM remained at the site and was not properly handled until the certified asbestos abatement contractor started decontaminating Building #2 in September 1997.

Clean Air Act contains a specific presumption that augurs in favor of a finding of continuing violation in this case. The CAA states as follows:

> For purposes of determining the number of days of violation for which a penalty may be assessed under [section 113(d)(1)], where the Administrator or an air pollution control agency has notified the source of the violation, and the plaintiff makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice and each and every day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.

CAA § 113(e)(2), 42 U.S.C. § 7413(e)(1). This statute places the burden of achieving compliance fully and as promptly as possible on the owner or operator of the source.

The evidence in the record shows that SMAQMD acting through its inspector, Mr. Singleton, delivered two notices of violation to Mr. Schmitt on August 25, 1997 (one concerning the work at the Calderwood Apartments and one concerning Building #2). Gov't Ex. 1 at 4.[49] The record also shows that the Region established a prima facie case that Friedman & Schmitt did not correct the wetting violation until September 10, 1997, when Mr. Singleton observed a certified asbestos abatement contractor decontaminating Building #2. *Id.* at 6.[50] Friedman & Schmitt did not attempt to prove by a preponderance of the evidence that they adequately wetted RACM remaining in Building #2 prior to September 10, 1997.

Friedman & Schmitt's argument that they are somehow not responsible for any continuing violation by virtue of their asking SMAQMD for advice on how to come into compliance is not supported by a preponderance of the evidence in the record. Although the evidence does show that Friedman & Schmitt sought the advice of SMAQMD and that they were not satisfied with SMAQMD's response,

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[49] Subsequently, on August 27, 1997, Mr. Singleton delivered two notices of violation to Mr. Mark Friedman concerning the work at the Calderwood Apartments and Building #2. Gov't Ex. 1 at 4.

[50] We reject Friedman & Schmitt's suggestion that keeping Building #2 locked, *see* Evidentiary Tr. at 316, established compliance at an earlier date. We have previously held that keeping RACM in a "containment area" does not defeat a wetting violation. *In re Echevarria*, 5 E.A.D. 626, 644 (EAB 1994).

the evidence also shows that Mr. Singleton advised Friedman & Schmitt that Building #2 needed to be decontaminated. Evidentiary Tr. at 306-07, 405. Ultimately, Friedman & Schmitt followed this advice and hired a certified asbestos contractor to decontaminate the building. *Id.* at 315. As noted above, the Region viewed the commencement of decontamination as ending the continuing violation. Accordingly, applying the presumption CAA § 113(e)(2) establishes, the wetting violation in this case continued for 17 days from August 25, 1997, the date of notice, to September 10, 1997, the date on which Mr. Singleton observed the certified asbestos abatement contractor decontaminating Building #2.

The Asbestos Penalty Policy (as adjusted for inflation) suggests a multi-day penalty of $550 per day in these circumstances. The ALJ, however, expressed concern that application of this penalty amount failed to adequately account for the relatively small quantity of RACM involved in the wetting violation. Initial Decision at 39-40, 42-43. While, as we have noted, even small amounts of dry, friable asbestos can present substantial risks, we nonetheless tend to agree with the ALJ that the multi-day penalty recommended by the policy produces a higher aggregate gravity number for this violation than may be appropriate under the circumstances. In particular, we conclude that a multi-day penalty of $100 per day will, when added to the $5,500 penalty for the first day, produce an overall gravity-based penalty for this violation that is both reflective of the seriousness of the violation and provides a meaningful deterrent. Accordingly, we add $100 for each of the 16 days that the violation continued after the first day that SMAQMD gave notice to Friedman & Schmitt of the violation (totaling $1,600), and assess an initial gravity-based penalty of $7,100 for the continuing wetting violation.

5. *Economic Benefit Component of the Penalty*

Mr. Trotter calculated the economic benefit Friedman & Schmitt obtained in this case as equal to $32,000. Evidentiary Tr. at 188-89, 209-12. Mr. Trotter based his calculations on the Asbestos Penalty Policy's guidance that, in the absence of evidence regarding the violator's actual costs of compliance, the cost of asbestos removal should be estimated at $20 per square foot of asbestos removed in violation of the Asbestos NESHAP's requirements. *Id.;* Asbestos Penalty Policyat 6, 17. Mr. Trotter multiplied 1,600 square feet of RACM removed from Building #2 by $20 per square foot to arrive at the $32,000 economic benefit component of his proposed penalty. Evidentiary Tr. at 189, 208-09. Friedman & Schmitt argue that the $20 per square foot cost of removing RACM overstates the actual economic benefit because testimony in the record shows that the actual cost of removing RACM would have been between $2.50 and $4.50 per square foot. Friedman & Schmitt's Brief at 45-46.

The Asbestos Penalty Policy specifically states that the $20 per square foot cost of removing RACM is to be used "in the absence of reliable information regarding a defendant's actual expenses." Asbestos Penalty Policy at 7. As Fried-

man & Schmitt correctly note, the record contains testimony that the cost of removing RACM in Sacramento, California, at the time of these violations was between $2.50 and $4.50 per square foot. Evidentiary Tr. at 367, 410.[51] Specifically, Mr. Schmitt testified that the cost of removal would have been $2.50 to $3.50 per square foot, *id.* at 367, and Mr. Hussey testified that the cost would have been "somewhere between $3 and $4.50 a square foot." *Id.* at 410. On appeal, the Region concedes that economic benefit should be calculated based on the testimony in the record regarding local RACM removal costs. Region's Brief at 29; Oral Argument Tr. at 30. While the testimony in the record does provide the cost range of $2.50 to $4.50 per square foot, this testimony was general in nature and fell short of providing an exact price for which local removal services might have been obtained. Moreover, the price ranges cited by the witnesses are not entirely consistent. They do, however, overlap with respect to a narrower range of $3.00 to $3.50 per square foot (based on the low end of Mr. Hussey's estimate and the high end of Mr. Schmitt's estimate). Because the testimony in the record is in agreement that local removal services might have been obtained for as little as $3.00 per square foot, we will use this number for purposes of calculating economic benefit with respect to Building #2. Accordingly, we assess an economic benefit component of $4,800.[52]

6. *Size-of-Violator Component of the Penalty*

Mr. Trotter calculated the penalty increase for the "size-of-violator" to be $62,500 to take into account Mr. Friedman's net worth. Evidentiary Tr. at 189-90. Mr. Trotter arrived at this increase by applying the guidance of the General CAA Penalty Policy suggesting incremental increases in the amount of the penalty based on the violator's net worth and by utilizing a discretionary limit equal to 50% of the preliminary deterrence amount of the penalty. General CAA Penalty Policy at 14-15. The preliminary deterrence amount is the sum of the gravity-based penalties for each violation, the economic benefit component, and the size-of-violator component. Where the discretionary 50% limit is applied, the size-of-violator component should not exceed one-half of this sum.

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[51] The ALJ erroneously stated that this evidence is grounds for rejecting the Asbestos Penalty Policy as resulting in an inappropriate penalty. Initial Decision at 38. To the contrary, as noted in the text, the Asbestos Penalty Policy specifically states that evidence specific to the case should be used when it is available and reliable. Accordingly, we do not reject the Asbestos Penalty Policy, but instead follow its guidance and use the evidence in the record of this case to calculate an appropriate economic benefit penalty component.

[52] The economic benefit of $4,800 is the product of 1600 square feet of RACM multiplied by $3.00 per square foot.

Based on Mr. Friedman's substantial net worth,[53] the Region reasoned that the General CAA Penalty Policy would ordinarily authorize a penalty increase of more than $70,000 for the "size of business" component. Evidentiary Tr. at 25, 188-190. However, since the other components of the Region's proposed preliminary deterrence penalty equaled $62,500,[54] Mr. Trotter testified that he calculated the "size of business" component as limited to $62,500 consistent with the General CAA Penalty Policy's guidance that the size-of-violator component may be limited to 50% of the preliminary deterrence amount. *Id.* at 190.

Friedman & Schmitt argue that the $62,500 size-of-violator component fails to recognize that the Asbestos Penalty Policy contains an example suggesting that the size of the contractor, not the size of the property owner, should be used in circumstances similar to the present case. Friedman & Schmitt's Brief at 46-50.[55] Friedman & Schmitt specifically request that we follow the Asbestos Penalty Policy's guidance with respect to this example and use the size of Mr. Schmitt's business, rather than the size of Mr. Friedman's business, in setting this component of the penalty in this case. *Id.* at 39 n.5. The ALJ agreed with Friedman & Schmitt and, although he generally rejected the Asbestos Penalty Policy, he specifically followed the Asbestos Penalty Policy's guidance in using the size of Mr. Schmitt's business in calculating this penalty component. Initial Decision at 44. The ALJ also stated that he believed Mr. Schmitt was the more culpable respondent since Mr. Schmitt made the decision to strip the asbestos himself. *Id.*

The Region has requested that we reverse the ALJ's decision on this issue. Oral Argument Tr. at 35-38. This request, however, must fail. We have frequently stated that in cases where the ALJ assessed a penalty that "falls within the range of penalties provided in the penalty guidelines, the Board will generally not substitute its judgment for that of the [ALJ] absent a showing that the [ALJ] has committed an abuse of discretion or a clear error in assessing the penalty." *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994); *accord In re Chempace Corp.*, 9 E.A.D. 119, 131 (EAB 2000); *In re B & R Oil Co.*, 8 E.A.D.

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[53] The parties' stipulated that Mr. Friedman's net worth exceeded $100 million. Evidentiary Tr. at 25, 188-90.

[54] This amount is the sum of the initial gravity-based penalties of $15,000 for the notice violation, $2,000 for the record-keeping violation, and $13,500 for the wetting work practice violation, plus the economic benefit component of $32,000.

[55] In the Asbestos Penalty Policy example, a hypothetical company, Consolidated Conglomerates, Inc., which has over $100 million in assets and annual sales in excess of $10 million, hires Bert and Ernie's Trucking Company to demolish a building. Bert and Ernie's Trucking Company owns two tow trucks and does $25,000 of business each year. In showing how the penalty would be calculated, the Asbestos Penalty Policy includes a size-of-violator component of only $2,000 "based on Bert and Ernie's size only." Asbestos Penalty Policy at 14. The policy does not explain why Bert & Ernie's size is used, rather than the size of Consolidated Conglomerates.

39, 64 (EAB 1998); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 536 (EAB 1998); *In re Pac. Ref. Co.*, 5 E.A.D. 520, 524 (EAB 1994).

In the present case, the ALJ expressly followed the guidance of an example set forth in the Asbestos Penalty Policy to explain his decision to use the size of Mr. Schmitt's business in assessing the penalty in this case. The Region has not shown why that decision is an abuse of discretion or clear error. We also note that the ALJ's conclusion that Mr. Schmitt, not Mr. Friedman, made the decision to strip the RACM without hiring a certified asbestos abatement contractor is supported by the testimony at trial. Evidentiary Tr. at 264, 305, 325, 411. Accordingly, 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. Since the evidence shows that the value of Mr. Schmitt's business was approximately $150,000, Evidentiary Tr. at 395-96, and the General CAA Penalty Policy at page 14 recommends a $5,000 penalty increase for businesses of this size, we assess a $5,000 increase in the penalty to take into account the size of Mr. Schmitt's business. The preliminary deterrence amount of the penalty, therefore, is $35,600 (consisting of $2,200 for the record-keeping violation, $16,500 for the notice violation, $7,100 for the wetting violation, $4,800 for economic benefit, and $5,000 for the size-of-business penalty factor).

7. *Adjustments to the Preliminary Deterrence Amount*

The Asbestos Penalty Policy recommends that the penalty derived from consideration of the gravity of the violation be adjusted to the extent appropriate to take into account the additional adjustment factors discussed in the General CAA Penalty Policy. Asbestos Penalty Policy at 1. The General CAA Penalty Policy provides guidance for adjustments to take into account the violator's history of violations, degree of willfulness or negligence, degree of cooperation, and environmental damage. General CAA Penalty Policy at 15-19.

These adjustments are to be applied to the gravity component of the penalty, which includes the increase on account of the size of the violator's business, but are not intended to affect the economic benefit component of the penalty. *Id*. at 15. In the present case, we have determined to assess a gravity-based penalty of $30,800 (consisting of $16,500 for the notice violation, $2,200 for the record-keeping violation, $7,100 for the violation of the wetting requirements, and $5,000 for the size-of-business penalty factor) and a $4,800 economic benefit-based penalty. As discussed below, we reduce the gravity component by 15% to reflect Friedman & Schmitt's cooperation and good faith after the violations were discovered, but we do not make any adjustment on account of their compliance history and pre-discovery compliance efforts.

Friedman & Schmitt argue that the penalty should be reduced to take into account the totality of the circumstances of this case, including, in particular, their

lack of prior violations, their cooperation in the investigation, and their prompt efforts to correct the violations. Friedman & Schmitt's Brief at 50-52. Friedman & Schmitt also contend that the absence of a warning that their conduct violated the CAA, lack of actual environmental hazard caused by their conduct, lack of notice of EPA's interpretation of the regulations as discussed above, lack of any effort on their part to hide their violations and their good faith, all militate in favor of mitigation of the penalty. *Id.* at 51-52.

The ALJ concluded that Friedman & Schmitt acted in good faith. Initial Decision at 41-42. The ALJ also noted that Friedman & Schmitt have no prior history of violations. *Id.* at 42. The General CAA Penalty Policy, however, recommends that the violator's degree of willfulness or negligence only be used to *increase* the amount of the penalty since the CAA is a strict liability statute. General CAA Penalty Policy at 16. In other words, the statute contemplates that a significant penalty may be imposed even in the absence of any proof of intent or negligence. Thus, the penalties recommended in the General CAA Penalty Policy and the Asbestos Penalty Policy are based on the assumption that the violator acted with the best of intentions, and upward adjustments are warranted when there is appropriate proof that this is not the case. For this reason, the General CAA Penalty Policy likewise recommends that a history of violations may only be used to increase the amount of the penalty. *Id.* at 17. Consistent with this view, we have previously held that the absence of a history of prior violations and unknowing violation are not grounds for downward adjustment of penalty that is otherwise calculated in accordance with an Agency penalty policy. *See, e.g., In re Mobil Oil Corp.,* 5 E.A.D. 490 (EAB 1994). For these reasons, we reject Friedman & Schmitt's request that the penalty be reduced on these grounds.

However, the General CAA Penalty Policy does recommend that the violator's degree of cooperation in correcting the violation after it is discovered may be an appropriate factor. In the Policy's view, the degree of cooperation may, in some cases, justify a reduction in the penalty and, in other cases, justify an increase in the penalty. General CAA Penalty Policy at 16-17. The General CAA Penalty Policy recommends that any mitigation not exceed 30% of the gravity component. It explains that "some mitigation may [] be appropriate in instances where the defendant is cooperative during EPA's pre-filing investigation of the source's compliance status or a particular incident." *Id.* at 17. Mitigation is also appropriate when the violator "makes extraordinary efforts to * * * come into compliance after learning of a violation." *Id.*

In the present case, we conclude that the cooperation and good faith the ALJ found warrants a 15% reduction in the amount of the penalty. We do not grant the full 30% penalty reduction allowable under the General CAA Penalty Policy's guidance since Friedman & Schmitt did not prove "extraordinary efforts"

to come into compliance after learning of the violation.[56] *Id.* Accordingly, we reduce the $30,800 gravity-based penalty by $4,620, which produces a $26,180 adjusted gravity based penalty. We add to this the economic benefit penalty of $4,800 to arrive at the total civil administrative penalty of $30,980 for Friedman & Schmitt's three violations of CAA § 113 and the Asbestos NESHAP.

III. *CONCLUSION*

For the foregoing reasons, we find Morton Friedman and Richard Schmitt are liable for three violations of the Asbestos NESHAP, 40 C.F.R. part 61, subpart M, and Clean Air Act sections 112 and 114, 42 U.S.C. §§ 7412, 7414. Pursuant to Clean Air Act section 113, 42, U.S.C. § 7413, we impose a civil administrative penalty of $30,980 for these violations. Mr. Friedman and Mr. Schmitt shall pay the entire amount of this civil administrative penalty within thirty (30) days of service of this final order (unless otherwise agreed to by the parties). Payment shall be made by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

EPA, Region IX
Danielle Carr
P.O. Box 360863
Pittsburgh, PA 15251-6863

So ordered.

[56] For example, as discussed above in part II.D.4, Friedman & Schmitt did not correct the wetting violation for 16 days after the first day on which they received formal notice of the violation. Friedman & Schmitt have not shown that they were unable to correct this violation in a more timely fashion, and they have not shown that correcting this violation in this amount of time required extraordinary efforts.