IN RE NORMA J. ECHEVARRIA AND FRANK J. ECHEVARRIA D/B/A ECHECO ENVIRONMENTAL SERVICES

CAA Appeal No. 94-1

FINAL DECISION

Decided December 21, 1994

Syllabus

Norma J. Echevarria and Frank K. Echevarria, doing business as Echeco Environmental Services ("Echeco"), appeal the assessment against them of a $9,450.00 civil penalty for being found in violation of certain work practice standards relating to the removal of asbestos-containing materials. The presiding officer determined that the material removed by Echeco was not "adequately wet" in accordance with the standards, since dust was emitted from a block of the material upon inspection by an EPA inspector who found it lying unbagged on the floor of the removal site. As a threshold matter, Echeco contends that the work practice standards are unconstitutionally vague and therefore unenforceable. Secondly, even if the standards are enforceable, Echeco disputes the fact that a violation occurred, asserting that the presiding officer's ruling is not supported by a preponderance of the evidence because it rests solely on the testimony of the EPA inspector, which by itself is not a sufficient basis upon which to sustain the charges.

Held: The initial decision of the presiding officer is affirmed. Echeco failed to demonstrate any compelling circumstances justifying review of its claim that the work practice standards are unconstitutionally vague and unenforceable. Moreover, as a practical matter, its claim is effectively barred from administrative review as a matter of right by Clean Air Act § 307(b), the statutory provision precluding untimely judicial review of duly promulgated emission and work practice standards. In addition, the presiding officer did not err by relying on the inspector's testimony, which was unrefuted and not shown to be unreliable.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

On December 22, 1993, Chief Administrative Law Judge Henry B. Frazier, III issued an initial decision finding Norma J. Echevarria and Frank K. Echevarria, doing business as Echeco Environmental Services ("Echeco"), liable for violating Clean Air Act § 112, 42 U.S.C. § 7412, and certain regulations appearing at Subpart M (National Emission Standard for Asbestos) of the National Emission Standards for Hazard-

ous Air Pollutants ("NESHAP"), 40 C.F.R. Part 61. Specifically, the presiding officer found that Echeco violated 40 C.F.R. § 61.145(c)(3) and (c)(6)(i), which are emission standards (more precisely, work practice standards) for asbestos. These work practice standards require asbestos-containing material to be kept adequately wet while it is being removed from a facility component and until it is collected for disposal. For these violations, the presiding officer assessed a penalty of $9,450. Pursuant to the applicable procedural rules, 40 C.F.R. § 22.30(a), Echeco has appealed the presiding officer's decision, contending that the initial decision should be reversed because the liability finding is not supported by a preponderance of the evidence, and because the regulations at issue are unconstitutionally vague. For the reasons set forth below, we uphold the initial decision of the presiding officer.

I. *BACKGROUND*

Norma J. Echevarria and Frank J. Echevarria are husband and wife who do business as Echeco Environmental Services. In 1991, Echeco contracted to perform asbestos abatement work at the North Gem School in Bancroft, Idaho. In particular, Echeco was hired to remove asbestos-containing insulation from the boiler and the pipes in the school's boiler room.[1] The surface of the boiler was covered by asbestos-containing magnesium block insulation. The pipes were insulated with corrugated pipe lagging containing asbestos. The insulation in the boiler room had been encapsulated in the 1980s with several layers of cheese cloth and latex paint, resulting in an almost cast-hard encapsulant on the boiler and the pipes.

Echeco began work on June 3, 1991. Prior to removing any insulation, Echeco established a containment area in the boiler room.[2] Echeco utilized an airless sprayer hung near the center of the room to spray the entire boiler room with amended water during the abatement project. The water was amended with a surfactant to enhance its absorption by the asbestos-containing materials. Echeco also utilized a negative air machine to remove airborne asbestos fibers in the boiler room during the abatement project.

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[1] Echeco was also hired to remove asbestos-containing insulation from the pipes under the school's gymnasium. This portion of Echeco's work, however, is not at issue in this case.

[2] Specifically, Echeco installed a double layer of barriers over the windows and doors of the boiler room, and installed a decontamination unit at the entrance to the contained boiler room. The decontamination unit consisted of a clean room, a shower room, and a small dirty room. The drain in the middle of the boiler room floor was sealed so that no water from the abatement project would enter the wastewater system.

Brad Browning was the only Echeco employee to remove asbestos-containing insulation from the boiler room. Browning first removed the insulation from the boiler. On the second day of the project, June 4, 1991, Browning began to strip the insulation from the pipes. Browning attempted to wet the pipe insulation material as it was being removed from the pipes by cutting holes in the encapsulant and inserting a water hose into the holes. The water from the hose did not contain a surfactant. As Browning removed the pipe insulation, he placed it on the floor in the boiler room to absorb the water that had collected on the floor. At the end of the workday, Browning's practice was to place the insulation stripped that day in bags with water and seal them with duct tape. When he left the containment area for lunch on June 4, Browning left the asbestos-containing insulation that had been removed from the pipes that morning unbagged and on the floor.

Rebecca Goehring is an EPA inspector trained in how to determine compliance with the asbestos NESHAP requirements. As part of her training, Goehring was schooled in how to determine if asbestos-containing material is adequately wet. According to Goehring, one method of determining compliance with the adequately wet requirements "is the hands-on method, to pick up the sample, to break it, to handle it, to rub your hand across it, to see whether or not it emits any fibers or dust that you can see." Tr. at 24. Further, Goehring explained, she was trained to obtain samples from "piles of materials sitting on the ground * * * to determine whether or not they were adequately wet." *Id.* at 26. In the course of her employment, Goehring conducted over 300 asbestos NESHAP inspections. *Id.*

While Browning and other Echeco employees were at lunch on June 4, Goehring inspected the work in progress in the boiler room. The Echeco employees returned from lunch during her inspection, but did not enter the containment area to observe the inspection. Goehring remained in the containment area for approximately 20 minutes. During that time, she observed that the boiler had been completely stripped of its magnesium block insulation, and that all of this insulation was in bags on the floor. Goehring opened one of the bags and pulled out a piece of magnesium block. When she broke this sample, it emitted dust. The inside of the piece between the wet outside layers was dry and crumbled. Later laboratory testing revealed that this insulation sample was 35% amosite asbestos.

In contrast to the boiler, the pipes in the boiler room had only been partially stripped of their insulation at the time of the inspection. Goehring estimated that one-quarter of the pipe insulation that had been removed was bagged; the remaining three-quarters of the re-

moved pipe insulation was lying on the floor unbagged. Goehring observed that the pile of unbagged pipe insulation was "semi-wet." Tr. 217-18. However, when she tore a sample of the insulation from this pile, Goehring found that it was "very stiff, very dry" and that it "emitted fibers, released dust." Tr. 39. Later laboratory testing revealed that this sample contained 95% chrysotile asbestos.

Goehring's observations were recorded in a written inspection report and in photographs taken in the containment area, all of which were admitted into evidence in this proceeding. The report indicated that the exterior of the pipe insulation lying unbagged on the boiler room floor was:

> [W]hite and dusty with approximately fifty percent of the surface showing darker water spots. The interior surface of the pipe insulation was dry and white and showed the darker water spotted areas only near the end quarter sections of each piece. The paper covering and corrugated interior of the insulation released dust when the insulation was handled or torn.

Inspection Report (Compl. Ex. 1) at 4. The photographs of the pile of pipe insulation conform to the descriptions contained in the inspection report. Compl. Exs. 9A, 9D.

Based upon the June 4 inspection, U.S. EPA, Region X, filed a complaint alleging that Echeco's asbestos abatement activities at the North Gym School on June 4 violated the NESHAP for asbestos contained in 40 C.F.R. Part 61, Subpart M. Specifically, the complaint alleged that based upon the inspector's observations, Echeco violated 40 C.F.R. § 61.145(c)(3) by failing to keep the asbestos-containing insulation from the boiler and the pipes adequately wet while it was being removed, and 40 C.F.R. § 61.145(c)(6)(i) by failing to make sure that the removed asbestos-containing insulation from the boiler and the pipes remained adequately wet until it was collected for disposal. For these alleged violations, the complaint sought a penalty of $43,400.

Echeco denied the alleged violations, and a hearing was held in this matter on July 20-22, 1993 in Pocatello, Idaho. At the hearing, the Region relied primarily upon the inspector's testimony to establish the alleged violations. In response, Echeco relied primarily upon the testimony of Browning, the Echeco employee assigned the responsibility of removing the asbestos-containing material in the boiler room, to contend that the asbestos-containing insulation was adequately wetted when stripped and until collected for disposal. Echeco also produced

testimony to support its legal claim that the asbestos NESHAP requirements were unconstitutionally vague and thus unenforceable. Steve Harrington, an expert witness on behalf of Echeco, testified as to the vague and ambiguous nature of the "adequately wet" requirement, the absence of uniform, objective and quantifiable standards for measuring compliance with the requirement, and the impossibility of preventing emissions during asbestos removal work. Initial Decision at 21.

The presiding officer issued his initial decision on December 22, 1993, finding Echeco liable for the alleged violations and assessing a penalty of $9,450. The presiding officer refused to entertain Echeco's contention that the pertinent asbestos NESHAP regulations are unconstitutionally vague on the basis that section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), bars challenges to the regulations in this enforcement proceeding. That statutory provision provides that challenges to regulations and requirements promulgated under Clean Air Act § 112, such as the asbestos NESHAP requirements, can only be raised by a petition filed in the U.S. Court of Appeals for the District of Columbia within 60 days of the regulation's or requirement's promulgation. Further, the statute provides that if a regulation or requirement could have been challenged in such a fashion, it shall not be subject to judicial review in civil enforcement actions.[3]

Proceeding to the violations alleged in the complaint, the presiding officer first rejected Echeco's contention that the testimony of the EPA inspector is not credible. The presiding officer found that Goehring's testimony that the asbestos-containing insulation was not adequately wet was not refuted by that of Browning, the only Echeco employee working in the boiler room, who had acknowledged that "on every job I have ever been on I have seen visible emissions of some type." Tr. at 649. In addition, the presiding officer noted, none of Echeco's other witnesses contradicted Goehring's factual testimony. Goehring's testi-

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[3] In pertinent part, Clean Air Act § 307(b) provides:

> (1) A petition for review of action of the Administrator in promulgating any * * * emission standard or requirement under section 7412 [Clean Air Act § 112] of this title * * * may be filed only in the United States Court of Appeals for the District of Columbia. * * * Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register * * *.
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> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

42 U.S.C. § 7607(b).

mony, the presiding officer concluded, indicated that the pipe insulation laying unbagged on the boiler room floor "emitted fibers and released dust when the EPA inspector broke it," and therefore was not adequately wet. The presiding officer relied upon this testimony to find that Echeco violated both 40 C.F.R. § 61.145(c)(3) and (c)(6)(i). Specifically, the presiding officer concluded that Echeco "failed to comply with the NESHAP work practices to adequately wet the [asbestos-containing pipe insulation] during the stripping operation from the pipe in the boiler room and to adequately wet the [asbestos-containing insulation] stripped from the pipe and ensure that it remained wet until collected and contained or treated in preparation for disposal." Initial Decision at 30. However, concerning the insulation removed from the boiler, the presiding officer concluded that the requirements of § 61.145 did not apply to those materials because they had been collected for disposal, *i.e.*, bagged, and therefore Echeco did not violate the adequately wet requirements with respect to the insulation removed from the boiler.[4] For the violations found, the presiding officer assessed a penalty of $9,450.[5]

Echeco promptly appealed the presiding officer's decision. Echeco contends that the vagueness of 40 C.F.R. § 61.145(c)(3) and (c)(6)(i) renders the regulation unconstitutionally void and unenforceable. In addition, Echeco contends that the presiding officer's finding that Echeco violated 40 C.F.R. § 61.145(c)(3) and (c)(6)(i) is not supported by a preponderance of the evidence.

II. *ANALYSIS*

The complaint alleges violations of Clean Air Act § 112, 42 U.S.C. § 7412, and its implementing regulations. Section 112(b)(1) lists pollutants that Congress has determined present, or may present, a threat of adverse human health or environmental effects; asbestos is on that list. The statute also requires EPA to promulgate emission standards for point sources of pollutants on the list, known as the National Emission Standards for Hazardous Air Pollutants or "NESHAP." Clean Air Act § 112(d), 42 U.S.C. § 7412(d). However, Congress recognized that in some instances, emission standards applicable to point sources alone would not be effective in controlling emissions of hazardous air pol-

[4] The Region disagrees with this portion of the presiding officer's initial decision. Appellee EPA Region 10's Reply to Appellants' Notice of Appeal and Brief at 7-8 n.2. "However, since the Presiding Officer found liability for each violation based upon the unbagged pipe insulation * * *, Region 10 elected not to appeal the finding and conclusion concerning the magnesium block" insulation removed from the boiler. *Id.*

[5] The Region has not appealed the presiding officer's penalty assessment.

lutants to a safe level. For example, Congress explained that the emission of asbestos fibers during construction or demolition could not be controlled by focusing on a point source.[6] Therefore, Congress authorized EPA to promulgate work practice standards under Clean Air Act § 112 to meet the statute's objectives. Clean Air Act § 112(h).[7]

The NESHAP for asbestos consists of the work practice standards set forth in 40 C.F.R. Part 61 Subpart M. Involved here are the work practice standards set forth in § 61.145(c)(3) and (c)(6)(i). In pertinent part, § 61.145(c) provides:

> (c) Each owner or operator of a demolition or renovation activity * * * shall comply with the following procedures:
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> (3) When RACM [regulated asbestos containing material] is stripped from a facility component while it remains in place in the facility, adequately wet the RACM during the stripping operation.
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[6] Specifically, Congress said:

> Generally, the requirements of section 112 of the Clean Air Act * * * are implemented by the promulgation of numerical emission standards applicable to point sources of release * * * from stationary sources of the listed pollutants. However, in some cases regulation in this form would not be effective or appropriate for significant source categories. *For instance, emissions of asbestos fibers from construction or demolition sites cannot be controlled or even measured by focusing on a point source of emissions.* To assure that adequate control is, nevertheless, achieved, it is in some cases possible to prescribe the use of specific equipment or procedures in the design of a facility or conduct of an activity. In the 1977 amendments to the Clean Air Act * * * the Congress authorized the use of other regulatory requirements including design, equipment, work practice or operational standards as an alternative to emission standards to carry out the objectives of section 112.

S. Rep. No. 101-228, 101st Cong., 2d Sess. (1990) (reprinted in 1990 U.S.C.C.A.N. 3385, 3567) (emphasis added).

[7] This section of the Clean Air Act provides:

> For purposes of this section, if it is not feasible in the judgment of the Administrator to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants, the Administrator may, in lieu thereof, promulgate a design, equipment, *work practice*, or operational standard, or combination thereof * * *.

42 U.S.C. § 7412(h)(1) (emphasis added).

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

In essence, these work practice standards require a person engaged in the removal of asbestos-containing material to keep such material adequately wet during the removal process and until it is collected for disposal. "Adequately wet" means:

> [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. Wetting to prevent the release of particulates is the primary method of controlling asbestos emissions during demolition or renovation work.[8]

The asbestos NESHAP imposes a standard of strict liability for violating any of the work practice standards. *United States v. Sealtite Corp.*, 739 F. Supp. 464, 468 (E.D. Ark. 1990); *United States v. Ben's Truck and Equipment, Inc.*, 25 ERC 1295, 1298 (E.D. Cal. 1986). To impose liability under the asbestos NESHAP, the Agency must make 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. *United States v. MPM Contractors, Inc.*, 767 F. Supp. 231, 233 (D. Kan. 1990). Here, Echeco admits that the asbestos NESHAP work practice standards applied to its work at the North Gem School.[9] As to the second prong, Echeco contends that these work practice standards are unconstitutionally vague, and that even if the standards are enforceable, the conclusion that Echeco violated the standards is not supported by a preponderance of the evidence. Each of these contentions will be addressed in turn.

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[8] EPA, Asbestos/NESHAP Adequately Wet Guidance at 1 (Dec. 1990).

[9] The asbestos work practice standards are applicable if the requirements found in 40 C.F.R. § 61.145(a)(1) are met. That particular regulatory provision provides that the asbestos work practice standards apply to "owners or operators" of a "demolition or renovation activity" if the combined amount of asbestos-containing material to be stripped and removed is at least 260 linear feet on pipes or 160 square feet on other facility components. In its answer to the complaint, Echeco admitted that it was the owner or operator of a renovation activity at the North Gem School involving the requisite amount of asbestos-containing material. Answer at 2.

A. Vagueness of the Work Practice Standards

In this appeal, Echeco contends that the work practice standards are "void and constitutionally unenforceable on grounds of vagueness." Appellants' Brief in Support of Alternative Findings of Fact, Alternative Conclusions of Law and Order at 16 ("Appellants' Brief").[10] Echeco asserts that Clean Air Act § 307(b), 42 U.S.C. § 7607(b), does not apply here to preclude review of Echeco's constitutional challenge to the work practice regulations. According to Echeco, § 307(b) precludes only *judicial* review; there is no statutory provision precluding *administrative* review. Also, Echeco argues, relying upon *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), § 307(b) precludes only review of emission standards, not work practice standards. Alternatively, Echeco argues that if the statute does preclude review of Echeco's constitutional challenges to the work practice standards, the statute is itself unconstitutional.

We are not persuaded by Echeco's arguments. In our opinion, the presiding officer was correct, for the reasons stated below, in refusing to entertain Echeco's challenge to the constitutional validity of the applicable work practice standards. As a "general rule * * * challenges to rulemaking are rarely entertained in an administrative enforcement proceeding." *In re American Ecological Recycle Research Corp.*, RCRA (3008) Appeal No. 83-3, at 5-6 (CJO, July 18, 1985) (*citing In re Transportation, Inc.*, Docket No. CAA(211)-27, *et al.*, at 8 n.8 (CJO, Feb. 15, 1982) and *In re Dow Chemical Co.*, Docket No. TSCA(16(a))-1, at 17 n. 19 (CJO, July 28, 1982)). This general rule applies even when a party asserts that a rule is unconstitutionally vague. *In re South Coast Chemical, Inc.*, FIFRA Appeal No. 84-4, at 10 (CJO, Mar. 11, 1986). The decision to entertain such challenges is at best discretionary, and review of a regulation will not be granted absent the most compelling circumstances. *Id.* at 10; *American Ecological Recycle Research Corp.* at 6.

This presumption against challenges to the validity of a regulation in enforcement proceedings is a rule of practicality. While it is true, as Echeco asserts, that Clean Air Act § 307(b) only makes direct reference to preclusion of judicial review, not administrative review, the effect of this statutory provision is to make it unnecessary for an administrative agency to entertain as a matter of right a party's challenge to a rule subject to this statutory provision. Thus, ordinarily, the only way for a regulation that is subject to a preclusive review provision to be invalidated is by a court in accordance with the terms of the preclusive review provision. In the case

[10] Specifically, Echeco asserts that the asbestos NESHAP regulations provide "no practical or objective quantifiable or qualitative standard or measure of what is adequately wet." Respondents' Brief in Support of Proposed Findings of Fact and Conclusions of Law at 8.

of the Clean Air Act, § 307(b)(1) provides *inter alia* that challenges to any regulation or requirement promulgated under Clean Air Act § 112 must be brought within 60 days of promulgation by a suit in the United States Court of Appeals for the District of Columbia. Manifestly, neither Echeco nor anyone else has succeeded in having a court invalidate the asbestos work practice standard at issue in this case. Therefore, the rule is no longer subject to judicial challenge, and the Agency, for reasons of administrative efficiency, is obviously not interested in reexamining such a rule in an administrative proceeding. Once the rule is no longer subject to court challenge by reason of the statutory preclusive review provision, the Agency is entitled to close the book on the rule insofar as its validity is concerned.[11] *RSR Corp. v. Donovan*, 747 F.2d 294, 301 (5th Cir. 1984) ("An agency has an interest in finality and conservation of its resources. It should not be compelled to defend the same regulation against identical attacks in successive enforcement actions, when those challenges could and should have been asserted in the period before pre-enforcement review."). The Agency retains the power, however, to repeal or amend the rule if the rule no longer serves its intended purposes. Similarly, citizens may petition the Agency to repeal or amend a rule if it is not to their liking.[12] In both instances, however, the means of repealing or amending the rule are carried out in the context of a rulemaking forum, not an enforcement proceeding. *Cf.*, *SEC v. Chenery*, 332 U.S. 194, 203 (1947) ("the choice made between proceeding by general rule or by individual *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.").

The presumption against entertaining a challenge to the validity of a regulation is thus an especially strong presumption,[13] which, for the reasons set forth below, operates to bar Echeco's challenge to the validity of

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[11] In this connection, the Board's refusal to entertain a challenge to a regulation's validity is not itself reviewable in any subsequent appeal to the court. For a party to seek judicial review of the regulation in that manner, i.e., under the guise of having the court review the Board's refusal, would amount to nothing more than a transparent attempt to evade the very thing that § 307(b) seeks to prevent, i.e., *untimely* judicial review of duly promulgated regulations.

[12] *See In re Petroleum Management, Inc.*, UIC Appeal No. 87-5, at n. 10 (Adm'r, Sept. 15, 1988) (petitioner could have raised challenge to a rule by seeking a repeal or amendment of rule pursuant to 5 U.S.C. § 553(e)); *American Ecological Recycle Research Corp.* at n.3 (repeal of a rule is a form of rulemaking).

[13] But as a rule of practicality, some recognition must be given to the possibility of an exceptional case. Thus, if an extremely compelling argument were made as to a rule's invalidity (for example, where it has been held invalid in an intervening court decision), the Board could rely on it to dismiss the complaint. *See, e.g., In re Transportation, Inc., supra* (administrative hearing process for enforcing violations of CAA § 211(d) ruled invalid as being contrary to statute); *In re 170 Alaska Placer Mines, More or Less*, NPDES Appeal No. 79-1, at 17 (Adm'r, Mar. 10, 1980) (superseded rule that improperly shifted the burden of persuasion "must be regarded as a nullity, since it is tantamount to a revision of the statutory scheme and is, therefore, beyond the agency's

Continued

the asbestos work practice standards. Turning first to Echeco's assertion that Clean Air Act § 307(b) applies only to emission standards, not work practice standards, we are convinced that there is no merit to the assertion. Echeco relies upon *Adamo Wrecking Co.*, which held that the then-applicable version of § 307(b) applied only to emission standards. In *Adamo Wrecking Co.*, the Court concluded that a work practice standard is not an emission standard, and therefore that § 307(b) did not apply to work practice standards. That case is not helpful here, however, because the version of the Clean Air Act applicable to Echeco is different than the version interpreted in *Adamo Wrecking Co.* The version of § 307(b) at issue in *Adamo Wrecking Co.* applied to "any emission standard [promulgated] under [Clean Air Act] section 112." Before the final decision in *Adamo Wrecking Co.*, Congress amended § 307(b) to cover "any emission standard *or requirement* under section 112." *See Adamo Wrecking Co.* at 286 n.4 (emphasis added). It is the amended version of § 307(b) that controls here. Plainly, a work practice standard promulgated under § 112 is a requirement of § 112 for the purposes of § 307(b).[14] Further, after the decision in *Adamo Wrecking Co.*, Congress again amended the Clean Air Act, this time providing that for the purposes of § 307(b), an "emission standard" is defined to include any work practice standard. Clean Air Act § 302(k), 42 U.S.C. § 7602(k). Thus, as either an "emission standard" or a "requirement" under § 112, a work practice standard is plainly now covered by § 307(b). *See U.S. v. Walsh*, 8 F.3d 659 (9th Cir. 1993) (constitutional challenge to the asbestos NESHAP work practice standards precluded by § 307(b)).[15]

authority to promulgate."). In such circumstances, it would be ridiculous for the Board to uphold charges in a complaint that are based on an invalid rule merely because the rule remained on the books, i.e., had not been repealed or amended in a rulemaking proceeding. The act of repealing the rule can always be undertaken at a later date independently of the enforcement action. *See* 51 Fed. Reg. 25253 (July 11, 1986) ("As a result of the administrative opinion in the case, *In re: Transportation, Inc.*, Docket No. CAA (211) - 27, [*supra*], EPA ceased its administrative hearing process for enforcing the regulations under Part 80, and in 1982 adopted new procedures to implement 211(d) of the [Clean Air] Act."); 45 Fed. Reg. 33415 (May 19, 1980) (rule conforming to interpretation in *In re 170 Placer Mines, More or Less, supra*). In addition, rather than having the Board dismiss the complaint outright, the option of staying the enforcement proceeding to allow a rulemaking proceeding to run its course would also be available.

[14] *See* Clean Air Act § 112(h), 42 U.S.C. § 7412(h), which authorizes the Agency to promulgate work practice standards in lieu of emission standards when emission standards cannot feasibly be prescribed or enforced.

[15] As Echeco notes, the *Walsh* court relied upon a provision in the Clean Air Act that "any * * * work practice * * * standard * * * shall be treated as an emission standard for purposes of the provisions of this chapter." 659 F.2d at 661. This provision, as a result of amendments adopted in 1990, is no longer a part of the Clean Air Act, and therefore, Echeco asserts, *Walsh* is not persuasive on this issue. What Echeco overlooks, and we find significant, is that the very same amendments expanded the definition of "emission standard" in § 302(k) to include work practice standards. In our opinion, this expanded definition has the same effect as the language relied upon in *Walsh*, and therefore Echeco's assertion that *Walsh* is not persuasive lacks merit.

Given that § 307(b) applies to the asbestos work practice standards, nothing Echeco has argued persuades us that there is a compelling basis for entertaining a challenge to the validity of the standards. Although Echeco asserts that "[i]t is difficult to imagine a more compelling question than whether a United States agency can enforce regulations and impose severe penalties, where the regulations on their face and as applied[16] are constitutionally void for vagueness," Appellants' Brief at 17, the mere assertion of a constitutional claim alone does not amount to a compelling circumstance justifying a deviation from the general rule against reviewing the validity of regulations in administrative enforcement actions. Moreover, nothing that Echeco has said persuades us that the regulation is impermissibly vague. As defined, the term "adequately wet" means that the asbestos-containing material is sufficiently wet to "prevent the release of particulates." 40 C.F.R. § 61.141. This definition provides a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited, or conversely, what conduct is required. *See Grayned v. City of Rockford*, 408 U.S. 109 (1972) (a regulation will be declared unconstitutionally vague only if it does not provide a person of ordinary intelligence reasonable notice of the prohibited conduct). Here, Inspector Goehring's testimony demonstrates that visible particulates were present, thus providing objective and ascertainable proof that the pipe insulation was not adequately wet.

Lastly, Echeco argues that if § 307(b) precludes constitutional challenges to regulations within its ambit we should hold § 307(b) itself unconstitutional. As discussed above, the board has concluded that § 307(b) establishes a presumption of nonreviewability that Echeco has not overcome. More importantly, however, this issue is clearly beyond this Board's purview. *Mathews v. Diaz*, 426 U.S. 67, 76 (1976) (constitutionality of a statute is beyond an agency's competence); *Johnson v. Robison*, 415 U.S. 361, 368 (1974) ("adjudication of the constitutionality of Congressional enactments has generally been thought beyond the jurisdiction of administrative agencies," quoting *Oestereich v. Selective Service System Local Board*, 393 U.S. 233, 242 (1968)); *Robinson v. U.S.*, 718 F.2d 336, 338 (10th Cir. 1983) (agency may not declare a statute unconstitutional).[17] Accordingly, for all of the reasons stated above, we reject Echeco's efforts to

[16] Nowhere on appeal does Echeco articulate how or why the *application* of the work practice standards results in an infringement of any constitutionally protected rights. Our discussion of Echeco's various challenges to the application of the regulation appears under the heading "B. Preponderance of the Evidence."

[17] *See In re Dr. Marshall C. Sasser*, CWA Appeal No. 91-1, 13 (CJO, Nov. 21, 1991) (argument that Clean Water Act § 309(g) unconstitutionally denies the right to a jury trial is beyond the jurisdiction of the EPA); *Petroleum Management, Inc.* at 4 n.5 (Administrator cannot declare a statute unconstitutional because that authority is exclusive to the courts).

escape liability on the grounds that the standards are unenforceable due to their alleged vagueness.

B. Preponderance of the Evidence

Pursuant to 40 C.F.R. § 22.24, the presiding officer must make his factual findings based upon a preponderance of the evidence. The "preponderance of the evidence" is a standard of proof, and as such 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 Winship*, 397 U.S. 358, 370 (1970). In essence, the preponderance of the evidence standard means that a fact finder should believe that his factual conclusion is more likely than not. *In re Great Lakes Division of National Steel Corp.*, EPCRA Appeal No. 93-3, at 10 n. 20 (EAB, June 29, 1994) (preponderance of the evidence means that a fact is more probably true than untrue); *In re City of Detroit Public Lighting Dept., et al.*, TSCA Appeal No. 89-5, at 8 (CJO, Feb. 6, 1991) (the City of Detroit was not responsible for discharges that deposited PCBs because, *inter alia*, "[i]t is more likely than not that the uncontrolled discharges that contaminated the areas * * * occurred before Detroit took possession of the property"); Koch, *Administrative Law and Practice* at 491 (1985).

Here, the presiding officer concluded, after evaluating all of the testimony and documentary evidence, that a preponderance of the evidence indicated that Echeco failed to keep the pipe insulation adequately wet while it was being stripped and until it was collected for disposal. In finding that the pipe insulation was not kept adequately wet in accordance with the regulations, the presiding officer relied upon the inspector's testimony that "when she tore a piece of 'semi-wet' air cell pipe insulation lying on the floor of the boiler room, she discovered that it was very stiff and very dry and that when torn, it emitted fibers and released dust." Initial Decision at 28-29. The inspector's handling and tearing of the pipe insulation was consistent with her training to determine violations of the adequately wet requirements, as detailed above. The regulatory definition of "adequately wet" provides that "[i]f visible emissions are observed coming from asbestos-containing material, then that material has not been adequately wetted." 40 C.F.R. § 61.141. Therefore, the presiding officer concluded, "[s]ince the piece of air cell pipe insulation which had been stripped from facility components and which was lying on the floor of the boiler room emitted fibers and released dust when the EPA inspector broke it, I conclude that the material was not adequately wet." Initial Decision at 29.

In sum, Echeco disagrees with the factual conclusions made by the presiding officer. The presiding officer acknowledged that the testimony of the witnesses for both parties was convincing. Tr. at 697. Despite the perceived closeness of the case, the presiding officer ultimately found that a preponderance of the evidence showed that Echeco violated the adequately wet requirements. Because the presiding officer had the opportunity to observe the witnesses testify and to evaluate their credibility, his factual findings are entitled to considerable deference here. *Great Lakes Division of National Steel Corp.* at 22; *In re Port of Oakland and Great Lakes Dredge and Dock Company*, MPRSA Appeal No. 91-1, at 28 n.59 (EAB, Aug. 5, 1992). While Echeco has expressed its disagreement with the presiding officer's determinations, it has not demonstrated that any of the factual findings made by the presiding officer are not supported by a preponderance of the evidence.

Echeco makes several arguments that the presiding officer's conclusion is not supported by a preponderance of the evidence. First, Echeco contends that "an asbestos inspector's observations are insufficient alone to establish NESHAP violations." Appellants' Brief at 9. We disagree. "In cases involving alleged violations of the NESHAP for asbestos, courts have *routinely* relied on the observations of inspectors to determine whether asbestos was adequately wetted." *MPM Contractors* at 233 (emphasis added). The court's statement in *MPM Contractors* is consistent with the approach the Agency has advised the regulated community it will take in enforcing the adequately wet requirements. In an Agency guidance document entitled "Asbestos/NESHAP Adequately Wet Guidance" (Dec. 1990), the Agency informed the regulated community that "[d]eterminations of whether asbestos materials are adequately wetted are made by EPA inspectors on site." *Id.* at 1. In the same document, the Agency again stated that "[t]he determination of whether [asbestos-containing material] has been adequately wetted is generally based on observations made by the inspector at the time of the inspection." Even a witness for Echeco testified that the "only way to tell if something is adequately wet is to physically be there, and * * * to handle the material," or, in other words, to inspect the material. Tr. at 602. It is difficult to imagine how the asbestos NESHAP enforcement program, or many of the other enforcement programs conducted by the Agency, could be of any effect if an inspector's credible observations were not probative evidence of a violation.[18] When an inspector trained to determine compliance with the applicable regulations

[18] *See In re Celotex Corp.*, TSCA Appeal No. 91-3 (CJO, Dec. 16, 1991) (presence of unmarked PCB capacitors established by an inspector's testimony describing her observations); *In re Elwin G. Smith Division, Cyclops Corp.*, RCRA (3008) Appeal No. 86-6 (CJO, Aug. 14, 1990) (violation found based upon testimony of inspector; presiding officer did not abuse discretion in crediting inspector's testimony more than respondent's).

reasonably determines that a violation has occurred and provides a rational basis for that determination, liability should follow, absent proof that the inspector's testimony lacks credibility.[19] Moreover, we note that here, the inspector's testimony was corroborated by her inspection report and photographs, which were admitted into evidence.

Echeco cites no authority, and provides no basis, for its position that an inspector's testimony alone is insufficient to establish a violation of the work practice standards. Instead, Echeco argues that *MPM Contractors* is not controlling here because in that case, and in the cases cited therein, the facts observed by the inspector were undisputed. Implicit in this argument is the suggestion that the facts observed by the inspector in this case are in dispute, presumably based upon Browning's testimony. Again, we disagree. Nothing in Browning's testimony contradicts or otherwise refutes the inspector's testimony that when broken, a piece of the insulation that had been removed from the pipe that morning emitted fibers and dust. The facts relied upon by the presiding officer have not been refuted, or disputed, or in any other way shown to be wrong, by Echeco. Although Echeco's employees had the opportunity to observe the inspection, none availed themselves of that opportunity, and in so doing they diminished their ability to refute the inspector's testimony directly. Only one of Echeco's witnesses—Browning—was ever actually in the containment area during the removal process, and he was the one removing the insulation.[20] His testimony nevertheless hardly refutes the inspector's testimony, for although he attempted to wet the insulation as best as he could, he conceded that "on every job I have ever been on I have seen visible emissions of some type." Tr. at 649. As the presiding officer noted, presumably "every job" would include the job at the North Gem School.[21]

Echeco also asserts that Browning's statement that "on every job I have ever been on I have seen visible emissions of some type," is not an admission that he inadequately wetted the pipe insulation here. The presiding officer did not label Browning's statement an "admission." Instead, he concluded that the statement did not refute the inspector's observations. We agree. Browning stated that on *every* job he has seen

[19] Indeed, counsel for the respondents acknowledged that the inspector's testimony "is either going to win or lose this case." Tr. at 99.

[20] Three of Echeco's five witness were never in the containment area. One was in the area only for a few moments, and was not there after Browning began removing the pipe insulation.

[21] Steve Harrington, an expert witness who testified on behalf of Echeco, and who was never in the containment area at the North Gem School, also testified that he had never been on an asbestos abatement project where fibers were not released. Tr. at 595, 600.

visible emissions of some type. He did not exclude this particular job. Visible emissions from asbestos-containing material indicate that the material is not adequately wet under the applicable regulations. 40 C.F.R. § 61.141. Thus, Browning's testimony provides no reason for concluding that this job is different from any other on which he has worked. In this way, his testimony supports the conclusion that despite his efforts to wet the pipe insulation as best as he could, visible emissions nevertheless occurred. If Echeco is arguing that compliance with the adequately wet requirements is impossible because, as Browning explained, visible emissions are present on every job, we construe the argument as a challenge to the validity of the regulations. As previously explained, this is not the proper forum to entertain such a challenge.

According to Echeco, in order to find a violation of the adequately wet requirements there must be evidence that the emissions observed by the inspector contain asbestos. Because such evidence is lacking here, Echeco contends, a preponderance of the evidence does not show a violation. This argument lacks merit. Under the clear language of the applicable regulations, visible emissions from asbestos-containing material demonstrate that the material is not adequately wet. 40 C.F.R. § 61.141. The visible emissions do *not* have to be visible *asbestos* emissions. Section 61.141 defines "visible emissions" as *any* emissions from asbestos-containing material. Thus, the regulations themselves contradict Echeco's assertion that a violation of the adequately wet requirements depends upon proof that the observed visible emissions were asbestos emissions. Further, to establish a violation of the adequately wet requirements, it is not essential for the Agency to prove that emissions occurred. *MPM Contractors* at 233; *Ben's Truck and Equipment, Inc.* at 1299. "It is the failure to follow the work practice to wet adequately rather than the release of visible emissions which creates liability." *Id.* Obviously, if it is not essential for the government to prove a release of visible emissions to show a violation of the adequately wet requirements, it need not prove a release of visible asbestos emissions.

In any event, we note that later laboratory testing of the sample torn by the inspector revealed that the pipe insulation contained 95% asbestos, thus making it more likely than not that the emissions observed by the inspector did in fact contain asbestos.[22] With respect to this laboratory test, Echeco argues that the sample of pipe insulation torn by the inspector was wet when it was received at the laboratory,

[22] In contrast, there is nothing in the record to support Echeco's suggestion that the fibers released were attributable only to the encapsulant on the insulation rather than the asbestos.

and consequently the presiding officer could not conclude that Echeco violated the adequately wet requirements. The Region, however, did not allege that Echeco failed to wet the pipe insulation. Instead, the Region alleged that Echeco failed to keep the pipe insulation *adequately* wet. As noted above, adequately wet means wet enough to prevent the release of visible emissions. Even though Echeco wetted the pipe insulation, its efforts did not make the pipe insulation adequately wet as that term is defined in the applicable regulations.

According to Echeco, there is no evidence to support the presiding officer's conclusion that the piece of insulation torn by inspector Goehring was actually removed from the pipe by Echeco. Echeco relies upon Browning's testimony that some pipe insulation would fall from the pipes without his effort in trying to strip that piece of insulation. Echeco maintains that the requirement to keep asbestos-containing material adequately wet during removal applies only to the material it is intentionally removing, and not to pieces that fall without any intentional effort on its part. Because the piece of pipe insulation torn by the inspector could have been one of the pieces that fell without Browning's effort, Echeco asserts that there is insufficient evidence to find that it violated this requirement.

In essence, Browning testified that the insulation made it from the pipes to the pile on the boiler room floor in one of two ways: by his intentional act of removing the insulation, or by his unintentional act of "bangling a] pipe real hard" so that a piece of insulation further away from the one he was working on would fall.[23] There is nothing in the record indicating whether the torn pipe insulation that emitted fibers was a piece removed by Browning's intentional efforts, or a piece that fell without Browning's intentional efforts. Such information, however, is not necessary to establish a violation. The intent to

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[23] Browning's testimony on this point provides:

> Q. During your stripping activities on June 3 and June 4 did you observe any of the pipe or boiler insulation that became dislodged or fell without you actually trying to strip it from the components?
>
> A. Yes, sir.
>
> Q. What kind or —
>
> A. Pipe insulation. A lot of times like when you are at Point B down here or something and you turn around and you don't see a pipe or something, you will bang that pipe real hard and with the state of it all being wet and stuff like that, it will just (indicating) fall right off the pipe.

Tr. at 654-655.

remove a piece of asbestos-containing material is not an element of the adequately wet violation because, as explained above, the asbestos NESHAP requirements impose strict liability. As explained in the proposal to promulgate § 61.145(c), the requirements of that provision "apply to *all* asbestos material including materials that have been stripped or removed. This is intended to clarify that materials that were not stripped *but may have fallen off facility components* must be treated the same as those that were stripped." 54 Fed. Reg. 917 (Jan. 10, 1989) (emphasis added). Thus, all that matters here is that Browning, an Echeco employee, removed the insulation from the pipes found by the inspector in the pile on the boiler room floor, and which, when broken, released dust and emitted fibers.

Echeco also contends that because the inspector did not witness the stripping and removal of pipe insulation, there is no evidence showing how wet the pipe insulation was when it was stripped. Thus, Echeco concludes that there is insufficient evidence to conclude that it failed to keep the pipe insulation adequately wet while removing it from the pipes.

It is true that the inspector did not observe the actual pipe insulation stripping activities. There is no requirement, however, that the inspector observe the removal activities. *See Sealtite Corp.* (violation based upon inspector's observations of asbestos-containing *waste* materials). If an inspector was required to observe the stripping operation, regulated entities could effectively halt any enforcement activity by stopping work whenever an inspector appears on site. Moreover, the requirement to keep asbestos-containing material adequately wet until it is collected for disposal implies that the material will remain adequately wet from the time it is removed from a facility component until it is collected in bags for disposal. In this case, the pipe insulation that was torn by the inspector had been removed only a few hours before the inspection. Had it been adequately wet when removed, it is unlikely that it would have been, as the inspector described it, "very stiff [and] very dry" when she examined it.

Lastly, Echeco contends that the evidence is insufficient to show that it violated the requirement to keep the pipe insulation adequately wet until it was collected for disposal. Echeco relies upon the part of § 61.145(c)(6)(i) providing that asbestos-containing material removed from a facility component must remain adequately wet "until collected and contained or treated in preparation for disposal in accordance with § 61.150." Section 61.150 prohibits visible emissions to the outside air in the disposal of asbestos-containing waste material (asbestos-containing material that has been removed or stripped). According to

Echeco, because the pipe insulation remained in the boiler room containment area and released no visible emissions to the air outside that containment area, Echeco complied with § 61.150 and therefore complied with § 61.145(c)(6)(i).

Echeco has misread the applicable regulations. Echeco is charged with violating § 61.145(c)(6)(i), which, unlike § 61.150, does not contain any provision prohibiting releases to the outside air. Indeed, such a requirement was deleted from § 61.145(c)(6)(i) in 1990,[24] before Echeco's violations took place. Thus, in order to establish a violation of § 61.145(c)(6)(i), the Region need not prove any emissions to the outside air. *Walsh* at 664 (attempt to sidestep adequately wet requirements by arguing that emissions must reach outside air to show violation is rejected because "[t]he question of emission of an air pollutant to the ambient air is not relevant. The violation of the work practice rule violates the statute."). In other words, compliance with the disposal requirements in § 61.150 does not equate to compliance with the removal or stripping requirements in § 61.145(c)(6)(i). The requirements in § 61.145(c)(6)(i) apply to asbestos-containing material that has been stripped or removed *before* it is collected or contained for disposal. 49 Fed. Reg. 13659 (Apr. 5, 1984). The requirements of § 61.150 apply to the material only *after* it has been collected or contained for disposal. *Id.* Here, Echeco has been charged with, and a preponderance of the evidence demonstrates, a violation of § 61.145(c)(6)(i)—the failure to keep the insulation removed from the pipes adequately wet until it is collected for disposal.

III. *CONCLUSION*

Echeco has failed to demonstrate any compelling circumstances justifying review of its claim that the work practice standards violated by Echeco are unconstitutionally vague and unenforceable. Moreover, as a practical matter, its claim is effectively barred from administrative review as a matter of right by Clean Air Act § 307(b). In addition, Echeco has failed to demonstrate that the presiding officer's determination that Echeco violated the requirements to keep asbestos-containing material adequately wet during the removal process and until it was collected for disposal is not supported by a preponderance of the evidence. Accordingly, the initial decision of the presiding officer is hereby affirmed.

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[24] *See* 55 Fed. Reg. 48419 (Nov. 20, 1990). Previously, the predecessor to § 61.145(c)(6)(i) provided that "[e]ach owner or operator to whom this section applies shall comply with the following procedures to prevent emissions of particulate asbestos material to the outside air." 49 Fed. Reg. 13662 (Apr. 5, 1984).

Respondents Norma J. Echevarria and Frank J. Echevarria d/b/a Echeco Environmental Services shall pay a civil penalty to the United States in the sum of $9,450.00. Payment shall be made by cashier's or certified check payable to "Treasurer, United States of America." The check shall be sent to the following address within sixty (60) days of the date of service of this decision:

EPA—Region X
Regional Hearing Clerk
P.O. Box 360903M
Pittsburgh, PA 15251

So ordered.