IN RE LYON COUNTY LANDFILL

CAA Appeal No. 00-5

FINAL DECISION AND ORDER

Decided April 1, 2002

Syllabus

Lyon County Landfill (the "County") appeals an April 4, 2000 initial decision ("Initial Decision") by a U.S. EPA administrative law judge ("ALJ") holding the County liable for six violations of the asbestos National Emission Standards for Hazardous Air Pollutants ("NESHAP") active waste disposal site standard and assessing a civil penalty of $45,800. The County challenges the ALJ's findings of fact and conclusions of law regarding liability and penalty assessment for all six counts of the Complaint. This is the Board's first opportunity to interpret the asbestos NESHAP's active waste disposal site standard.

Region V's Complaint alleged that the County failed to satisfy several of the requirements in the active waste disposal site standard, 40 C.F.R. § 61.154. Specifically, the Region alleged six violations: Counts I and II — allowing, on two consecutive days, the discharge of visible emissions to the outside air from an active waste disposal site where asbestos-containing waste material ("ACWM") had been deposited and failing to adequately cover ACWM; Count III — failing to maintain complete waste shipment records; Count IV — failing to furnish upon request, and make available during normal business hours for inspection, a map or a diagram showing the location, depth and area, and quantity of the ACWM within the disposal site; Count V — failing to maintain an updated map or diagram recording the location, depth and area, and quantity of the ACWM within the disposal site; and Count VI — failing to notify the Administrator forty-five (45) days prior to excavating or otherwise disturbing any ACWM that had been deposited at the waste disposal site.

Held: The Board affirms the ALJ's findings of liability for Counts I — III and VI, and it reverses the ALJ's findings of liability for Counts IV and V. Further, the Board reduces the penalties for Counts II and VI. Accordingly, it reduces the total civil penalty of $45,800 assessed by the ALJ to $18,800.

With respect to Counts I and II, the Board finds that ACWM in the form of RACM (regulated asbestos-containing material), within the meaning of 40 C.F.R. § 61.141, was present on the surface of the Landfill during the two days of inspection. The Board interprets the definition of ACWM in 40 C.F.R. § 61.141 to include RACM disposed of at an active waste disposal site, thereby rejecting the argument that the concept of RACM only applies at a demolition or renovation operation, not at an active waste disposal site. Furthermore, the Board finds adequate record support that visible emissions coming from ACWM were present on both days of the inspection and that the County failed to satisfy any of the alternative work practices (i.e., covering the material or applying a dust suppression agent) allowed under the active waste disposal site standard. Finally, the Board rejects

the County's efforts to add additional elements to the Region's burden in proving the violations. Having established that: (1) the active waste disposal site standard applies to the County (i.e., the landfill is an active waste disposal site that receives ACWM from "covered" sources); (2) there were visible emissions coming from ACWM at the site; and (3) the County did not meet any of the alternative work practice standards for covering the waste material, the Region need not additionally prove the friability of the asbestos waste, the existence of a "threshold" amount of waste material, or trace the origins of the asbestos waste to a specific source.

For Counts III and VI, the Board also upholds the ALJ's findings of fact and conclusions of law. However, with respect to Counts IV and V, the Board reverses the ALJ's finding of liability. Specifically, the Board holds that the plain language of the two provisions at issue in Counts IV and V does not require that records be kept at the landfill (Count IV) or be updated immediately, the time interval urged by the Region, or at any other particular time interval. The record must be updated with sufficient frequency to minimize the likelihood of an unintentional disturbance of ACWM, and the County's practice of updating the records monthly was not unreasonable or unlawful under the circumstances (Count V).

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Stein:

On April 4, 2000, Administrative Law Judge Barbara A. Gunning ("Administrative Law Judge" or "ALJ") issued an initial decision ("Initial Decision") finding Lyon County (the "County") liable for violations of Clean Air Act (the "Act" or "CAA") section 112, 42 U.S.C. § 7412, and various regulatory requirements of the National Emission Standards for Asbestos found at 40 C.F.R. part 61, subpart M ("asbestos NESHAP"). In the Initial Decision, the ALJ found that the County violated 40 C.F.R. § 61.154, which includes emission limits, work practice standards, notification requirements, and recordkeeping requirements for active waste disposal sites that accept asbestos-containing waste material, and she assessed a civil penalty of $45,800 against the County. The County has appealed the Initial Decision, asserting that the Initial Decision should be reversed because, *inter alia*, the evidence does not support the findings of fact and conclusions of law made by the ALJ.

We begin by summarizing the factual and procedural history of the case and the relevant statutory and regulatory background. Thereafter, we more fully describe the arguments raised by the parties and explain the rationale for our resolution of the issues. For the reasons set forth below, we affirm the ALJ's findings of liability for Counts I, II, III, and VI; we reverse her findings of liability and penalty for Counts IV and V; and we assess a total civil penalty of $18,800 against the County.

I. *BACKGROUND*

A. *Factual Background*

Lyon County, a municipality in Minnesota, owns and operates the Lyon County Landfill ("Landfill") located in Lynd, Minnesota. Joint Stipulations of Facts and Law ¶¶ 7-8 (May 22, 1998) ("Joint Stips."). On July 20 and July 21, 1994, two Minnesota Pollution Control Agency ("MPCA") inspectors conducted an asbestos NESHAP compliance inspection of the Landfill. Upon arriving at the Landfill, the inspectors requested to see a map or diagram of the location of asbestos-containing waste material ("ACWM")[1] within the disposal site. Hearing Transcript ("Tr.") at 268-69 (June 3-4, 1998) (Meier). An employee of the Landfill replied that the map was not kept at the Landfill but, rather, at the Lyon County Courthouse. Tr. at 40 (Connell), 269 (Meier), 460 (Henriksen). Employees of Lyon County thereafter directed the inspectors to a mounded area in which the County disposed of ACWM. Tr. at 55-56 (Connell), 270 (Meier).

While inspecting this area, the inspectors observed that ripped plastic bags with asbestos warning labels attached to them were lying uncovered on the surface of the Landfill. Complainant's Exhibit ("C Ex.") 1 (Inspection Report). The inspectors further observed and collected samples of what they described as dry suspect ACWM on the surface of the mounded area and the road leading to the mounded area. *Id.* The inspectors noted that "visible emissions" were present in this area. *See* C Ex. 1; Tr. at 63, 89, 278, 287. According to the inspectors, prior to leaving the Landfill on July 20, 1994, they advised a County Landfill employee that the exposed ACWM was a violation of the asbestos NESHAP. *See* C Ex. 1, at 31.

The following day the inspectors returned to the Landfill. They observed that the mounded area had been covered with dirt, but that ripped bags with the asbestos warning label attached were still present in this area. Additionally, the inspectors noted that one of the ripped bags had an asbestos waste generator label with Tyler High School's name printed on it. The inspectors had not observed this bag during the previous day's inspection. *See* C Ex. 1; Tr. at 92, 286. Further, they again observed dry suspect ACWM on the surface of the disposal area and visible emissions from this area. *See* C Ex. 1; Tr. at 89, 287. During the two-day inspection, the inspectors collected six samples of suspect ACWM and took 22 photographs of the material. Subsequent analysis of the samples revealed that each sample contained asbestos ranging from five to thirty percent. *See* C Exs. 1-2.

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[1] The term ACWM has a specific regulatory meaning, which we discuss *infra* Part I.C.

In conjunction with their inspection of the Landfill on July 21, 1994, the inspectors reviewed the Landfill's asbestos records at the Lyon County Courthouse. These records included waste shipment records ("WSRs"), purchase orders, and a map of the Landfill that identified the location of ACWM within the disposal site. *See* C Ex. 1; Tr. at 435-37. During their initial review of the County's records, the inspectors noted that one of the WSRs did not indicate the quantity of ACWM delivered for disposal. *See* Tr. at 81, 120; C Ex. 7B. Additionally, the inspectors noted that May 9, 1994, was the last entry on the map that contained the location of ACWM at the disposal site.[2]

B. *Procedural Background*

Based on the July 20 and 21, 1994 inspection, United States Environmental Protection Agency ("U.S. EPA" or "Agency"), Region V filed a six-count complaint ("Complaint") against the County on August 14, 1996. In its Complaint, U.S. EPA, Region V ("Region" or "Region V") alleged that the County had violated several requirements of the asbestos NESHAP. Specifically, the Complaint alleged six violations, all of which are at issue in this appeal: Count I — allowing the discharge of visible emissions to the outside air from an active waste disposal site where ACWM had been deposited, and failing to adequately cover ACWM on July 20, 1994, in violation of 40 C.F.R. § 61.154(a); Count II — allowing the discharge of visible emissions to the outside air from an active waste disposal site where ACWM had been deposited, and failing to adequately cover ACWM on July 21, 1994, in violation of 40 C.F.R. § 61.154(a); Count III — failing to maintain complete WSRs in violation of 40 C.F.R. § 61.154(e)(1)(iii); Count IV — failing to furnish upon request, and make available during normal business hours for inspection, a map or a diagram showing the location, depth and area, and quantity of ACWM within the disposal site in violation of 40 C.F.R. § 61.154(i); Count V — failing to maintain an updated map or diagram recording the location, depth and area, and quantity of the ACWM within the disposal site in violation of 40 C.F.R. § 61.154(f); and Count VI — failing to notify the Administrator forty-five days prior to excavating or otherwise disturbing any ACWM that had been deposited at the waste disposal site in violation of 40 C.F.R. § 61.154(j). *See* Complaint ¶¶ 31, 44, 52, 58, 62, 75.

On June 3 and June 4, 1998, the ALJ held a hearing on the matter during which both sides presented their cases. On August 21, 1998, the ALJ filed her first initial decision, dismissing the Complaint against the County for lack of jurisdiction pursuant to section 113(d)(1) of the CAA. Region V appealed the ALJ's first initial decision to this Board. After oral argument, the Board reversed in part

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[2] This date appears to be inconsistent with other evidence admitted at hearing. According to the ALJ, the testimony at the hearing suggests that the County had updated the map on May 19, 1994. *See* Initial Decision ("Init. Dec.") at 41.

the ALJ's findings and remanded the matter for further proceedings.[3] *See In re Lyon County Landfill*, 8 E.A.D. 559 (EAB 1999).

On April 4, 2000, the ALJ issued her Initial Decision on the merits of the case. As noted above, in her Initial Decision, the ALJ found the County liable on all counts and assessed a civil penalty of $45,800. Lyon County timely appealed the Initial Decision on May 1, 2000, and requested oral argument on the issues raised on appeal. The Region filed its response brief requesting that we affirm the Initial Decision's holdings and did not raise any issues on cross-appeal.

On January 24, 2001, the Board issued an order requesting that the parties present argument on the "elements necessary to prove a violation of the active waste disposal site standard for visible emissions under 40 C.F.R. § 61.154." *See* Order Scheduling Oral Argument at 5 (Jan. 24, 2001). The oral argument was held on March 1, 2001.

C. *Statutory and Regulatory Background*

This case involves alleged violations of section 112 of the CAA, 42 U.S.C. § 7412, and its implementing regulations. In section 112(b) of the Act, Congress listed pollutants that it determined present, or may present, a threat of adverse human health or environmental effects. Asbestos is included as a hazardous air pollutant in section 112(b). The Act requires the Administrator to develop regulations that establish emission standards for each category or subcategory of major sources or area sources of hazardous air pollutants listed in section 112(b) of the Act.[4] CAA § 112(d), 42 U.S.C. 7412(d). These standards are known as the National Emission Standards for Hazardous Air Pollutants or "NESHAPs." *See* 40 C.F.R. pt. 61. Pursuant to section 112, the Administrator promulgated regulations that establish emission standards or work practice standards, or sometimes both, for each hazardous air pollutant listed in section 112(b) of the Act. *See In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 528 (EAB 1998).

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[3] The County appealed the Board's Remand Order (Aug. 26, 1999) to the United States District Court for the District of Minnesota on September 24, 1999. The District Court granted U.S. EPA's motion to dismiss the petition for lack of subject matter jurisdiction because the Court found that the County had failed to exhaust its administrative remedies and U.S. EPA had not issued a final decision, as is required by 42 U.S.C. § 7413(d) in order for the district court to have jurisdiction to consider such an appeal.

[4] The Act defines a "major source" as "any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." CAA § 112(a)(1), 42 U.S.C. § 7412(a)(1). The Act defines an "area source" as "any stationary source of hazardous air pollutants that is not a major source." CAA § 112(a)(2), 42 U.S.C. § 7412(a)(2).

According to the regulations that implement section 112 of the Act, the NESHAPs are applicable "to the owner or operator of any stationary source for which a standard is prescribed under this part [61]." 40 C.F.R. § 61.01(c). A stationary source is defined by both the Act and the regulations as "any building, structure, facility, or installation which emits or may emit any air pollutant." CAA § 112(a)(3) (citing § 111(a)(3)), 42 U.S.C. § 7412 (a)(3); 40 C.F.R. § 61.02.

1. *Active Waste Disposal Site Standard*

In this case, the stationary source in question is the Landfill, which is owned and operated by the County. The instant case involves the active waste disposal site standard set forth in 40 C.F.R. § 61.154, part of the asbestos NESHAP. This standard imposes several requirements on owners and operators of active waste disposal sites, most significantly, to prevent visible emissions to the outside air or, alternatively, to cover the ACWM. The standard provides, in relevant part:

> Each owner or operator of an active waste disposal site that receives asbestos-containing waste material from a source covered under [40 C.F.R.] §§ 61.149, 61.150, or 61.155 shall meet the requirements of this section:
>
> (a) Either there must be no visible emissions to the outside air from any active waste disposal site where asbestos-containing waste material has been deposited, or the requirements of paragraph (c) or (d) of this section must be met.
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> * * * * * * *

(c) Rather than meet the no visible emission requirement of paragraph (a) of this section, at the end of each operating day, or at least once every 24-hour period while the site is in continuous operation, the asbestos-containing waste material that has been deposited at the site during the operating day or previous 24-hour period shall: (1) Be covered with at least 15 centimeters (6 inches) of compacted nonasbestos-containing material, or (2) Be covered with a resinous or petroleum-based dust suppression agent * * *.

(d) Rather than meet the no visible emission requirement of paragraph (a) of this section, use an alternative emissions control method that has received prior written approval by the Administrator according to the procedures described in § 61.149(c)(2).

40 C.F.R. § 61.154(a), (c), (d).

The standard for active waste disposal sites also includes recordkeeping and notification requirements for owners and operators. The recordkeeping requirements relevant to this appeal provide:

> (e) For all asbestos-containing waste material received, the owner or operator of the active waste disposal site shall: (1) Maintain waste shipment records, * * * and include the following information: * * * (iii) The quantity of the asbestos-containing waste material in cubic meters (cubic yards).
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> * * * * * * *
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> (f) Maintain, until closure, records of the location, depth and area, and quantity in cubic meters (cubic yards) of asbestos-containing waste material within the disposal site on a map or diagram of the disposal area.
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> * * * * * * *
>
> (i) Furnish upon request, and make available during normal business hours for inspection by the Administrator, all records required under this section.
>
> (j) Notify the Administrator in writing at least 45 days prior to excavating or otherwise disturbing any asbestos-containing waste material that has been deposited at a waste disposal site and is covered.

40 C.F.R. § 61.154(e), (f), (i), (j).

The Agency drafted the active waste disposal site standard, 40 C.F.R. § 61.154, in order "to prevent public exposure to asbestos emissions from waste disposal sites." 54 Fed. Reg. 912, 920 (Jan. 10, 1989) (Notice of Proposed Asbestos NESHAP Rule Revision) ("1989 Proposal"). Its decision to regulate waste disposal sites directly was predicated in part on its concerns about asbestos emissions due to noncompliance with then-existing requirements for disposal of waste from demolition and renovation operations. The Agency observed:

> In general, compliance with the NESHAP approaches 100 percent for all operations except demolition and renovation, including disposal of demolition and renovation waste, where it is estimated to be about 50 percent for demolition and about 80 percent for renovation. As a result of this noncompliance, significant asbestos emissions

> occur, with those from the disposal of demolition waste greatly exceeding other emissions * * *. Several amendments are proposed to improve compliance with and enforceability of the NESHAP * * *.

Id. at 913.

Prior to the 1989 Proposal, the Agency put the onus for compliance with the waste disposal provisions on the generators of asbestos waste, rather than on the owners or operators of the disposal site. 40 Fed. Reg. 48,292, 48,293 (Oct. 14, 1975) (NESHAP Amendments to Standards for Asbestos and Mercury). In proposing the active waste disposal site standard, the Agency made a conscious choice to make the waste disposal operators directly responsible for complying with the waste disposal provisions when they accept asbestos waste from generators. 54 Fed. Reg. at 914. The Agency explained its rationale for subjecting the waste disposal owners and operators to liability:

> At present, the waste generator is responsible for selecting a disposal site that meets the asbestos waste disposal requirements of the NESHAP. The proposed amendments also make the disposal site owner or operator responsible for complying with the NESHAP provisions for waste disposal sites. Enforcement officials have stated that the current waste disposal provisions are difficult to enforce because the responsible party, the generator, does not have sufficient control of the disposal practices used at the disposal site. This proposed amendment should increase compliance with the NESHAP provisions at an active waste disposal site by making each party responsible. Specifically, the waste generator is responsible for selecting a disposal site that meets the NESHAP requirements, and the waste site operator is required to comply with the work practice provisions at the disposal site. All waste must be disposed of at the site specified on the waste shipment record.

Id. at 920.

The Agency regarded the waste shipment records as critical to its efforts to improve enforceability at active waste disposal sites. It explained that the information contained in the WSRs

> will establish a record of the chain-of-custody and alert enforcement personnel of potential violations of the waste disposal requirements. In addition all containers of waste

> will be required to be labeled with the waste generator's name and location of the site where the asbestos waste was generated. * * * [This requirement] will assist enforcement officials in tracking asbestos waste shipments and in determining that asbestos waste is being properly disposed of and result in increased compliance.

Id.

2. *Asbestos-Containing Waste Material and Regulated Asbestos-Containing Material*

What constitutes "asbestos-containing waste material" or ACWM underlies the parties' dispute in this case. The regulations define ACWM as:

> [M]ill tailings or any waste that contains commercial asbestos and is generated by a source subject to the provisions of this subpart. This term includes filters from control devices, friable asbestos waste material, and bags or other similar packaging contaminated with commercial asbestos. *As applied to demolition and renovation operations, this term also includes regulated asbestos-containing material waste and materials contaminated with asbestos including disposable equipment and clothing.*

40 C.F.R. § 61.141 (emphasis added).

The parties fundamentally disagree as to whether regulated asbestos-containing material ("RACM") referred to in the definition of ACWM quoted above constitutes ACWM in the context of this appeal.[5] The regulations enumerate several types of asbestos-containing material ("ACM") that constitute RACM. Specifically, RACM is defined as:

> (a) Friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable

[5] In the Initial Decision, the ALJ held that, in this particular case, the record must establish that RACM was received at the site in order to find ACWM was received at the site. The ALJ reasoned that the Region entered into the record evidence only pertaining to asbestos disposal from demolition and renovation operations — a source covered under 40 C.F.R. § 61.150. *See* Init. Dec. at 18-19. Therefore, with respect to Counts I and II, the Initial Decision focused primarily on the definition of RACM and whether the Region established that RACM was present at the Landfill.

> 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.

In the instant case, the parties apparently agree that the material observed during the inspection at the Landfill was not friable.[6] *See* Appellee's Appeal Response Brief at 10 ("Region's Brief"); Lyon County's Brief of Appellant and Request for Oral Argument at 6 ("County's Brief"). However, the parties dispute whether Category I or II nonfriable ACM satisfying the above definition of RACM was present at the Landfill during the inspection.

Category I and Category II nonfriable ACM — two categories of RACM — are further defined in the regulations. Thus, the asbestos NESHAP defines Category I nonfriable ACM as "asbestos-containing packings, gaskets, resilient floor covering, and asphalt roofing products containing more than 1 percent asbestos * * *." 40 C.F.R. § 61.141. Category II nonfriable ACM is defined as "any material, excluding Category I nonfriable ACM, containing more than 1 percent asbestos * * * that when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure."[7] *Id.*

3. *Visible Emissions*

The active waste disposal site standard prohibits visible emissions, except when one of the alternative work practice provisions of the standard are met. The regulations define visible emissions as:

> [A]ny emissions, which are visually detectable without the aid of instruments, coming from RACM or asbestos-containing waste material, or from any asbestos milling, manufacturing, or fabricating operation.

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[6] Pursuant to 40 C.F.R. § 61.141, friable asbestos material means material "containing more than 1 percent asbestos * * * that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure."

[7] The asbestos NESHAP does not define "ACM" or asbestos-containing material independently from the terms "Category I nonfriable asbestos-containing material (ACM)" and "Category II nonfriable ACM." Rather, in defining these two terms, the regulations reference the broad category of ACM as material containing more than one percent asbestos as determined by the appropriate test method. *See* 40 C.F.R. § 61.141.

40 C.F.R. § 61.141.

In allowing the regulated community to comply with the active waste disposal standard by meeting specified work practices for covering ACWM at the disposal site, the Agency was well aware that visible emissions could occur under some circumstances even if good work practices were followed. As early as 1983, the Agency alerted the regulated community that under high wind conditions visible emissions could occur even if good work practices were followed. In the 1983 preamble to a proposed revision of the asbestos NESHAP rule,[8] the Agency stated:

> Under normal conditions, a waste disposal site could be operated with no visible emissions. Under high-wind conditions, however, visible emissions could occur even if good work procedures were followed. Therefore, a no visible emission limitation that would be achievable under normal operating conditions would be technologically impracticable during windy conditions. Work-practice standards provide an alternative means of compliance that would represent best available technology under these and other abnormal conditions. The Administrator believes it is important to provide alternative work-practice standards for sources that may not always be able to achieve no visible emissions even though they employ good asbestos emission control procedures.

48 Fed. Reg. 32,126, 32,127 (July 13, 1983). Full compliance with the active waste disposal site standard can be achieved by using either of the cover provisions in 40 C.F.R. § 61.154 (c)(1) (covering with six inches of compacted material) or (c)(2) (covering with an effective dust suppression agent).[9] However, unless an owner or operator of an active waste disposal site uses one of the alternative methods set forth in 40 C.F.R. § 61.154(c) or (d), there is an absolute prohibition on visible emissions. 40 C.F.R. § 61.154(a).

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[8] In this Federal Register notice, U.S. EPA proposed to amend the asbestos NESHAP standard by reinstating work practice and equipment provisions of the standard. In 1978, the U.S. Supreme Court held that such provisions were without legal authority because they were not emission standards. *See Adamo Wrecking Co. v. United States,* 434 U.S. 275 (1978). Congress subsequently amended the Act to include work practice standards within the definition of emission standards, and U.S. EPA's proposal followed Congress' action in authorizing such standards. This revision was finalized in April 1984. *See* 49 Fed. Reg. 13,658 (Apr. 5, 1984).

[9] Compliance may also be achieved by using a method that has received prior written approval by the Adminstrator. 40 C.F.R. § 61.154(d).

4. *Standard of Review*

To impose 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.'" *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 529 (EAB 1998) (quoting *In re Echevarria*, 5 E.A.D. 626, 633 (EAB 1994)). Pursuant to 40 C.F.R. § 22.24, the Region must prove each element of the two-fold showing by a preponderance of the evidence.[10] The Board reviews the ALJ's factual and legal conclusions on a *de novo* basis.[11] *E.g., In re LVI Envtl. Servs.*, 10 E.A.D. 98, 100 (EAB 2001); 40 C.F.R. § 22.30(f).

II. *ANALYSIS*

A. *Introduction*

The County raised in its brief seven grounds for appeal:

> 1) Whether a public landfill can be held strictly liable for having non-friable ACM on its site at the time of inspection;
>
> 2) Whether the Complaint based on a single one-time violation was time barred by 42 U.S.C. § 7413(d)(1);
>
> 3) Whether the Environmental Appeals Board had the authority to remand the matter to the ALJ for further proceedings under the Part 22 rules in effect at the time of the violations;
>
> 4) Whether the evidence supports the findings of fact and conclusions of law found by the ALJ in the Initial Decision;

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[10] In defining "preponderance of the evidence," we have held that this standard "'means that a fact finder should believe that his factual conclusion is more likely than not.'" *In re the Bullen Cos.*, 9 E.A.D. 620, 632 (EAB 2001) (quoting *Ocean State*, 7 E.A.D. at 530.)

[11] However, the Board generally defers to an ALJ's factual findings where credibility of witnesses is an 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); *see In re Advanced Elecs., Inc.*, 10 E.A.D. 385, 392 n.17 (EAB 2002).

> 5) Whether the Asbestos Demolition and Renovation Penalty Policy provisions for demolition and renovation activities are applicable to a public landfill;
>
> 6) Whether liability can be established as a matter of law based solely on the testimony of an inspector, without corroborating evidence and a finding of friable asbestos; and
>
> 7) Whether the penalty imposed in the Initial Decision was fair and just given the circumstances of this case.

See County's Brief at 5, 8, 9, 10, 23, 25, 27.

In issue 2 above, the County has re-raised, without additional briefing, the issue of whether the Region's administrative action was time-barred pursuant to section 113(d)(1) of the Act, 42 U.S.C. § 7413(d)(1). *See* County's Brief at 8. We need not consider this issue since we have already ruled on it. *See In re Lyon County Landfill*, 8 E.A.D. 559 (EAB 1999) (holding that section 113(d)(1) of the CAA authorizes waivers in cases where violations of any duration occurred more than twelve months prior to the initiation of the administrative action). Our Remand Order establishes the law of the case in successive stages of the same litigation. Accordingly, we will not address the same issue again here. *See In re Schoolcraft Constr., Inc.*, 8 E.A.D. 476, 482 (EAB 1999); *In re J.V. Peters & Co.*, 7 E.A.D. 77, 93 (EAB 1997) (discussing law of the case doctrine and its applicability in administrative adjudications), *aff'd sub nom. Shillman v. United States*, No. 1:97-CV-1355 (N.D. Ohio Jan. 14, 1999), *aff'd in part*, 221 F.3d 1336 (6th Cir. 2000), *cert. denied sub nom. J.V. Peters & Co. v. United States*, 53 U.S. 1071 (2001).

The remainder of the County's appeal primarily focuses on whether the Region has proven that the County violated the asbestos NESHAP. The Board analyzes the County's appeal by evaluating the two-fold showing necessary to prove each asbestos NESHAP violation alleged by the Region. Thus, first, in Part II.B., we will analyze whether the active waste disposal site standard under the asbestos NESHAP applies to the County. Next in Parts II.C. — F., we will discuss each alleged violation of the active waste disposal site standard, and analyze whether the Region has met its burden of proof in establishing each violation. In this context we will address the arguments raised by the County. Thereafter, in Part II.G., we will discuss the appropriateness of the penalty imposed in the Initial Decision, and in Part II.H. we will address the County's argument that the Board did not have the authority to remand this matter under the 40 C.F.R. part 22 (Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits) ("Part 22 rules") rules in effect at the time of the violations.

B. *Asbestos NESHAP Applicability*

To establish that the active waste disposal site standard under the asbestos NESHAP applies, the Region must prove that the County is (1) the owner or operator of an active waste disposal site, (2) that received ACWM, (3) from a regulated source.[12]

The County does not appear to contest that the active waste disposal site standard applies to it. Indeed it has admitted each of the elements necessary to make such an applicability finding. Specifically, the County stipulated that "[a]t all times relevant to the Complaint, Respondent was [the owner or operator of] an active waste disposal site." Joint Stips. ¶ 19; *see also* Joint Stips. ¶ 8 ("Lyon County owns and operates the Lyon County Landfill"). Moreover, at oral argument the County's attorney reiterated that the Landfill was an active waste disposal site at all times relevant to this matter, and the Landfill did accept ACWM from "covered sources."[13] *See* Oral Argument Transcript at 9 ("Argument Tr."); Reply Brief of Appellant, Lyon County Landfill at 1 ("County's Reply Brief").

Accordingly, we affirm the ALJ's finding that the asbestos NESHAP standard for active waste disposal sites applies to the County. We now turn to the more complex question of whether the County violated the applicable provisions of the asbestos NESHAP as alleged in the Complaint.

C. *Counts I and II (Failing to Prevent Visible Emissions ("VE") and Failing to Adequately Cover ACWM)*

Our analysis of Counts I and II begins by examining the relevant regulatory language. As noted earlier, the regulatory provision at issue in Counts I and II states:

> (a) Either there must be no *visible emissions* to the outside air from any active waste disposal site where *asbestos-containing waste material* has been deposited, or the requirements of paragraph (c) [cover alternatives] or (d) [alternative emission control] of this section must be met.

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[12] *See* 40 C.F.R. § 61.154 ("Each owner or operator of an active waste disposal site that receives asbestos-containing waste material from a source covered under §§ 61.149, 61.150, or 61.155 shall meet the requirements of this section"); *see also supra* Part I.C. (further detailing the regulatory provisions that apply in this case).

[13] We note that, apart from the County's admission, the record includes ample evidence that the Landfill received ACWM from regulated sources — here demolition and renovation operations covered under 40 C.F.R. § 61.150. *See* C Ex. 7B (County's Response to Minnesota Pollution Control Agency, including copies of disposal manifests).

40 C.F.R. § 61.154(a) (emphasis added).

Thus, to establish that the County violated 40 C.F.R. § 61.154(a), the Region must prove that visible emissions within the meaning of the regulations were present at the site on July 20 and July 21, 1994, and that the County failed to satisfy either the work practice standard of 40 C.F.R. § 61.154(c) or the alternative emission control method of 40 C.F.R. § 61.154(d). As noted above, visible emissions are defined as "any emissions, which are visually detectable without the aid of instruments, *coming from RACM or asbestos-containing waste material*, or from any asbestos milling, manufacturing, or fabricating operation." 40 C.F.R. § 61.141 (emphasis added).

1. *Presence of ACWM*

In order to determine whether the Region proved by a preponderance of the evidence that visible emissions were present at the Landfill on the days in question in violation of 40 C.F.R. § 61.154(a), we must first discern whether ACWM was present at the site because visible emissions, pursuant to its definition, must come from ACWM.[14] 40 C.F.R. § 61.141.

As discussed above in Part I.C. (Statutory and Regulatory Background), the definition of ACWM enumerates several kinds of materials that are considered ACWM. The definition of ACWM, "[a]s applied to demolition and renovation operations, * * * includes RACM * * *." 40 C.F.R. § 61.141. Because the County asserted at oral argument that the part of the definition of ACWM which includes the term "RACM" is inapplicable to owners and operators of active waste disposal sites, we first consider this argument.

In the County's view, as expressed at oral argument, the part of the definition of ACWM that includes the term RACM is inapplicable to owners and operators of active waste disposal sites.[15] Argument Tr. at 10-11. Therefore, the County contends that, even if the Region did establish that RACM was present at the site during the inspection, the presence of exposed RACM would not show a violation of the asbestos NESHAP because RACM does not constitute ACWM *under the active waste disposal site standard.*

The County never raised or presented this argument to the ALJ, nor did it present this argument to us in its notice of appeal, appeal briefs, or at any time

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[14] The regulations provide that visible emissions may also come from RACM, which is a subset of ACWM as explained *infra* Part II.C.2.

[15] The provision at issue states: "As applied to demolition and renovation operations, this term also includes regulated asbestos-containing material waste and materials contaminated with asbestos including disposable equipment and clothing." 40 C.F.R. § 61.141.

prior to oral argument. Moreover, this new argument is completely at odds with the arguments the County made in its briefs. *See* Lyon County's Post-Hearing Memorandum; Notice of Appeal of Initial Decision and Motion for Extension of Time to File Appeal Brief; County's Brief; Lyon County's Reply Brief. Contrary to the view expressed at oral argument, the County consistently maintained that RACM must be present in order to establish a violation of the active waste disposal site standard in this case. Lyon County's Post-Hearing Memorandum at 5 ("The only (ACWM) received at the landfill subject to NESHAP regulation is regulated asbestos containing material (RACM) as defined in § 61.141."); County's Brief at 11 ("The EPA must show that the County somehow failed to apply a required work practice to actual RACM that resulted in a violation."); County's Brief at 19 ("There is no evidence that the 20 small pieces of non-friable suspect ACM documented during the July 21st, 1994 inspection were RACM or produced visible emissions.").

Moreover, the ALJ in her Initial Decision agreed with the County's argument that RACM must be present on the surface of the Landfill in order to find the County liable for Counts I and II — a part of the Initial Decision that neither party appealed. *See* Init. Dec. at 18-19; *supra* note 5. Because of the County's untimely presentation of this issue, a compelling case could be made that the County has waived this argument. *See In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 764 (EAB 1998), *aff'd*, 114 F. Supp. 2d 775 (N.D. Ind. 1999); *In re James C. Lin & Lin Cubing, Inc.*, 5 E.A.D. 595, 598 (EAB 1994); *see also* 40 C.F.R. § 22.30(a)(1) (prescribing contents of notice of appeal and briefs and specifying that statement of issues presented on appeal shall be contained therein). Nonetheless, in construing the relevant provisions of the asbestos NESHAP, we find ourselves addressing the question of whether or not RACM is part of ACWM for purposes of the active waste disposal site standard in the asbestos NESHAP, particularly as it relates to visible emissions. Accordingly, we address the County's argument despite the fact that it was not raised in a timely manner.

However, even if the County had properly preserved this argument for appeal, it would not persuade us. In essence, the County maintains that RACM is excluded from regulation except at the demolition or renovation operation. Although the definition of ACWM may be susceptible to more than one interpretation, given the framework and regulatory history of the asbestos NESHAP, we conclude that the correct interpretation of the definition allows RACM to be properly disposed of as ACWM under the active waste disposal site standard.

The asbestos NESHAP is structured to regulate asbestos waste material from its generation, in this case during the demolition or renovation activity, through its ultimate disposal — in many respects like the cradle to grave system of the Resource Conservation and Recovery Act ("RCRA"), §§ 3001-3023,

42 U.S.C. §§ 6921-6939(e), governing hazardous waste.[16] The demolition and renovation provisions and the active waste disposal site provisions are closely connected[17] as the 1989 Proposal explains:

> The major provisions of the current demolition standard are the requirement for removal (and control during removal) of friable asbestos[18] material prior to demolition and the requirement for proper waste disposal. * * * *[T]hese two provisions are tied intimately to one another (i.e., the waste disposal provisions cover the waste generated by the removal requirement)* * * *.

54 Fed. Reg. 912, 915 (Jan. 10, 1989) (emphasis added).

We reject the County's interpretation, which divorces the disposal site from its logical nexus to sources that generate asbestos-containing waste. Acceptance of the County's argument would create an enormous loophole in the asbestos NESHAP and potentially exempt a significant portion of asbestos waste from requirements for proper disposal. The Agency did not intend this result. To the contrary, as discussed earlier, a principal reason that the Agency promulgated the active waste disposal site standard was to ensure proper disposal of asbestos waste generated by demolition and renovation operations. *See generally supra* Part I.C. Consistent with the regulatory scheme, which links generators of asbestos waste with owners or operators of active waste disposal sites, RACM continues to be regulated under the asbestos NESHAP at the disposal site as well. Therefore, in keeping with the Agency's intent at the time it drafted the revised definition of ACWM,[19] we interpret the part of the ACWM definition referring to RACM as

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[16] The Agency took note of some of the similarities between the hazardous waste regulations and the active waste disposal standard in the preamble to the amendments that proposed the addition of the active waste disposal standard. *See* 54 Fed. Reg. 912, 919 (Jan. 10, 1989).

[17] For example, owners and operators of demolition and renovation operations must ensure that RACM is properly treated while the demolition or renovation operation is underway, i.e., by assuring that the material is adequately wet. 40 C.F.R. § 61.145(c). RACM from these operations must be "kept wet until collected or contained or treated in preparation for disposal in accordance with § 61.150." 40 C.F.R. § 61.145(c)(6). Under § 61.150(b), asbestos-containing waste material generated at the demolition and renovation operation "shall be deposited as soon as is practical by the waste generator at: (1) A waste disposal site operated in accordance with the provisions of § 61.154." Section 61.154, in turn, comes into play when asbestos waste generated by the demolition or renovation operation is accepted for disposal by the active waste disposal site owner or operator. 40 C.F.R. § 61.154.

[18] As discussed *infra* note 19, the Agency later revised the asbestos NESHAP to use the term RACM instead of "friable asbestos."

[19] At the time of the 1989 Proposal, the definition of ACWM provided that ACWM "means any waste that contains commercial asbestos and is generated by a source subject to the provisions of
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clarifying what kind of asbestos waste generated by demolition and renovation operations is subject to the asbestos NESHAP generally. Having rejected the County's new argument, we now examine if ACWM in the form of RACM was, in fact, present at the Landfill.

The ALJ held that the Region had established by a preponderance of the evidence that ACWM in the form of RACM was present on the surface of the Landfill. We now consider whether the evidence in the record supports her findings and conclusions. As outlined above, the asbestos NESHAP defines RACM to include, *inter alia*, "Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading," and "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."

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this subpart. This term includes asbestos mill tailings, asbestos waste from control devices, friable asbestos waste material, and bags or containers that previously contained commercial asbestos. *However, as applied to demolition and renovation operations, this term includes only friable asbestos waste and asbestos waste from control devices.*" 49 Fed. Reg. 13,658, 13,661 (Apr. 5, 1984) (emphasis added).

Following a 1985 policy determination concerning nonfriable asbestos materials, there was confusion about which asbestos materials were covered by the definition of friable asbestos, and several state and regional officials asked the Agency to clarify its policy with regard to nonfriable asbestos materials in the wake of the 1985 policy determination. *See* 55 Fed. Reg. 48,406, 48,408 (Nov. 20, 1990).

In 1989 the Agency proposed changes to the definition of ACWM in response to the concerns that the existing regulations were confusing with respect to which asbestos materials were covered by the term "friable asbestos." The Agency explained in the preamble to the 1989 Proposal that the definition of ACWM was "modified to give additional examples of waste material that are covered by the regulation. The part of the definition pertaining to waste from demolition and renovation is modified to clarify that the standard applies to *nonfriable* material that can be * * * crumbled, pulverized, or reduced to powder by operations covered by the regulation." 54 Fed. Reg. at 921 (emphasis added).

However, this revised proposed definition was itself confusing to commenters. Therefore, in the final rule the Agency again altered the definition of ACWM and created the concept of RACM:

> Asbestos-containing waste material means mill tailings or any waste that contains commercial asbestos and is generated by a source subject to the provisions of this subpart. * * * *As applied to demolition and renovation operations, this term includes regulated asbestos-containing material waste and materials contaminated with asbestos including disposable equipment and clothing.*

55 Fed. Reg. 48,406, 48,415 (Nov. 20, 1990) (emphasis added). According to the Agency's explanation of its inclusion of the term RACM in the final rule, some commenters were still confused and felt that the proposed revisions may have made matters more confusing with respect to what was regulated. Thus, in order to clarify what kind of asbestos waste was subject to regulation under the asbestos NESHAP, the Agency developed the term and definition for RACM. *See* 55 Fed. Reg. at 48,408.

40 C.F.R. § 61.141. According to the definitions in the asbestos NESHAP, both Category I and Category II nonfriable ACM must contain more than 1% asbestos in order to meet the definition of RACM. *See* 40 C.F.R. § 61.141 (definitions for Category I and Category II nonfriable asbestos-containing material); *see also supra* Part I.C. By including Category I and Category II nonfriable ACM that is in damaged condition as RACM, the regulations reduce the potential risk for significant fiber release by requiring that such material be treated in the same manner as friable ACM. *See* 55 Fed. Reg. 48,406, 48,408-09 (Nov. 20, 1990) (response to comments regarding regulation of nonfriable ACM).

In this case, the laboratory results showed that the samples taken at the Landfill during the two-day inspection contained between five and thirty percent asbestos.[20] C Ex. 2. Furthermore, the record reflects that both transite — Category II — and vinyl asbestos tile ("VAT") — Category I — were present at the Landfill. *See* Init. Dec. at 7 (Finding of Fact 12); Tr. at 60 (Connell) ("Photo 5 shows a piece of suspect vinyl asbestos tile that was lying on the ground near the asbestos disposal bags."), 69 (Connell) (explaining that Photo 10 shows transite material that had been crushed and broken), 89 (Connell) (explaining that Photo 20 shows broken and crushed transite material lying loose on the surface of the Landfill).

The record also includes extensive testimony from the inspectors on the condition of the suspect ACWM that they observed at the Landfill. Both inspectors described the suspect ACWM as damaged, ground up, or crushed. *See* Tr. at 59, 62, 65, 69, 89-90, 91, 114, 148-49, 274. The inspectors additionally took several photographs of the suspect ACWM that support their testimony, which the Region introduced into evidence at the hearing. *See* C Ex. 1; Init. Dec. at 26. While contesting that the material was, in fact, ACWM, the County nonetheless conceded that the material was crushed and crumbled. *See* Argument Tr. at 53 ("I think the EPA did prove their case that at some point in time some material was crushed and crumbled."). The ALJ found both inspectors' testimony to be credible, and made factual findings consistent with their testimony.[21] *See* Init. Dec. at 20 ("In the instant case, the two suspect ACMs are VAT and transite."), 25-26 ("The photographic evidence and the testimony of the MPCA inspectors is sufficiently probative to sustain the finding that the exposed asbestos-containing VAT had been cut or abraded and that the exposed asbestos-containing transite had been crumbled."). Specifically, she found that Category I nonfriable ACM in the form of VAT that had been subject to grinding or cutting, and Category II nonfriable ACM in the form of transite that had been crumbled, was observed and sampled by the inspectors on July 20 and 21, 1994. Init. Dec. at 7 (Finding of Fact

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[20] The County has not challenged the sampling results in its appeal to the Board.

[21] The ALJ is in the best position to evaluate the testimony and credibility of the witnesses. *See supra* note 11.

12). We find ample evidence in the record to support the ALJ's findings and conclusions that ACWM in the form of RACM was present on the surface of the Landfill on both July 20 and 21, 1994.

2. *Presence of Visible Emissions*

We must next determine whether the Region has satisfied its burden of proving a visible emissions violation of the asbestos NESHAP. As noted, the asbestos NESHAP defines visible emissions to mean, in relevant part, "emissions which are visually detectable without the aid of instruments, coming from RACM or asbestos-containing waste material * * *." 40 C.F.R. § 61.141. Further, the active waste disposal site standard prohibits visible emissions "to the outside air from any active waste disposal site, where asbestos-containing waste material has been deposited * * *." 40 C.F.R. § 61.154(a).

United States v. Midwest Suspension & Brake, 824 F. Supp. 713 (E.D. Mich. 1993), *aff'd*, 49 F.3d 1197 (6th Cir. 1995), provides a useful framework for analyzing whether a visible emission violation of the asbestos NESHAP has occurred. The Court in that case found that the government need not prove that the asbestos fibers themselves were visible; rather, the government need only establish that "an emission, which was detectable without the aid of instruments, occurred and that the emission contained asbestos." *Id.* at 729. In *Midwest Suspension & Brake*, an inspector obtained a sample of loose-lying alleged ACM at a dumpster into which waste from stripped brake pads was disposed. (Subsequently, the government determined the waste contained greater than one percent asbestos.) The inspector thereafter followed the dumpster from the brake rehabilitation facility at which he obtained the sample to the local landfill where he observed a plume. The Court found that given these facts, a visible emission had occurred. In its opinion, the Court emphasized that visible emissions violations can be proven by circumstantial evidence. *Id.* at 730. The Court explained that, "[w]hile [the inspector] * * * did not test this plume that was discharged, it reasonably may be inferred that the plume came from the loose material, which included dust, that was lying in the dedicated dumpster."[22] *Id.* at 729.

In the instant case, the Region has introduced evidence that the inspectors observed and sampled loose-lying suspect ACWM, which was found to contain asbestos above the requisite one percent to be considered ACM. Furthermore, the

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[22] *United States v. Midwest Suspension & Brake* did not involve an alleged violation by an active waste disposal site owner or operator. Rather, the case involved alleged violations of the asbestos NESHAP by an owner or operator of a fabricating operation. To our knowledge, the case before the Board is the first adjudicated case in either the administrative or judicial context involving an alleged violation by an active waste disposal site owner or operator of 40 C.F.R. § 61.154 of the asbestos NESHAP. Thus, this is the Board's first opportunity to interpret the language of the active waste disposal site standard.

inspectors in this case testified at length regarding their observations of emissions from the ACWM, as well as from the area where the ACWM was observed.[23] *See* Tr. at 220-21 (Connell) (stating that he observed light brown visible emissions emanating from the ACWM area and from the suspect ACWM at the Landfill on July 20 and 21, 1994), 222 (Connell) (testifying that on July 21, 1994, he observed "dust and debris particulates coming from the entire area of which [sic] where I sampled and where I saw suspect asbestos waste on the surface of [the Landfill]"), 278 (Meier) (stating that she remembered seeing "puffs of gray-brown kind of dust swirling around in the [asbestos disposal] area" on July 20, 1994), 287-88 (Meier) (stating that on the second day of the inspection she observed "brownish-gray type of swirling kind of cloud" in the asbestos disposal area). The record in this matter clearly supports the ALJ's factual findings[24] and related conclusions of law[25] that visible emissions occurred on July 20 and 21, 1994, at the Landfill.

As discussed *supra*, when visible emissions are present, the owner or operator of an active waste disposal site can avoid liability under the standard by complying with certain work practice standards. Here, the Landfill had a choice of covering the ACWM with six inches of appropriate cover, or with an effective dust suppression agent, *see* 40 C.F.R. § 61.154(c), or using an alternative emissions control method that had received prior written approval by the Administrator, *see* 40 C.F.R. § 61.154(d).

The record clearly establishes through the testimony of the inspectors and the inspection report, that the suspect ACWM observed was not properly covered. *See*, *e.g.*, Tr. at 57, 59, 62, 65, 69, 89-90, 91, 92, 114 (Connell), 271-72 (Meier); C Ex. 1; Init. Dec. at 6 (Findings of Fact 8-10). Therefore, the County failed to comply with the work practice standard in part (c) of the active waste disposal site standard. Additionally, the testimony from both parties indicates that the County was not using an alternative emissions control method approved by the Adminis-

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[23] The inspectors observed emissions that occurred in the "outside air," meaning the air outside buildings and structures, since the inspection took place at a landfill. *See* 40 C.F.R. § 61.141.

[24] Init. Dec. at 6 (Findings of Fact 8-9). The Initial Decision's Finding of Fact 8 states in relevant part: "The inspectors also observed [on July 20, 1994,] that when there were wind gusts in the asbestos disposal area, dust and particulate matter which was gray-brown, emanated from the area around the suspect ACWM, the broken bags, and the asbestos disposal area." The Initial Decision's Finding of Fact 9 states in relevant part: "During the July 21, 1994, inspection, the inspectors observed that when there were wind gusts in the asbestos disposal area, dust and particulate matter which was gray-brown, emanated from the area around the suspect ACWM, the broken bags, and asbestos disposal area."

[25] Init. Dec. at 10 (Conclusions of Law 2-3). In her Conclusions of Law section of the Initial Decision, the ALJ finds that the visible emissions to the outside air from the ACWM and the surrounding asbestos disposal area at the Landfill on July 20, 1994, and July 21, 1994, are violations of the asbestos NESHAP regulations at 40 C.F.R. § 61.154(a).

trator. *See* Tr. at 76, 278, 477 (County's Environmental Administrator Henriksen). Therefore, since visible emissions were present on July 20 and 21, 1994, and the County failed to comply with either the appropriate work practice standard or the alternate emission control method allowed under 40 C.F.R. § 61.154, we find that the evidence in the record supports the ALJ's findings of fact and conclusions of law that the County is liable for Counts I and II of the Region's Complaint.

3. *County's Additional Arguments Against Liability*

In its appeal, the County claims that the Region has failed to carry its burden on Counts I and II as alleged in the Complaint because the Region and the ALJ have misinterpreted the elements required to prove a violation of 40 C.F.R. § 61.154(a). The County predicates its argument on several alleged errors in the ALJ's interpretation of the regulation, which we consider below.

a. *Friability of ACWM*

Throughout the County's briefs, it asserts that in order for ACM to be RACM, ACM must be friable. Accordingly, the County argues that since the inspectors did not perform a hand pressure test to establish friability, the Region's case must fail.[26] *See* County's Brief at 6-7, 14, 15, 17; County's Reply Brief at 1, 2, 5, 6. The County's argument ignores the definition of RACM, a subset of ACWM, which clearly includes nonfriable ACM. *See* 40 C.F.R. § 61.141; *see also supra* note 19. Significantly, the notion that only friable ACM is regulated was specifically rejected in the preamble to the November 20, 1990 regulation. In it, U.S. EPA detailed its reasoning for including nonfriable ACM as within the scope of the asbestos NESHAP under certain circumstances. *See* Asbestos NESHAP Final Rule, 55 Fed. Reg. 48,406, 48,408 (Nov. 20, 1990); *see also supra* note 19.

> [I]n some instances, nonfriable materials that were subjected to intense forces, such as the intense mechanical

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[26] The County apparently believes that its argument is supported by the Complaint, which alleges that the ACM observed by the inspectors was friable. *See* County's Brief at 15. We do not agree that such an allegation would necessarily require a finding of friability in order to conclude that ACWM in the form of RACM was present. In administrative cases such as this, a complaint must only give "adequate notice of the alleged charge so that the charged party has an opportunity to prepare a defense." *In re Yaffe Iron & Metal Co.*, Inc., 1 E.A.D. 719, 721-22 (JO 1982) (citation omitted); *see also In re Port of Oakland & Great Lakes Dredge & Dock Co.*, 4 E.A.D. 170, 205 (EAB 1992). Although the Complaint does allege that the observed ACM was "easily crumbled under hand pressure," the Complaint further describes the condition of the ACM observed by the inspectors as "broken up, crushed and crumbled by heavy machinery." *Compare* Complaint ¶¶ 27, 37 *with id.* ¶¶ 26, 36. We find that the Complaint's allegations satisfy the regulatory requirements of an administrative complaint since the Respondent could certainly prepare its defense based on the allegations in the Complaint.

> forces encountered during demolition, could be crumbled, pulverized, or reduced to powder. In these instances, certain materials which had been considered nonfriable appeared capable of releasing significant amounts of asbestos fibers to the atmosphere. * * * In view of the damage done to these otherwise nonfriable materials and the resulting increased potential for fiber release, these and other similar practices involving nonfriable asbestos material were considered to render nonfriable ACM into dust capable of becoming airborne.
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> As a result, EPA issued a policy determination in 1985 regarding the removal of nonfriable asbestos material that was consistent with EPA's intent to distinguish between material that could release significant amounts of asbestos fibers during demolition and renovation operations and those that would not. This policy determination stated in essence that any ACM, whether originally friable or nonfriable that become (or are likely to become) crumbled, pulverized, or reduced to powder are covered by the NESHAP.

55 Fed. Reg. at 48,408. The 1990 asbestos NESHAP final rule explicitly incorporated the intent of the NESHAP by including nonfriable ACM, which has the potential to release asbestos fibers, in the definition of RACM — a subset of ACWM: "[S]ome nonfriable asbestos materials can be crumbled, pulverized, etc., in the course of demolition/renovation operations leading to asbestos emissions and are, therefore, subject to control under the NESHAP." 55 Fed. Reg. 48,406, 48,413 (Nov. 20, 1990). Thus, not only does the County's argument disregard the intent of the NESHAP, it also disregards the explicit language of the NESHAP itself.[27]

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[27] The County cites as further support for its friability argument the Board case, *In re L & C Services*, 8 E.A.D. 110 (EAB 1999). *See* County's Brief at 14 ("It is clear under the holdings of *L & C Services* that in order to establish that the material was RACM, the EPA must establish that the material was easily crumbled under hand pressure.") However, a reading of this Equal Access to Justice Act case shows that it does not stand for the proposition that the County asserts. In *L & C Services*, the Region relied on the alleged friability of the ACM to prove that RACM was present. The Region did not rely on any of the other three enumerated types of material listed under the definition of RACM. *In re L & C Serv., Inc.*, Dkt. No. vii-93-CAA-112, at 14 n.6 (ALJ, Jan. 29, 1997) ("EPA alleges only that the suspect material was friable."). Thus, the Board's decision focused only on the fact pattern of that record in articulating our reasons for awarding attorneys' fees to the appellant in *L & C Services*. In the instant case, however, the Region introduced evidence to show that Category I and II nonfriable ACM — types of ACM defined by the NESHAP to be RACM in certain circumstances — were present on the surface of the Landfill during the inspection. This evidence was suffi-

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In addition, the County cites 40 C.F.R. § 61.150(a)(5)[28] as support for its argument that ACM must be friable in order to be RACM. As a general matter, we note that the exemption cited by the County is found in a different standard of the asbestos NESHAP — the standard for waste disposal for manufacturing, fabricating, demolition, renovation, and spraying operations. There is no mention of this exemption in the standard for active waste disposal sites. In any event, we do not interpret section 61.150 as supporting the County's argument. In fact, section 61.150 requires all ACWM generated by demolition and renovation operations to be disposed of at a waste site operated in compliance with section 61.154. *See* 40 C.F.R. § 61.150(b)(3) ("All asbestos-containing waste material shall be deposited as soon as is practical by the waste generator at: (1) A waste disposal site operated in accordance with the provisions of § 61.154, * * * (3) The requirements of paragraph (b) of this section do not apply to Category I nonfriable ACM *that is not RACM*.") (emphasis added).

Only nonfriable ACM that does *not* meet the definition of RACM is exempt from certain requirements of section 61.150. *See* 40 C.F.R. § 61.150(a)(5), (b)(3). The definition of RACM, in contrast, does indeed include Category I and Category II nonfriable ACM under certain circumstances. *See supra* Part I.C.; 40 C.F.R. § 61.141. Accordingly, 40 C.F.R. § 61.150 does not wholly exempt, as the County suggests, nonfriable ACM from requirements under the standard for waste disposal for manufacturing, fabricating, demolition, renovation, and spraying operations.

b. *Threshold Amounts of ACWM*

The County also asserts that in order to find ACWM — here RACM — present at the Landfill, the Region must establish that a threshold amount of RACM existed on the surface of the Landfill. *See* County's Brief at 6. In the County's view, the active waste disposal site standard incorporates the threshold requirement found at 40 C.F.R. § 61.145 (Standard for demolition and renovation).[29] 40 C.F.R. section 61.145 requires demolition and renovation operations

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cient to persuade the ALJ that Category I and II nonfriable ACM was present at the disposal area. Init. Dec. at 7 (Finding of Fact 12). Thus, given the facts present in *L & C Services*, it is clearly distinguishable from the instant matter and does not support the County's argument that ACM must be friable in order to be RACM. See *supra* Part II.C.1., noting the County's concession that EPA had established that the material in question had been crushed or crumbled.

[28] 40 C.F.R. § 61.150(a)(5) states: "As applied to demolition and renovation, the requirements of paragraph (a) of this section do not apply to Category I nonfriable ACM waste and Category II nonfriable ACM waste that did not become crumbled, pulverized, or reduced to powder."

[29] Certain provisions of the asbestos NESHAP standard for demolition and renovation operations come into play depending on the amount of RACM present at the facility. Thus, certain require-
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to comply with specific provisions of the standard only when a certain amount of asbestos material is present. The County maintains this position even though its attorney admitted at oral argument that such a threshold is not part of the applicable standard. Argument Tr. at 21 (Mr. Carlson, Counsel for County) ("In the definition [of RACM] itself, I don't see that there is any threshold requirement.").

We find the County's argument unpersuasive because such a threshold requirement simply is not provided for in 40 C.F.R. § 61.154. The County contends that the threshold stated in the standard for demolition and renovation operations (40 C.F.R. § 61.145(a)), *see supra* note 29, should nonetheless be incorporated into the active waste disposal site standard (40 C.F.R. § 61.154). The County does not provide a credible rationale for why we should read the regulation in this fashion. Moreover, the County's interpretation would result in illogical consequences. For example, under the County's interpretation, liability would not arise in a case where a shipment of ACWM — here RACM — was delivered to an active waste disposal site in an amount above the demolition and renovation standard's threshold, but where only a lesser amount (below the threshold) of ACWM was improperly covered. *See* Argument Tr. at 24-26. This outcome is directly at odds with the intent of the asbestos NESHAP, which is designed to reduce releases of asbestos into the air. Accordingly, we reject this argument and decline to read such a threshold element into the standard.

c. *Tracing the Origins of Suspect ACWM*

Furthermore, the County asserts that the correct interpretation of the regulatory standard for active waste disposal sites requires, *inter alia*, the Region, in order to prove a violation, to track the particular suspect ACWM found by the inspectors at the Landfill back to a specific delivery of RACM to the Landfill by a regulated source. *See supra* note 5. According to the County,"[t]he mere receipt of RACM from a source cannot establish a violation. The EPA must show that the Landfill failed to apply a required work practice to actual RACM that resulted in a violation." County's Brief at 11. The County asserts that the Region has failed to carry its burden on Counts I and II, because the Region allegedly did not introduce evidence that the suspect ACWM observed by the inspectors at the Landfill on July 20 and 21, in fact, came from regulated sources. Here the County argues that some portion of its asbestos waste comes from non-regulated sources. Therefore, it maintains that some of its waste-containing asbestos is not subject to the active waste disposal standard. It contends that the scant evidence introduced by the Region is highly speculative and circumstantial in nature, and fails to show

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(continued)
ments only apply if a facility contains 80 linear meters or more of RACM on pipes or at least 15 square meters of RACM on other facility components. 40 C.F.R. § 61.145. This amount is what the County calls the "threshold amount."

that the suspect ACWM observed during the inspection came from a regulated — rather than a non-regulated — source. Furthermore, the County contends that the ALJ improperly shifted the burden of proof when she held that the County should submit evidence on the origins of non-regulated material in the County's case-in-chief if it believed that the ACM came from a source not regulated under the asbestos NESHAP.

Again, we can find no reference to such a requirement in 40 C.F.R. § 61.154. Indeed, the only applicability requirement is explicitly stated in the first part of the standard, and Petitioner has not contested that such an applicability showing was made. *See supra* Part II.B.; 40 C.F.R. § 61.154 ("Each owner * * * of an active waste disposal site that receives asbestos-containing waste material from a source covered under § * * * 61.150 * * * shall meet the requirements of this section"). Moreover, while we agree with the County that certain asbestos waste is not regulated under the asbestos NESHAP, we hold that the County's choice to commingle its regulated asbestos waste with its non-regulated asbestos waste does not exempt the County from the asbestos NESHAP requirements. Accordingly, without evidence from the County rebutting the Region's *prima facie* case in this regard, the Region has satisfied its burden. *See* Init. Dec. at 31;[30] 40 C.F.R. § 22.24; *In re City of Salisbury*, 10 E.A.D. 263 (EAB 2002) (explaining respondent's burden to rebut the complainant's *prima facie* case in the Clean Water Act context).

d. *Condition of ACWM*

Lastly, the County contends that the Region failed to show that the deteriorated condition of the ACM occurred "in the course of demolition or renovation

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[30] The ALJ states:

> Even if I were to assume that the evidence establishes that nonregulated RACM is deposited in the asbestos disposal area of the Landfill, the fact that the Landfill commingles nonregulated RACM with RACM from covered sources does not exempt Respondent [the County] from the jurisdiction of the asbestos NESHAP regulations for active waste disposal sites. Once RACM from a covered source is deposited at the site, the site is subject to the asbestos NESHAP standard for active waste disposal sites. Also, once the EPA establishes the presence of RACM at the site and that site received ACWM from covered sources, it must be presumed that RACM came from a covered source. To hold otherwise, would impose an impossible requirement upon the EPA to trace the exact origin of the RACM. The commingling of regulated and nonregulated RACM cannot be used as a means to avoid jurisdiction under the asbestos NESHAP regulations.

Init. Dec. at 31.

operations" as required by the regulatory definition of RACM.[31] Here, the County asserts that the record does not contain any evidence regarding the condition of the ACWM prior to disposal. *See* County's Reply Brief at 2.

In the Initial Decision, the ALJ found in Finding of Fact 12 that RACM was present on July 20 and 21, 1994.[32] We find that the record contains sufficient support to affirm the ALJ's Finding of Fact 12. Specifically, the record includes evidence establishing an inference that the condition of the ACM, as observed by the inspectors, likely occurred during demolition or renovation operations. Thus, the record shows that RACM was present. In concluding that RACM was present on July 20 and 21, 1994, the ALJ referenced in her Finding of Fact 12 Inspector Connell's testimony, which concerns the uniformity of the ACM's condition. He stated:

> It looked as if the material had been at some point operated on by some sort of mechanical chipper or grinder. I noticed that all of the pieces were just uniformly small, and if floor tile is removed with some sort of kind of flat spade or even a chemical to work the glue loose, you would expect to see some larger pieces. Generally you would see a lot of whole tile, a lot of half tile, and in this case I really didn't see any pieces bigger than a palm, but really most of the pieces I saw were a quarter or smaller, which was — which I believe to be materials that were subjected to some sort of mechanical means.

Tr. at 148-149 (Connell). While we recognize, as the Region suggests, that providing direct evidence of when the ACM became crushed, ground, crumbled, etc., would be a difficult task, we do find that evidence similar to what we have in this record, absent evidence from the Respondent rebutting the Inspector's testimony, does establish the reasonable inference that the condition of the ACM more likely than not occurred during the demolition or renovation operation. Here, the ALJ expressly relied on this testimony of Inspector Connell, and the County failed to rebut this inference by providing contrary evidence. Therefore, we find that the Region has met its burden of proof.

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[31] In relevant part, as noted previously, the NESHAP defines RACM as "(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.

[32] Init. Dec. at 7 (Finding of Fact 12).

For the reasons discussed above, we affirm the ALJ's findings and conclusions that the County is liable for Counts I and II of the Complaint.

D. *Count III (Failing to Maintain Complete WSRs)*

Count III of the Complaint alleges that the County failed to maintain WSRs including all quantities of ACWM received, in violation of 40 C.F.R. § 61.154(e)(1)(iii). This section requires that for "all asbestos-containing waste material received, the owner or operator of the active waste disposal site shall: (1) Maintain waste shipment records [("WSRs")] * * * and include the following information: * * * (iii) The quantity of the asbestos-containing waste material in cubic meters (cubic yards)." 40 C.F.R. § 61.154(e)(1)(iii).

The County contends that the evidence in the record does not support the Initial Decision's findings of fact and conclusions of law regarding Count III. Apparently, the County believes that liability should not follow because the majority of its WSRs included all the required information. *See* County's Brief at 19-20.

However, in reviewing the County's briefs, we do not find any more than a bald assertion to support the County's argument that the record does not support the Initial Decision's holding. Indeed, the County recognizes its violation of the regulatory requirement in its appeal brief. *See* County's Brief at 19. The record in this matter establishes, and the County admits, that the quantity of ACWM was not initially included on the May 19, 1994 WSR for the Church of Saint Michael. *See* C Ex. 7B; Respondent's Ex. R-11; Tr. at 80-81, 120 (Carlson, County's Attorney) ("[I]t's uncontested that at the time of the inspection [July 21, 1994] the quantity was not filled in."), 133, 280-81. The standard clearly requires that owners or operators of active waste disposal sites maintain WSRs, including the quantity of ACWM. *See* 40 C.F.R. § 61.154(e)(1)(iii). As we have stated before, the CAA imposes a strict liability standard for violations of the asbestos NESHAP. *See In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 546 (EAB 1998); *see also In re Echevarria*, 5 E.A.D. 626, 633 (EAB 1994). The County's argument that liability should not be found because the County properly completed the majority of WSRs is unpersuasive as a defense to liability. Rather, this argument is more appropriately analyzed when considering the assessment of a penalty for the violation. *See infra* Part II.G.

Moreover, we are not persuaded that liability should not result because, according to the County, it "promptly corrected the oversight." County's Brief at 19. According to the record, the WSR "oversight" was only corrected after the inspectors identified the WSR and the missing information. *See* Tr. at 81, 120. 40 C.F.R. section 61.154(e)(3) requires that a discrepancy be resolved within fifteen days after receiving the waste, and if not resolved, the owner or operator of the active waste disposal site must immediately notify appropriate authorities. Here, the discrepancy was not discovered by the County but, rather, by the inspec-

tors, and the WSR was not corrected for several months. Tr. at 81, 120. Thus, we agree with the ALJ's rejection of the County's argument, and we affirm her finding of liability for Count III of the Complaint.

E. *Count IV & V (Failing to Furnish Map of ACWM Within Disposal Site and Failing to Maintain an Updated Map of the ACWM Within the Disposal Site)*

The County challenges the ALJ's finding of liability and interpretation of two particular provisions of the active waste disposal site standard at issue in Counts IV and V. The Initial Decision holds the County liable for a violation of 40 C.F.R. § 61.154(i)[33] because the County did not keep a map of the Landfill on site but, rather, at the County Courthouse (Count IV). In finding liability, the ALJ states that the "logical and reasonable interpretation of the regulation dictates that the records, including the map, be kept at the Landfill" since this would allow for the regular updating of the ACWM disposals on the map. Init. Dec. at 39. The County argues that such a finding of violation is not supported by a plain reading of the regulation which, the County argues, does not require that the map be kept at the disposal site.

Similarly, the County argues that the finding of liability on Count V[34] (Failure to Maintain a Diagram or a Map Recording the Location, Depth, and Area of ACWM Within the Disposal Site) is not supportable since the regulation does not state a specific interval of time between which updates must occur. At the hearing, the County put on testimony regarding its practice of updating its map on a monthly basis. Tr. at 438 (Henriksen). Mr. Henriksen, Lyon County's Environmental Administrator, testified that the frequency of updating the map was dependent upon the number of ACWM shipments received. *Id.* He further testified that on July 21, 1994, the map reflected all ACWM shipments that were received in May (there were no shipments received in June) and that the map was updated at the end of July to reflect all ACWM shipments received by the Landfill in July.[35] Tr. at 440-41.

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[33] 40 C.F.R. § 61.154(i) requires owners or operators to "[f]urnish upon request, and make available during normal business hours for inspection by the Administrator, all records required under this section."

[34] Count V alleges a violation of 40 C.F.R. § 61.154(f), which requires owners or operators to "[m]aintain, until closure, records of the location, depth and area, and quantity in cubic meters (cubic yards) of asbestos-containing waste material within the disposal site on a map or diagram of the disposal area."

[35] The Landfill had received four ACWM shipments and corresponding WSRs in July on the following dates: July 1st (two shipments), July 8th, and July 28th. Tr. at 441 (Henriksen).

Here, the ALJ reasons that, "[d]espite the absence of a specified timetable for updating the map of the ACWM disposal area in the regulation, the regulatory scheme of the asbestos NESHAP regulations compels me to find that the monthly updating of Respondent's map is not a reasonable interval of time." Init. Dec. at 41. In construing this provision to require an update of the map concurrently with the deposit of the ACWM, the ALJ specifically cites the intent of the asbestos NESHAP — to control asbestos emissions — as supporting her conclusion of law. *See id.* (citing 48 Fed. Reg. 32,126 (July 13, 1983)).

The Region asserts that the ALJ's finding of liability on both counts is consistent with the purpose of the asbestos NESHAP, since it helps to ensure that owners and operators of landfills know the location of ACWM, thereby decreasing the likelihood of disturbing the ACWM and exposing buried ACWM. *See* Region's Brief at 21. The Region suggests that the County's decision not to maintain its map of the asbestos disposal area at the Landfill likely contributed to the County's disturbance of the ACWM and violation of 40 C.F.R. § 61.154(j) (Count VI). *See id.* Similarly, the Region contends that the County's failure to update its map promptly also contributed to the violation found in Count VI. Furthermore, the Region seems to suggest that, in order to prevail, the County was under an obligation to show the impracticability of updating its maps immediately after disposal of ACWM occurred. *See id.* at 22.

Interpretation of an administrative regulation follows the tenets of statutory construction. *In re Bil-Dry Corp.*, 9 E.A.D. 575, 595 (EAB 2001) (citing *Black & Decker Corp. v. Comm'r*, 986 F.2d 60, 65 (4th Cir. 1993)). When construing a regulation, the interpretation must harmonize with the objective of the statute that the regulation implements. *See id.* at 28 (citation omitted). While it is true that the intent of the asbestos NESHAP is to control emissions from asbestos, we cannot agree that this requires the finding of liability in Counts IV and V. The intent of the NESHAP does not provide us with the ability to add additional requirements to a regulation. The plain language of the two regulatory provisions at issue here does not require that the records either be kept in a specific location, or be updated at any particular time interval.

A review of the asbestos NESHAP reveals that many of its provisions explicitly require records to be kept in a particular location. Thus, if U.S. EPA had intended to require the owner or operator of an active waste disposal site to keep its records at the site, the Agency could easily have drafted the regulatory provision to explicitly require this as it has in numerous other provisions. *Compare* 40 C.F.R. § 61.142(b)(4) ("Furnish upon request, and make available *at the affected facility* during normal business hours for inspection by the Administrator, all records required under this section") (emphasis added) *with* 40 C.F.R. § 61.154(i) ("Furnish upon request, and make available during normal business hours"); *see also* 40 C.F.R. §§ 61.147(b)(6), 61.144(b)(6). In the absence of an explicit provision requiring the records to be kept on-site, the County did not act

unlawfully by keeping its asbestos waste records at the County Courthouse, so long as the records were made available during normal business hours.[36]

In addition, although the maps or diagrams required under 40 C.F.R. § 61.154(f) must be updated with sufficient frequency to allow for use of those maps or diagrams to minimize the likelihood of an unintentional disturbance of the ACWM, we do not find that in this case a monthly update of the County's diagram was unreasonable or conflicts with the intent of the regulation itself.[37]

Accordingly, we decline to read these additional requirements into the instant regulatory provisions and we, therefore, reverse the ALJ's finding of liability on Counts IV and V.

F. *Count VI (Failing to Notify the Administrator Forty-five Days Prior to Excavating/Disturbing ACWM at the Disposal Site)*

The Region alleged in Count VI of the Complaint that the County failed to "[n]otify the Administrator in writing at least 45 days prior to excavating or otherwise disturbing any [ACWM]," in violation of 40 C.F.R. § 61.154(j). After reviewing the evidence submitted at hearing, the ALJ found that the evidence did support the Region's case regarding Count VI. "[T]he evidence establishes that Respondent * * * excavated ACWM at the Landfill that previously had been covered" without first complying with 40 C.F.R. § 61.154(j). Init. Dec. at 43.

In challenging the ALJ's finding, the County asserts that the record is devoid of evidence that supports such a finding. The County again challenges the ALJ's finding that the material observed by the inspectors on the second day of the inspection was ACWM. *See* County's Brief at 22. Additionally, the County believes the evidence regarding excavation of previously buried ACWM is wanting. In support of its argument that the Region failed to establish a violation, the County contends that the asbestos disposal bag observed by the inspectors was never entered into evidence, the bag itself was empty, and no samples were taken from the bag. *Id.* at 23. Moreover, the County emphasizes that the inspection report did not include this violation.

The Region argues that in the process of disturbing the asbestos, the disposal bag had torn and its contents were scattered. The Region contends that since

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[36] The inspectors arrived at the Landfill at approximately 4:00 pm, when the Landfill was closing for the day. Tr. at 38, 40 (Connell). At that time, the inspectors requested the map or diagram of the location of ACWM at the Landfill. Tr. at 38-39 (Connell). When the inspectors went to the County Courthouse the following day, they were provided with the requested documents. Tr. at 79-80.

[37] Although we do not find liability on this count, a weekly update of the County's maps would be a better practice given the nature of its asbestos disposal business.

the inspectors sampled the area surrounding the torn bag and found ACWM, "[t]he preponderance of the evidence establishes the violation." Region's Brief at 23.

The ALJ based her finding of liability in this count on the testimony of both the inspectors. According to their testimony and the inspection report, the inspectors instructed a County employee on July 20, 1994, that all ACWM must be covered with at least six inches of nonasbestos-containing material in order to comply with the asbestos NESHAP. According to the inspectors' testimony, the County's employee thereafter stated that he would cover the ACWM with appropriate material. Tr. at 78, 277. The following day the inspectors revisited the Landfill and observed that, although it appeared that some attempt had been made to cover the ACWM, some of the ACWM observed the day before was still left uncovered. Significantly for this Count, the inspectors testified that they also observed on the surface of the Landfill an asbestos disposal bag with a waste generator label identifying Tyler High School, which the inspectors had not seen the previous day. Tr. 92, 171, 286-87.

The regulatory definition of ACWM specifically includes "bags * * * contaminated with commercial asbestos." 40 C.F.R. § 61.141. According to the inspectors, they observed a bag that had been ripped and no longer had a bottom. Tr. 171 (Connell). Furthermore, the inspectors sampled the suspect ACWM, which surrounded the bag, and test results subsequently revealed that the sample contained over one percent asbestos. C Ex. 1; Tr. at 87 (Connell). The inspectors also noted that an asbestos generator label (which is required for disposal of ACWM) was affixed to the ripped bag. Tr. at 87-88 (Connell) ("At that point I saw on the — what would be the handle of the bag where all the duct tape is, a waste generator label affixed to the bag. That waste generator label stated that the waste had come from the Tyler High School"), 218. From this record, including the testimony and photograph,[38] we conclude, as did the ALJ,[39] that it is more likely than not that this bag contained ACWM and was, therefore, contaminated with commercial asbestos. Accordingly, we find that the asbestos disposal bag was ACWM.

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[38] *See* C Ex. 1, Photo 18.

[39] *See* Init. Dec. at 6-7 (Finding of Fact 10) ("During the inspection on July 21, 1994, the inspectors observed exposed suspect ACWM that was not present at the asbestos disposal area on the previous inspection on July 20, 1994. In particular, the inspectors noted an ACWM disposal bag with an asbestos waste generator label from Tyler High School that was ripped open and lying exposed on the surface of the disposal area. This bag from Tyler High School was not observed on inspection for the asbestos waste disposal area on the July 20, 1994 inspection."); C Ex. 1; Tr. at 86-94 (Connell), 286-88 (Meier).

Moreover, the Region established through its inspectors' testimony that it is more likely than not that the bag was previously buried and subsequently disturbed,[40] since the inspectors had not seen this bag the previous day. *See* Tr. at 92 (Connell) ("The bags that had the label from Tyler High School and the bag where photograph number 19 and then photograph number 18, both of those materials were in an area that I inspected the previous day and they were not visible to me, and they were visible on the 21st."), 171 (Connell) ("Based on what I saw, I felt that the bag probably was buried at sometime. I didn't see it on July 20th, and with the waste generator label indicating it came from this Tyler High School, my indication was that this bag had gotten uncovered * * *."), 218. Inspector Connell further explained in his testimony why he believed some ACWM had been excavated or otherwise disturbed by stating:

> It came from my observations of the specific broken and mangled bags that I found that had the Tyler High School label. That was the only thing that made me sure that I wasn't just looking at a similar asbestos disposal bag, because looking for those waste generator labels is very important, and that was the only one I found, and it was only on the second day.

Tr. at 253. Thus, a reasonable inference can be drawn from the testimony that since the area in which the bag was found had been inspected on July 20, 1994, and the bag had not been observed on July 20, 1994, but was lying on the surface of the Landfill on July 21, 1994,[41] the County had excavated or otherwise disturbed ACWM — the asbestos disposal bag — within the meaning of the regulation.

We reject the County's argument that the Region failed to establish liability on this Count because it did not enter the bag into evidence. The Region did not need to enter the bag into evidence, since the record included testimony from the inspectors, an inspection report, and a photograph, all of which provide evidence to support the Region's *prima facie* case for the Count: "When an inspector trained to determine compliance with the applicable regulations 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." *In re Echevarria*, 5 E.A.D. 626, 639-640 (EAB 1994). Here, the ALJ

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[40] Such a showing is necessary since the provision only requires notification prior to "excavating or otherwise disturbing any asbestos-containing waste material that has been deposited at a waste disposal site and is covered." *See* 40 C.F.R. § 61.154(j).

[41] No new shipments of asbestos were received at the landfill between July 20 and 21, 1994. As noted earlier, the most recent shipment before the inspection was on July 8, 1994.

found the inspectors' testimony to be credible, and no proof was offered by the County that the testimony lacked credibility.

The County does not assert that it had appropriately notified the Adminstrator. Thus, the Region has established through this testimony that the County did violate 40 C.F.R. § 62.154(j) by failing to give proper notice before excavating or otherwise disturbing ACWM that had been deposited at the site. Accordingly, we affirm the ALJ's finding of liability on Count VI.

G. *Penalty*

The County challenges the ALJ's penalty assessment of $45,800 on two bases: (1) the ALJ's application of the Clean Air Act Stationary Source Civil Penalty Policy's Appendix III "Asbestos Demolition and Renovation Civil Penalty Policy" was not warranted; and (2) the penalty assessed was unfair and unjust. *See* County's Brief at 23, 27. Although it states that the proposed penalty of $58,000 is "most appropriate," the Region requests that this Board affirm the ALJ's "thorough and well reasoned" penalty assessment of $45,800 against the County. *See* Region's Brief at 26.

Section 113(d)(1) of the Act, 42 U.S.C. § 7413(d)(1), authorizes the Adminstrator to assess administrative civil penalties of "up to $25,000, per day of violation" against violators of the Act "where the total penalty sought does not exceed $200,000."[42] The Act further identifies factors that the Administrator must consider in assessing any penalty under section 113 of the Act. These statutory factors are:

> ([I]n 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)(1), 42 U.S.C. § 7413(e)(1). In addition, the Agency's Part 22 rules provide:

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[42] The Debt Collection Improvement Act of 1996 ("DCIA"), 31 U.S.C. § 3701, requires EPA to adjust the maximum civil penalties on a periodic basis to incorporate inflation. On June 27, 1997, EPA promulgated the Adjustment of Civil Monetary Penalties for Inflation Rule, 40 C.F.R. §§ 19 et seq., as mandated by the DCIA. The rule sets the maximum allowable administrative penalty per day of violation of the CAA at $27,500 and a maximum total penalty of $220,000. 40 C.F.R. § 19.4.

> 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.

40 C.F.R. § 22.27(b). U.S. EPA has developed penalty policies that provide guidance to the ALJ, as well as the enforcement personnel, in determining an appropriate penalty assessment by describing a method for translating statutory penalty factors into numerical terms. Relevant to the matter at hand, U.S. EPA has developed a general penalty policy for assessing penalties in the CAA context. *See* C Ex. 13 (Clean Air Act Stationary Source Civil Penalty Policy) ("CAA Penalty Policy"). Among the attachments to the CAA Penalty Policy is Appendix III titled "Asbestos Demolition and Renovation Civil Penalty Policy" ("Asbestos Demolition and Renovation Penalty Policy"), which applies the CAA's statutory factors to demolition and renovation asbestos NESHAP violations. C Ex. 12, at 1.[43]

The applicable regulations and the Board's cases make clear that, although the ALJ must consider any civil penalty policies applicable to the matter, the ALJ has significant discretion to assess a penalty other than that calculated pursuant to the particular penalty policy. *See* 40 C.F.R. § 22.27(b); *In re Allegheny Power Serv. Corp. & Choice Insulation, Inc.*, 9 E.A.D. 636, 656 (EAB 2001), *appeal docketed,* No. 6:01-CV-241 (S.D. W. Va. Mar. 16, 2001); *In re Employers Ins. of Wausau & Group Eight Tech., Inc.*, 6 E.A.D. 735, 758 (EAB 1997). The ALJ's penalty assessment must contain a reasoned analysis of the basis for the penalty assessment, but the ALJ is free to depart from the penalty policy so long as he or she adequately explains his or her rationale. *See Ocean State*, 7 E.A.D. at 535. On appeal, the Board has the authority to increase or decrease a penalty assessment in an initial decision, *see* 40 C.F.R. § 22.30(f), and has exercised this authority in appropriate circumstances. *See, e.g., In re City of Marshall*, 10 E.A.D. 173 (EAB 2001); *In re Rybond, Inc.*, 6 E.A.D. 614, 639 (EAB 1996).

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[43] The Asbestos Demolition and Renovation Penalty Policy is designed to be used in conjunction with the CAA Penalty Policy in order to assess penalties that apply to demolition and renovation operations. The Asbestos Demolition and Renovation Penalty Policy calculates the gravity and/or economic benefit components of a penalty for violations of the asbestos NESHAP involving demolition and renovation operations. Once these components of the penalty are determined as a "preliminary deterrence" amount, the CAA Penalty Policy governs the remaining components of the penalty; specifically, the adjustment factors that may be applied to increase or lower the penalty.

1. *Use of Asbestos Demolition and Renovation Penalty Policy at Active Waste Disposal Sites*

As identified *supra*, the County appeals the ALJ's use of the Asbestos Demolition and Renovation Penalty Policy in this matter. The County asserts that the application of this penalty policy to the facts of this case is unwarranted, because demolition and renovation owners and operators control the handling of ACWM, and may have an economic incentive in noncompliance with the asbestos NESHAP. Conversely, the County argues that a landfill such as Lyon County's Landfill has no control over the ACWM brought to it unless the source of the ACWM generates a WSR. *See* County's Brief at 23. The County also asserts that the risk resulting from its noncompliance with the NESHAP is questionable since one of the inspectors at the Landfill testified that he did not feel that he was in personal jeopardy at the time of the inspection. *See id.* at 24. Furthermore, the County argues that the Asbestos Demolition and Renovation Penalty Policy was not intended to apply to landfills and, therefore, creates a harsh result when applied in this instance. *See id.*

The Region responds by emphasizing that pursuant to the active waste disposal site standard, 40 C.F.R. § 61.154, an active waste disposal site that accepts ACWM must also "exercise careful control over any site where ACWM has been deposited." Region's Brief at 28. Indeed, the Region asserts that renovation and demolition operators pay active waste disposal sites, such as this Landfill, to dispose of ACWM properly. In response to the County's argument that the risk of exposed ACWM was not serious at the Landfill, the Region cites a number of cases, including Board precedent that recognize the significant risk to human health from exposure to asbestos. *See* Region's Brief at 28-29. The Region believes that in cases where an active waste disposal site has not complied with the NESHAP, a substantial penalty must be assessed in order to deter noncompliance in the future and to prevent future asbestos exposure to humans.

As the County points out, the Asbestos Demolition and Renovation Penalty Policy does not appear on its face to be strictly applicable to active waste disposal sites since the policy focuses on demolition or renovation projects, and the violations that may occur during such projects. *See* Asbestos Demolition and Renovation Penalty Policy. However, we do not believe that the ALJ erred in her use of the Asbestos Demolition and Renovation Penalty Policy to guide her assessment of a penalty.

In the instant case, the ALJ explained in the Initial Decision that, while she considered and used the general CAA Penalty Policy — the applicable penalty

policy for this matter[44] — she found the resulting penalty under the CAA Penalty Policy used alone to be too harsh. *See* Init. Dec. at 48. Instead, the ALJ consulted the Asbestos Demolition and Renovation Penalty Policy as a guide in determining an appropriate penalty for each of the violations.

> Although the Asbestos [Demolition and Renovation] Penalty Policy is not expressly applicable and does not directly address waste disposal site violations, the rationale and guidance set forth in that policy is considered to be most useful and helpful in determining an appropriate penalty for Respondent's asbestos NESHAP active waste disposal site violations.

Init. Dec. at 47-48.

We have held that where a statute permits, "the Administrator or her delegate may exercise [] discretion by looking to the [statutory] factors listed in * * * other sections as guidance in specific cases." *In re Woodcrest Mfg., Inc*. 7 E.A.D. 757, 774 n.11 (1998), *aff'd*, 114 F. Supp.2d 775 (N.D. Ind. 1999). In *Woodcrest*, an Emergency Planning and Community Right to Know Act ("EPCRA") case, the statute did not include specific factors to use in determining an appropriate penalty for a particular violation. In reviewing the penalty assessment in that matter, the Board affirmed the ALJ's discretion to look to other statutory penalty factors under EPCRA section 325(b)(1)(C) as guidance in determining an appropriate penalty for the section 325(c) violation. *See id.* Similarly, nothing in the CAA prohibits the ALJ from using the Asbestos Demolition and Renovation Penalty Policy as guidance in this case. It was well within the ALJ's discretion to apply the Asbestos Demolition and Renovation Penalty Policy in combination with the CAA Penalty Policy, rather than the CAA Penalty Policy alone.[45] The County has not shown that this approach did not serve as a reasonable framework for applying the statutorily required factors under section 113(e) of the CAA to the facts of this case.

Furthermore, we agree with the Region that careful control over a landfill's operations must be exercised, especially when the landfill has accepted ACWM. To find otherwise, would diminish the importance of complying with the asbestos NESHAP's standard for active waste disposal sites. We do not find anything in the record to suggest that the risks to human health resulting from exposure to

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[44] As stated in the CAA Penalty Policy, "this penalty policy will serve as the civil penalty guidance used in calculating administrative penalties under Section 113(d) of the Act * * *." CAA Penalty Policy at 1.

[45] In the following section, we examine in more detail the ALJ's specific penalty assessments for each count.

airborne asbestos are any less serious or significant than we and others have found in the past. *See In re Schoolcraft Constr., Inc.*, 8 E.A.D. 476, 492-93 (EAB 1999) ("Because exposure to airborne asbestos poses such a serious risk to human health, violations of * * * 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.").

2. *Fairness and Justness of Penalty*

The County's second and last penalty argument on appeal challenges the fairness and justness of the penalty assessment, given the circumstances surrounding this matter. In attempting to establish that the penalty is unfair, the County focuses in particular on the ALJ's use of the WSRs to determine the total amount of asbestos waste that should be considered in calculating the penalty. The County asserts that nowhere in the record has the Region established that RACM delivered to the Landfill was mishandled, or that a WSR alone establishes that the observed ACM was friable and, therefore, according to the County, RACM. County's Brief at 27-28.

For reasons addressed *supra*, we have reversed the ALJ's determinations of liability for Counts IV and V. Accordingly, we will not assess a penalty for those counts and, thus, we will subtract from the overall penalty the ALJ's penalty assessment of $2,000 for those counts. Our analysis in this section will focus on the penalty assessed for Counts I, II, III, and VI, beginning with an explanation of the penalties assessed in the Initial Decision.

The ALJ began her penalty analysis with an introduction to the statutory factors that must be considered when determining an appropriate penalty. After an explanation of the guidelines and penalty policies created to assist in calculating penalties for these CAA violations, including an explanation of the general matrix framework of the penalty policies, the ALJ took each of the six counts separately in which she found liability and explained the preliminary deterrence amount assessed in each count.[46]

For Count I, the ALJ considered the violation to fall under the work practice violation category in the Asbestos Demolition and Renovation Penalty Policy. The ALJ then used the WSRs to calculate, according to the formula in the Asbestos Demolition and Renovation Penalty Policy, how many units of asbestos were

[46] The ALJ's preliminary deterrence amount for all counts focused solely on the gravity component of the Asbestos Demolition and Renovation Penalty Policy matrix for the violations because the Region did not seek to recover an amount for the County's economic benefit of noncompliance. In deciding not to seek the economic benefit component, the Region used its discretion not to seek recovery of an economic benefit of less than $5,000. Here, the Region had determined the County's economic benefit of noncompliance to be $1,675. Init. Dec. at 49.

involved in the violation. Specifically, the ALJ concluded that "the total amount of asbestos deposited at the Landfill during the relevant period must be considered because such amount related to the potential for environmental harm associated with improper handling at the disposal site." Init. Dec. at 50. To determine this amount, the ALJ totaled the amount of ACWM recorded on the WSR manifests from May 2, 1994 (the last shipment of transite to be received by the Landfill) to July 8, 1994 (the last shipment of vinyl asbestos tile prior to the inspection). The WSR amounts totaled 67 cubic yards; the ALJ then converted 67 cubic yards into 51.7 units of asbestos pursuant to the Asbestos Demolition and Renovation Penalty Policy. The ALJ then looked to the Asbestos Demolition and Renovation Penalty Policy's matrix, which provides that a $15,000 gravity portion of the penalty is appropriate when a violation involves 51.7 units and it is a first-time violation. The ALJ accepted the Asbestos Demolition and Renovation Penalty Policy's suggested amount and assessed a $15,000 gravity portion of the penalty for Count I. We agree with the ALJ's assessment of $15,000 for Count I, and find no error in her decision to use the potential for harm as determined by the recent WSRs as a basis for applying the appropriate matrix in the Asbestos Demolition and Renovation Penalty Policy.

For Count II, the ALJ again used the Asbestos Demolition and Renovation Penalty Policy's work practice violation category. The Asbestos Demolition and Renovation Penalty Policy's matrix for work practice violations breaks down the work practice violations into several types: a first violation, a continuing violation of the first violation, a second violation, a continuing violation of the second violation, a subsequent violation and a continuing violation of the subsequent violation. Asbestos Demolition and Renovation Penalty Policy at 17.[47]

At hearing, the Region argued that Count II should be considered a "second" violation. The ALJ rejected the Region's argument that Count II should be considered a "second" violation, which would call for a $25,000 assessment in the gravity portion of the penalty (an escalation from the first-time violation amount of $15,000 suggested in the Asbestos Demolition and Renovation Penalty Policy). The Region did not appeal this holding to the Board.

Instead, the ALJ determined that the facts in the record established another "first-time violation" for Count II. Accordingly, she assessed $15,000 in penalties for Count II. In addition to the $15,000 penalty assessment, the ALJ added an additional $1,500 to Count I's gravity component (beyond the $15,000 already

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[47] The Asbestos Demolition and Renovation Penalty Policy explains that a second or subsequent violation "should be determined to have occurred if, after being notified of a violation by the local agency, State or EPA at a prior demolition or renovation project, the owner or operator violates the Asbestos NESHAP regulations during another project, even if different provisions of the NESHAP are violated." Asbestos Demolition and Renovation Penalty Policy at 4.

assessed) to account for the continuing nature of the violation as contemplated by the Asbestos Demolition and Renovation Penalty Policy's matrix for continuing violations. Asbestos Demolition and Renovation Penalty Policy at 17; Init. Dec. at 52.

While we agree with the ALJ's assessment of a $1,500 penalty for the continuing violation, we are not persuaded that the findings associated with Count II as articulated in the Findings of Fact and Conclusions of Law support the assessment of an additional "first-time" violation penalty of $15,000.[48] Thus, we find the assessment of a $1,500 penalty for Count II[49] appropriate given the facts of this case, but reverse the ALJ's penalty assessment of $15,000 for an additional first-time violation. *See* Asbestos Demolition and Renovation Penalty Policy at 4-5, 17.

For Count III, the ALJ explained that under the Asbestos Demolition and Renovation Penalty Policy the violation falls under the category of a recordkeeping violation. The ALJ held that the Asbestos Demolition and Renovation Penalty Policy's suggested gravity amount of $1,000 was appropriate based on the facts of this case. Specifically, the ALJ took into account in her penalty assessment the fact that the amount of ACWM received from the demolition/renovation operator at the Church of St. Michael could have been obtained from other records in the County's possession. The Asbestos Demolition and Renovation Penalty Policy suggests a penalty of $1,000 for waste shipment violations that involve failure to maintain records, but where other information regarding waste disposal is available.[50] Asbestos Demolition and Renovation Penalty Policy at 16. Thus, since the County failed to adequately maintain a WSR in violation of 40 C.F.R. § 61.154(e)(1)(iii), but other information regarding the waste disposal

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[48] The ALJ found generally that on July 21, 1994, when the inspectors returned to the Landfill on the second day, they saw that some of the disposal area and ACWM had been covered with dirt but that again they observed ACWM on the surface of the Landfill. Init. Dec. at 6 (Finding of Fact 9); *see also* Init. Dec. at 10 (Conclusion of Law 3); Tr. at 92 ("[An asbestos disposal bag with a warning label on it] looked very similar to the material that I saw lying in the roadway on the previous day, and although there was — there was no bag on the roadway where I had previously observed it, it did appear to be that this bag had been moved from the roadway over to the side of the disposal area.").

Given the totality of the circumstances, we are not inclined to treat this as a new first-time violation but, rather, as a continuation of the violation of the previous day. The $1,500 penalty contemplated in the matrix of the Asbestos Demolition and Renovation Penalty Policy seems to us fully adequate under the circumstances.

[49] While the ALJ added the continuing violation penalty of $1,500 to Count I, given that the Region pled the violation of July 21, 1994, as a separate count, we are assessing the $1,500 continuing violation penalty for Count II.

[50] When failure to maintain records precludes discovery of waste disposal activity, *i.e.*, other documents do not contain the missing information, the Asbestos Demolition and Renovation Penalty Policy suggests a $2,000 penalty. Asbestos Demolition and Renovation Penalty Policy at 16.

was available, the ALJ found the instant violation analogous to the fact pattern found in the Asbestos Demolition and Renovation Penalty Policy, and assessed a $1,000 penalty for Count III. We agree with the ALJ's penalty assessment of $1,000 for Count III.

For Count VI, using the Asbestos Demolition and Renovation Penalty Policy for notice violations, the ALJ found that $15,000 was the appropriate gravity amount of the penalty. In assessing this sum, the ALJ reasoned that the penalty for a notification violation must be significant because notification plays a pivotal role in enforcement of the asbestos NESHAP. Init. Dec. at 54. The Asbestos Demolition and Renovation Penalty Policy suggests a significant penalty when required notice is not given and when substantive violations have likely occurred.[51] Asbestos Demolition and Renovation Penalty Policy at 2. The ALJ found that "[t]he violation here may not be categorized as a minor violation because in addition to the notification violation there was no compliance with the attendant work practice requirement to adequately cover the ACWM after it was excavated." Init. Dec. at 54. Thus, the ALJ assessed a $15,000 penalty for Count VI. While we agree that this violation of 40 C.F.R. § 61.154(j) is significant,[52] we assess a lower penalty for Count VI than $15,000 since we have already assessed in Counts I and II a significant penalty for the County's substantive noncompliance with the standard's visible emission provision, 40 C.F.R. § 61.154(a). On balance, we find that in the circumstances of this case, the assessment of $5,000 in penalties for Count VI is more appropriate.

Following the ALJ's determination of the preliminary deterrence portion of the penalty, the ALJ then considered any adjustment factors pursuant to the general CAA Penalty Policy. Those adjustment factors are: degree of willfulness, negligence, degree of cooperation, history of noncompliance, and environmental damage as they applied to this matter. The ALJ explained in her analysis that under the CAA Penalty Policy, a decrease in the gravity component of the penalty is appropriate only when applying the degree of cooperation factor, and only if certain circumstances are met. All other adjustment factors, if applicable, would only allow for increases in the penalty. In reviewing the record, the ALJ explained that she concurred with the Region's position that no adjustments for the factors identified above were warranted in this case. However, the ALJ did adjust the overall penalty pursuant to the statutory "as justice may require" factor. The

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[51] In contrast, the Asbestos Demolition and Renovation Penalty Policy suggests a much lower penalty amount when required notice is not given, but the Agency concludes that the source "probably achieved compliance with all substantive requirements." Asbestos Demolition and Renovation Penalty Policy at 2.

[52] As discussed in Part I.C., the asbestos NESHAP was designed to prevent the public's exposure to asbestos emissions. When ACWM is disturbed, it has the potential to be released into the outside air — making public exposure to asbestos fibers more likely.

ALJ decreased the penalty by $3,700 in order to reimburse the County for costs it incurred due to a delay in the hearing date, which, according to the ALJ, was the fault of the Region. Neither party appealed this $3,700 reduction.

As discussed above, upon reviewing the ALJ's penalty assessment for Counts I, II, III and VI, the Board concurs with the penalty analysis, with the two exceptions. Accordingly, pursuant to 40 C.F.R. § 22.30(f), we decrease the ALJ's assessment of $45,800 by $15,000 for Count II and $10,000 for Count VI. Further, because we found the County was not liable for Counts IV and V, we eliminate the $1,000 penalty for Count IV and the $1,000 penalty for Count V. Therefore, after accounting for the $3,700 reduction discussed above, we assess $18,800 in total civil penalties against the County.

H. *Appropriateness of the Board's Remand*

The County raises on appeal the appropriateness of the Board's prior remand of this matter to the ALJ for consideration on the merits after we reversed in part her earlier decision involving the interpretation of section 113(d)(1) of the CAA. *See generally In re Lyon County Landfill*, 8 E.A.D. 559 (EAB 1999). The County asserts that the Board was without authority to issue its remand order in August of 1999: "It is undisputed that the plain reading of the Part 22 rules simply did not provide for the ability of the EAB to remand issues back to an ALJ for further proceedings." County's Brief at 9. In support of this argument, the County cites to 40 C.F.R. § 22.31(a), which states:

> Contents of the final Order. When an appeal has been taken or the Environmental Appeals Board issues a notice of intent to conduct a review sua sponte, the Environmental Appeals Board shall issue a final order as soon as practicable after the filing of all appellate briefs or oral argument, whichever is later. The Environmental Appeals Board shall adopt, modify, or set aside findings and conclusions contained in the decision or order being reviewed and shall set forth in the final order the reasons for its action.

40 C.F.R. § 22.31(a) (1996). Moreover, the County believes that since this time, the July 23, 1999 revision to the Part 22 rules has "corrected this situation." *See* 64 Fed. Reg. 40,138 (July 23, 1999) (codified at 40 C.F.R. pt.22 (1999)).

The Region counters the County's argument by citing to 40 C.F.R. § 22.30(c), another provision of the same Part 22 rules that was in place at the time of the Board's Remand Order. Region's Brief at 31. This provision states that "[n]othing herein shall prohibit the EAB from remanding the case to the Presiding Officer for further proceedings." 40 C.F.R. § 22.30(c) (1996). The Region

argues that the language cited by the County is consistent with the Board's ability to remand cases: "If findings and conclusions are set aside, a remand would logically follow." Region's Brief at 31.

In response to these arguments, we first note that the revised Part 22 rules apply in this case and, thus, that the remand authority that is provided for in those rules also applies.[53] However, even if the Part 22 rules in effect prior to the July 1999 revisions applied to this matter, the County's argument would nonetheless fail. As the Region points out, the plain reading of the Part 22 rules in place at the time of the commencement of this action did give the Board authority to remand matters to an ALJ for further consideration. *See* 40 C.F.R. § 22.30(c) (1996). Accordingly, we have on a number of occasions used our remand authority under the previous Part 22 rules. *See In re L & C Servs.*, 8 E.A.D. 110 (EAB 1999) (remanding the case to the Presiding Officer for a determination of reasonable attorney's fees and expenses to be awarded to Appellant); *In re Schoolcraft Constr.*, 7 E.A.D. 501 (EAB 1998) (remanding case to the Presiding Officer for a determination on whether the Region met its burden of establishing the violation and, if so, what the appropriate penalty should be). For these reasons, we reject the County's argument that the Board remanded without proper authority under the regulations.

III. *CONCLUSION*

For the foregoing reasons, we uphold the ALJ's finding of liability on Counts I, II, III, and VI of the Complaint, and we reverse her finding of liability and the penalty assessed on Counts IV and V. For reasons discussed above, we assess a total civil penalty of $18,800 against the County. The County shall pay the full amount of the civil penalty within thirty (30) days of the date of service of

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[53] The Part 22 rules were revised in July of 1999. 64 Fed. Reg. 40,138 (July 23, 1999). The revised Part 22 rules apply to all administrative proceedings commenced on or after August 23, 1999. In addition, the revised rules also apply to proceedings commenced prior to August 23, 1999, unless "to do so would result in substantial injustice." *Id.* The County has not shown that substantial injustice would occur if the revised Part 22 rules were used in this case. *See* 40 C.F.R. § 22.30(f) (1999) ("The * * * Board may remand the case to the Presiding Officer for further action.").

this order, unless another time frame is mutually agreed upon by the parties. Payment shall be made by forwarding a cashier's check, or certified check payable to the Treasurer, United States of America, at the following address:

First National Bank of Chicago
U.S. EPA, Region V (Regional Hearing Clerk)
P.O. Box 70753
Chicago, Illinois 60673

So ordered.