

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
City of Wilkes-Barre,)	Docket No. CAA-03-2005-0053
A.R. Popple, Inc.,)	
Wyoming S. & P, Inc.)	
)	
Respondents)	

**ORDER DENYING COMPLAINANT’S MOTION
TO SUPPLEMENT RECORD**

I. Introduction

This civil penalty proceeding under Section 112(a)(3) and (d) of the Clean Air Act, 42 U.S.C. § 7413(a)(3) and (d), was commenced on December 30, 2004, by the issuance by the Division Director of the Waste and Chemical Management Division of the United States Environmental Protection Agency, Region 3 (“Complainant” or “EPA”) of a complaint charging the City of Wilkes-Barre, A.R. Popple, Inc., and Wyoming S.&P., Inc. (“Respondents”) with violations of the Asbestos National Emission Standard for Hazardous Air Pollutants (“Asbestos NESHAP”), 40 C.F.R. Part 61, Subpart M. Specifically, the complaint alleges that Respondents are the owners or operators of a “demolition activity” within the meaning of 40 C.F.R. § 61.141, that the facility being demolished is the Wilkes-Barre Steam Heat Plant, an abandoned building complex located in the City of Wilkes-Barre, that (Count I) Respondents violated § 61.145(b) by failing to give adequate notice of the demolition, that (Count II) Respondents violated § 61.145(c)(6) by failing to keep all RACM adequately wet until treated or contained in preparation for disposal, that (Count III) Respondents violated § 61.145 (c)(8) by failing to have a trained supervisor present during demolition activities, and Count IV that Respondents violated § 61.150(b) by failing to dispose of all waste material containing asbestos as soon as practical. For these alleged violations, it was proposed to assess Respondents a penalty of \$36,650. No apportionment or allocation of the penalty among the Respondents was made or attempted.

The City of Wilkes-Barre (“City”) is a municipality incorporated in the Commonwealth of Pennsylvania. A.R. Popple, Inc. (“Popple”) is a demolition contractor incorporated in the Commonwealth of Pennsylvania and Wyoming S.&P., Inc. (“Wyoming”) is an asbestos contractor incorporated in the Commonwealth of Pennsylvania. These corporations maintain offices within the City of Wilkes-Barre and are persons within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e), and are thus subject to the Asbestos NESHAP.

The City answered the complaint, denying, inter alia, that it was the owner or operator of a demolition activity within the meaning of § 61.141, denying that it was the owner of, or had

assumed responsibility for, the Wilkes-Barre Steam Heat Plant, denying knowledge of, or responsibility for, the violations alleged in the complaint, admitting that it contracted with A.R. Popple, Inc for the demolition of the Steam Heat Plant and that it contracted with Wyoming S & P, Inc for asbestos abatement work in connection with the demolition, but alleging that it was acting in its municipal capacity to abate a nuisance. The City denied liability and requested a hearing.

A.R. Popple through counsel filed an answer alleging that it was an excavation contractor who also performed demolition projects, admitting that in June of 2002 it was engaged by the City of Wilkes-Barre to abate an emergency situation in that the roof of the Steam Heat Plant had collapsed, denying, inter alia, that it was the owner or operator of a demolition activity within the meaning of the regulation, denying that any violations of regulations occurred and specifically denying that it was responsible for any violations that may have occurred, opposing any penalty and requested a hearing.

Wyoming S & P, Inc filed an answer by its president, denying responsibility for the violations alleged in the complaint and requested a hearing.

A Memorandum from the Director of Code Enforcement to the Mayor of the City of Wilkes-Barre, dated June 20, 2002, recounts a visit to the Steam Heat Property, N.Washington/Bennett Streets on that date in response to a complaint. The Memorandum states that the roof of the structure [Steam Heat Plant] had collapsed against the front wall, presenting a clear and immediate danger to the public and residents of Bennett Street. The Memorandum concludes that the structure represents a hazardous condition and should be demolished immediately in order to prevent damage to life and property. This was the situation that led the City of Wilkes-Barre to award a contract to A.R. Popple for the demolition of the Steam Heat Plant. A.R. Popple performed the demolition work in June and July 2002.

As indicated above, Count II of the complaint alleges that regulated asbestos-containing material ("RACM") was not kept adequately wet during demolition activities. The Fire Department of the City of Wilkes-Barre was employed to assist in wetting the material. In its Pre-Hearing Statement, dated April 29, 2002, A.R. Popple listed proposed exhibits as the contract between the City and A.R. Popple, A.R. Popple's bid documents submitted to the City, and Receipts [for deliveries] from the Certified Asbestos Landfill. A.R. Popple reserved the right to supplement this list with documents produced by other parties including the City's Fire Department Records.

A hearing in this matter was held in Wilkes-Barre, Pennsylvania on August 23 and 24, 2005.

At the hearing, Fire Department Records for the City of Wilkes-Barre for the period January 1, 2002, through August 26, 2002, were offered in evidence by Popple and admitted (Exh P-1) over Complainant's objection that the records should have been included in Popple's Prehearing Exchange. Counsel for Popple pointed out that Fire Department records were specifically mentioned in its reservation of the right to supplement its Prehearing Exchange and alleged that he had been trying to obtain the records from the City, through Mr. Henry, City

attorney.¹ Counsel recited the delays in obtaining the records, stating that the records were not available to him until Tuesday (apparently August 23, 2005) and that copies were distributed to Ms. Abramson, Complainant's counsel, on the same day (Tr. 302). As noted below, however, in its Opposition to Complainant's Motion to Supplement Record, Popple alleges that through no fault of its own, it did not receive the Fire Department records until [Friday] August 19, 2005 (id. at 2). Popple alleges that immediately upon receiving the records, the records were copied and forwarded to relevant parties.

II. Complainant's Motion

On September 26, 2005, Complainant filed a Motion to Supplement Record, seeking to introduce records from the Pennsylvania State Climate Office (PSCO) showing temperature and rainfall conditions in Scranton, Pennsylvania, apparently maintained by the FAA, during the period July 28, 2002, through July 31, 2002. An attached affidavit of Mr. Rich Ponak, an EPA environmental scientist who testified at the hearing and who obtained the records, states that weather information for Wilkes-Barre was not available from the PSCO during the relevant time frame. Mr. Ponak's affidavit states that Scranton, Pennsylvania and Wilkes-Barre, Pennsylvania are approximately 18.74 miles apart. Complainant alleges that, it lacked time before the hearing to prepare for the Fire Department records, and that it should be able to submit weather records in rebuttal.

Complainant alleges it did not have time prior to the hearing to prepare a rebuttal of the issues raised by the Fire Department records. Motion to Supplement Record at 3. Complainant complains that Popple failed to disclose the Fire Department records in its Prehearing Exchange but was allowed to use the records as evidence at the hearing. EPA says that it would have submitted rebuttal evidence in the form of weather records, if the fire records had been submitted prior to the hearing. *Id.* EPA further argues that evidence pertaining to the weather conditions is related to Popple's defense that the Fire Department wet down the Steam Heat Plant site as required by law. *Id.* Complainant argues the Fire Department records "were introduced to call into question the condition (i.e. wetness) of the asbestos containing waste material on July 16 and 31, 2002" and that information regarding the weather conditions directly rebuts that issue. *Id.* However, no weather records for July 16, 2002, are attached to the motion. Moreover, Complainant does not explicitly explain how information regarding the weather conditions at Scranton during the demolition is relevant to the issue of whether Respondents with the assistance of the Wilkes-Barre Fire Department adequately wet waste materials containing asbestos.

In addition, Complainant maintains that the weather records are appropriate under the rule of official notice, which is permissible under Rule 22.22(f) of the Consolidated Rules of Practice.² Complainant argues that this court has the authority to take official notice of the

¹ . A copy of a letter concerning this proceeding from counsel for Popple to Mr. Henry, City Attorney, dated August 5, 2005, states that, as previously discussed, please contact the City of Wilkes-Barre Fire Department for copies of any shift logs, work diaries, incident reports or any other documents reflecting the Fire Department's activity in connection with the referenced matter. Popple cites this letter, which is attached to Popple's Brief In Opposition to EPA's Motion To Supplement Record, as evidence of a written request for Fire Department records.

weather data that it seeks to add to the record. Citing cases where federal courts have taken judicial notice of weather conditions or drought,³ Complainant contends that the records it seeks to offer should be accepted because the records come from the Pennsylvania State Climate Office (PSCO) website. *Id.* at 4-5. Complainant asserts that this website is both reputable and reliable because it is accessible to the public and “compiles data from weather stations operated by various State and Federal entities that systematically keep records generally regarded as accurate” *Id.* at 5. As indicated hereinafter, objection to the weather records is not based on their reliability or accuracy, but on their relevance.

III. Popple’s Opposition

Attached to A.R. Popple’s Proposed Findings of Fact and Conclusions of Law, dated October 24, 2005, is A.R. Popple’s Brief in Opposition to EPA’s Motion to Supplement Record, also dated October 24, 2005 (“Opposition”). Although this Opposition was not filed within 15 days of service of Complainant’s Motion as provided by Rule 22.16(b),⁴ no prejudice to Complainant or other parties is apparent and the Opposition will be considered.

Popple emphasizes that, in its prehearing statement, it reserved the right to supplement its exhibit list with records from the City of Wilkes-Barre’s Fire Department, that these records are relevant to the issue of whether asbestos-containing waste material was adequately wet during demolition activities at the Steam Heat Plant site, that these records are part of the record and should remain so (Opposition at 1, 3). Counsel alleges that he did not receive the Fire Department records until [Friday] August 19, 2005, and that copies were immediately forwarded to all relevant parties. Popple points out that Complainant’s objection to the admission of the Fire Department records was considered and overruled at the hearing.

Popple supports its argument that the Fire Department records are admissible on the issue of whether the asbestos-containing waste material was adequately wet by reference to Federal Rule of Evidence Rule 402, providing in part “all relevant evidence is admissible, except as otherwise provided..”. More pertinent here is Consolidated Rule 22.22 **Evidence** providing in part “(a) General. (1) The Presiding Officer [ALJ] shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable or of little probative value, except....” Citing *Daubert v. Menell Pharmaceuticals, Inc.*, 509 U.S.579, 588 (1993), Popple says that relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. To the same effect, see Federal Rule of Evidence Rule 401. Similarly, “probative value” denotes the tendency of a piece of information to prove a fact that is of

² *Id.* at 4. Rule 22.22(f) provides: “*Official notice.* Official notice may be taken of any matter which can be judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.”

³ .See, e.g., *U.S. v. Sargent County Water Resource Dist.*, 876 Fed. Supp 1081, 1086 (N.D. 1992) (judicial notice taken of recent draught even though no such evidence was presented at trial) and *Rio Grande Silvery Minnow v. Keys*. 220 U.S. LEXIS 9246 (D. N.M. 2002) (judicial notice of current weather conditions indicating that the Rio Grande watershed is experiencing a very dry year).

⁴ Rule 22.16(b) mandates that a “party’s response to any written motion must be filed within 15 days after service of such motion.”

consequence in the case. *Chautauqua Hardware Corporation*, EPCRA Appeal No. 91-1, 3 E.A.D. 616, 632 (CJO, 1991) at 622.

Lastly, Popple asserts that the weather records should be excluded because they were not offered at the hearing and are irrelevant (Opposition at 3, 4). Firstly, Popple emphasizes that the weather records do not reflect weather information from the Wilkes-Barre area, the area of the demolition site and are therefore not relevant. Secondly, Popple says that the Motion fails to identify any issues that the weather records could possibly address with regard to the Fire Department records or otherwise.⁵

IV. Discussion

In general, Consolidated Rule 22.19(a) bars the introduction into evidence of documents or exhibits or testimony of a proposed witness not included in a party's prehearing exchange.⁶ Rule 22.22(a), however, creates an exception for documents and exhibits when "the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so." 40 C.F.R. § 22.22(a). If a party realizes that its information is incomplete, inaccurate, or outdated, then that party is obligated to supplement the record. 40 C.F.R. § 22.22(f).

A motion to reopen the record to receive additional exhibits or testimony after adjournment of a hearing but prior to the issuance of an initial decision is addressed to the sound discretion of the ALJ. *See In the Matter of Lake County, Montana*, Docket No. CAA-8-99-11, 2001 EPA ALJ LEXIS 132 (July 24, 2001); *see also In the Matter of Chempace Corp.*, Docket No. 5-IFFRA-96-017, 1998 EPA ALJ LEXIS 123 (Nov. 3, 1998). Consolidated Rule of Practice Rule 22.28 provides that a motion to reopen a hearing that includes the introduction of new evidence must explain in detail the purpose of the evidence and that there is good cause why the evidence was not provided at the hearing.⁷ However, Rule 22.28 specifically addresses motions filed "after service of the initial decision." 40 C.F.R. § 22.28. Motions to supplement or to reopen the record prior to the issuance of an initial decision are not subject to Rule 22.28. *In the Matter of Lake County, Montana*, Docket No. CAA-8-99-11, 2001 EPA ALJ LEXIS 132 (July

⁵ At the time that this Order was drafted, Complainant's reply to Popple's Opposition had not been reviewed. EPA contends that that Popple replied after the fifteen day deadline and therefore it should not be heard on procedural grounds, that the weather records should be introduced as a rebuttal to the fire department records, and that the weather records are relevant to showing the RACM was kept adequately wet. All of these contentions are directly addressed in this Order and do not change the result.

⁶ Rule 22.19(a)(1) states in part that:

In accordance with an order issued by the Presiding Officer, each party shall file a prehearing exchange. Except as provided in § 22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify.

⁷ Rule 22.28(a) provides:

Filing and content. A motion to reopen a hearing to take further evidence must be filed no later than 20 days after service of the initial decision and shall state the specific grounds upon which relief is sought. Where the movant seeks to introduce new evidence, the motion shall: state briefly the nature and purpose of the evidence to be adduced; show that such evidence is not cumulative; and show good cause why such evidence was not adduced at the hearing.

24, 2001). Because an initial decision has not been issued in the present matter, Rule 22.28 is not applicable. The “good cause” requirement of the rule has, however, been used as guidance.

In this instance, Complainant’s objection to the introduction of the Fire Department records was overruled at the hearing. Complainant’s remedy at that point was to move for a continuance or to hold the record open in order to allow it to rebut or explain allegedly new evidence. Even if that procedural deficiency is disregarded, however, weather records from Scranton, Pennsylvania for a four-day period of the demolition have not been shown to be relevant to the Wilkes-Barre area, the area of the demolition. Moreover, even if the weather records are regarded as representative of weather conditions in the Wilkes-Barre area at the time, Complainant has failed to address with specificity how these records relate in any way to the issue of whether asbestos-containing waste material was adequately wet within the meaning of § 61.145(c)(6). It follows that Complainant’s Motion to Supplement Record will be denied.

V. Order

The Complainant’s Motion to Supplement Record is denied.

Dated this 2nd day of November, 2005.

Spencer T. Nissen
Administrative Law Judge