UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
HOUSING AUTHORITY OF THE	**)**	**DOCKET No. CAA-03-2003-0211**
CITY OF MOUNDSVILLE, *ET AL*.	**)**	
	)	
Respondents.	**)**	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

This case was initiated by the filing of an Administrative Complaint on June 5, 2003. Three Respondents are named in the Complaint: the Housing Authority of the City of Moundsville (MHA), Earl P. Huffner (Huffner), and Carpeting Unlimited, Inc. (CU).[1] The Complaint alleges violations of section 112 of the Clean Air Act (CAA), as amended (42 U.S.C. § 7412), and of Federal regulations promulgated thereunder, specifically the National Emission Standard for Asbestos (40 C.F.R. Part 61, Subpart M), arising out of the Respondents' removal of floor tiles containing asbestos in residential buildings in Moundsville, West Virginia.

By Motion dated February 24, 2004, Respondent CU moved to dismiss the claims against it on the grounds that it was a sub-contractor "working at the directive of the contractor [Huffner]," "that it had no control or supervision of this renovation operation" and therefore does not fall within the definition of "owner or operator of a demolition or renovation activity pursuant to 40 C.F.R § 61.141."

On March 9, 2004, Complainant filed its Response to CU's Motion to Dismiss. In the Response, Complainant asserts that Respondent CU does fall within the definition of "owner or operator" under 40 C.F.R § 61.141 in that CU "operated" the renovation when its employees removed floor tiles in the apartment complex.

[1] Complainant has notified this Tribunal that it has settled its claims against Respondent Huffner. Thus, MHA and CU are the only remaining Respondents in this action.

A. Standards for Motions to Dismiss

Section 22.20(a) of the Consolidated Rules of Practice provides in pertinent part that–

> The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

40 C.F.R. §§ 22.20(a).

Respondent CU's Motion to Dismiss is analogous to a motion to dismiss for failure to state a claim upon relief may be granted under Section 12(b)(6) of the Federal Rules of Civil Procedure.[2] The standards for deciding such a motion are well established. A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also, May v. Commissioner of Internal Revenue*, 752 F.2d 1301, 1303 (8th Cir. 1985); *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982). In reviewing the sufficiency of a complaint, "the allegations of plaintiffs' complaint must be assumed to be true, and further, must be construed in their favor." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *May v. Commissioner of Internal Revenue, supra*. Moreover, the threshold that a complaint must meet to survive a motion to dismiss for failure to state a claim is "exceedingly low." *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 703 (11th Cir. 1985) (citation omitted).

B. Discussion

Section 112(d) of the CAA (42 U.S.C. § 7412(d)) authorizes EPA to promulgate regulations establishing emission standards for major and area sources of hazardous air pollutants. Accordingly, EPA promulgated National Emission Standards for Hazardous Air Pollutants (NESHAPs), including the National Emission Standard for Asbestos (Asbestos NESHAP), codified at 40 C.F.R. Part 61, Subpart M. Within Subpart M is the standard for

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[2] As authority for its Motion to Dismiss, Respondent cites to the general rule on motions rather than Rule 22.20; however, the Motion is for the most part written as a motion to dismiss based upon the legal insufficiency of the allegations set out in the Complaint. The exception to this is Respondent's factual assertion in its Memorandum of Law in support of the Motion that "[t]here is no dispute that Huffner Contracting had total control and supervision over this renovation operation." Memorandum, p.2. This allegation goes beyond those made in the Complaint and if supported by affidavit could be deemed to convert the Motion into one seeking accelerated decision. However, in its Response to the Motion, Complainant notes that it *does dispute* the accuracy of this assertion and under Rule 22.20 (40 C.F.R. § 22.20(a)), accelerated decision can only be granted where "no genuine issue of material fact exists." Complainant's Response, p.4

demolition and renovation, at 40 C.F.R. § 61.145, which provides in pertinent part that "***each*** *owner or operator* of a demolition or renovation activity" shall:

> (a). . . prior to the commencement of the demolition or renovation, throughly inspect the affected facility . . . for the presence of asbestos . . . .
>
> (b) . . .
>
> (1) Provide the [EPA] Administrator with written notice of intention to demolish or renovate . . . .
>
> (c) . . .
>
> (2) . . .
>
> (i) Adequately wet all [regulated asbestos-containing material (RACM)] exposed during cutting or disjointing operations; and
>
> (ii) Carefully lower each unit or section to the floor. . . not dropping, throwing, sliding, or otherwise damaging or disturbing the RACM. . . . .
>
> (8) . . . no RACM shall be stripped, removed, or otherwise handled or disturbed at a facility regulated by this section unless at least one on-site representative . . . trained in the provisions of this regulation . . . is present. . . .

40 C.F.R. §§ 61.145(a),(b)(1),(c)(2),(c)(8).[3]

The term "owner or operator of a demolition or renovation activity" is defined in the Asbestos NESHAP as "any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation operation, or both." 40 C.F.R. § 61.141.

The Complaint alleges that Respondent MHA owns the buildings known as the Dorsey Street/Burly Court apartment complex. Complaint ¶ 29. On June 13, 2001, MHA allegedly hired Respondent Huffner to be the general contractor responsible for, *inter alia,* the removal and replacement of hundreds of square feet of floor tiles in the complex. Complaint ¶¶ 31,44. On June 19, 2001, Huffner allegedly subcontracted with Respondent CU to perform the actual removal and replacement of the tile flooring. Complaint ¶ 34. In July 2001, the Complaint

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[3] Asbestos and RACM are technical terms with specific definitions which are set forth in 40 C.F.R. § 61.141 of the Asbestos NESHAP . Subsection (a) regarding inspecting for asbestos prior to demolition or renovation applies to all owners and operators, but the provisions of subsections (b) and (c) of 40 C.F.R. § 61.145 only apply to renovations "if the combined amount of RACM to be stripped, removed . . . or similarly disturbed is . . . at least 15 square meters (160 square feet) on . . . facility components." 40 C.F.R. § 61.145(a)(4).

states, CU's workers removed and replaced floor tiles in various apartment units in the complex. Complaint ¶ 35. On a number of occasions, CU workers were allegedly observed to be removing 9"x9" brown floor tile containing regulated asbestos with a scraper, without any water, causing the floor tile to be broken into many pieces. Complaint ¶¶ 36-54.

In regard to the renovation activity in the complex, Complainant asserts that the Respondent CU was an "operator of a renovation activity within the meaning of 40 C.F.R. § 61.141." Complaint ¶ 63. Further, the Complaint alleges that in such capacity, in connection with the renovation, CU failed to inspect for asbestos in violation of 40 C.F.R. § 61.145(a); failed to notify the EPA of the renovation activity in violation of 41 C.F.R. § 61.145(b)(4), disturbed and failed to wet the RACM during removal of the tiles in violation of 40 C.F.R. § 61.145(c)(2); and failed to have an on-site representative present during removal in violation of 40 C.F.R. § 61.145(c)(8). Complaint ¶¶ 69, 77, 83 and 87.

In the Motion to Dismiss, Respondent CU challenges the characterization of it as an "operator of a renovation activity" asserting that "Huffner Contracting had total control and supervision over this renovation operation as set forth in the contract. In fact, Huffner, in recognizing its role in this case has already entered into a settlement wit [sic] the EPA." Further, CU asserts that "Carpeting Unlimited was simply a sub-contractor working at the directives of the contractor. Carpeting Unlimited had no control or supervision of this renovation, as that was specifically and explicitly contracted for between MHA and Huffner."[4] Memorandum of Law in support of Motion at 2-3.

In determining whether a person is an "owner or operator" within the meaning of the Clean Air Act, the question is whether the Respondent had "significant or substantial or real control and supervision over a project." *United States v. Walsh*, 8 F.3d 659, 662 (9th Cir. 1993) *cert. denied*, 114 S. Ct. 1830 (1994).[5] A Respondent with "the ability to correct the work, [has] . . . the necessary control to be an operator under the statute." *Id.* In *Walsh*, the Court found that where the Respondent was on-site when the work was being performed, the foreman took

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[4] While CU refers to a contract, it does not attach the contract as an exhibit to its Motion nor cite directly to it.

[5] The term "owner or operator" has been in the asbestos NESHAP from the time of its original promulgation in 1984. However the definition of the term was initially proposed in 1989 and added in 1990. *See*, 54 Fed. Reg. 912 (Jan. 10, 1989) and 55 Fed Reg. 48406 (Nov. 20, 1990). In adding the definition the Agency stated that "'Owner or operator of a demolition or renovation activity' is defined to help clarify responsibility for compliance. The definition of 'owner or operator of a demolition or renovation activity' includes the owner of the facility being demolished or renovated. It also includes the current owner of the property on which the facility is situated, if the owner sells the facility to another party for demolition or renovation. In such circumstances, the property owner, while no longer holding title to the facility, causes the demolition or renovation to occur, and thereby owns, leases, operates, controls, or supervises the demolition or renovation operation. . . . " 54 Fed. Reg. 912 (Jan. 10, 1989).

directions from him, and if there were problems or calls by workers or inspectors, he would have dealt with them, then the Respondent had the requisite substantial control to be an "operator" of the activity. *Id*. at 662-663. *See also, United States v. Pearson*, 274 F.3d 1225, 1231 (9th Cir. 2001)(holding employee of subcontractor had sufficient supervisory authority over the activity be an operator under CAA, noting that to be liable a person "need not possess ultimate, maximal, or preeminent control over the actual asbestos abatement work practices. Significant and substantial control means having the ability to direct the manner in which work is performed and the authority to correct problems. On any given asbestos abatement project there could be one or more supervisors. The term 'supervisor' is not limited to the individual with the highest authority."); *United States v. Geppert Bros., Inc.*, 638 F. Supp. 996, 999 (E.D. Pa. 1986)(by the use of the word "each," it is clear that 40 C.F.R. § 61.145 can be applied to more than one party at a given site.)

"[A]n organization that has control over an asbestos removal project qualifies as an 'operator,' as that term is used in the Statute." *United States v. J & D Enterprises of Duluth*, 955 F. Supp. 1153, 1158 (D. Minn. 1997)(quoting *Adair v. Troy State University of Montgomery*, 892 F. Supp. 1401, 1409 n. 9 (M.D. Ala. 1995)). *See also, United States v. Sealtite Corp.*, 739 F. Supp. 464, 469 (E.D. Ark. 1990)("The demolition or renovation contractor is considered an 'owner or operator' because it 'operates' the stationary source."). On the other hand, employees carrying out their normal activities, acting under orders from their employer, are not operators, except in the case of knowing and willful violations under the CAA's criminal provisions (42 U.S.C. §§ 7413(h)). *United States v. Pearson*, 274 F.3d 1225, 1230 (9th Cir. 2001).

In this case, the Complaint alleges that under a written agreement with Huffner, CU was a subcontractor on the renovation operation contractually responsible for removing the existing floor tiles and that *its* workers were the individuals actually on-site removing the RACM from the apartment complex. Complaint ¶¶ 33, 35. A subcontractor is defined as "one who is awarded a portion of an existing contract by a contractor, esp[ecially] a general contractor." Blacks Law Dictionary 1437 (7th ed. 1999). A subcontractor is not an employee of the contractor, but rather is an independent contractor who engages to perform services for another according to its own method and manner, free from direction and control of the contractor in all matters relating to the performance of the work, except as to the result or the product of the work. *Painters Dist. Council No. 3 Pension Fund v. Elrod & Sons, Inc.*, 1988 U.S. Dist. LEXIS 7320 *19 (D. Kan. 1988).[6] As such, CU was, at least, *a supervisor*, of *its workers* on the renovation operation and, through supervising such employees, operated, controlled or supervised the manner in which the renovation work was performed and had authority to correct problems. Therefore, the Complaint has sufficiently made out a claim evidencing that CU had "significant or substantial or real control and supervision" over the renovation operation such

[6] As indicated above, CU asserts in its Motion that "Huffner Contracting had total control and supervision over this renovation operation as set forth in the contract" and that it "had no control or supervision." CU does not assert, however, that it was an employee of Huffner or that its workers were employees of Huffner.

that it would be an "operator" within the meaning of the Clean Air Act.

I further note that while not directly related to the issue of being an "operator," CU also asserts in its Motion that "[p]rior to the work being performed by Carpeting Unlimited, Carpeting Unlimited was advised that there were tests performed and that it was clear to commence work.." This statement raises an issue of lack of knowledge and intent. However, "[h]aving been deemed an owner or operator, [defendant] has no valid challenge against application of the Act, regardless of how minimal the company's responsibilities or knowledge might actually have been. The Act imposes strict liability on all owners and operators of properties in violation of the Act." *United States v. B & W Inv. Properties, Inc.*, 38 F.3d 362, 367 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 1998 (1995) citing *United States v. Hugo Key and Son*, 731 F. Supp. 1135, 1137 (D. R.I. 1989); *United States v. Ben's Truck and Equipment*, Inc., 17 Env'tl L. Rep. 20,777 (E.D. Cal. 1986). "The Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will assure that violations will not occur." *United States v. J & D Enterprises of Duluth*, 955 F. Supp. 1153, 1159 (D. Minn. 1997)(quoting H.R. Rep. No. 94-1175, 94th Cong., 2d Sess. at 53-54 (1976)).

Nevertheless, the extent of CU's knowledge of the existence of RACM at the renovation site and its responsibilities in regard thereto vis-a-vis others involved in the renovation is not wholly irrelevant to this proceeding. In determining an appropriate penalty to be imposed, Section 113(e) of the Act (42 U.S.C. §§ 7413(e)) requires that a number of factors be taken into account including a violator's good faith efforts to comply, the seriousness of the violation, and other factors as justice may require. "[T]he court can mitigate the impact of strict liability in cases where the evidence shows that a specific defendant is less culpable due to the actions of another person." *United States v. J & D Enterprises of Duluth*, 955 F. Supp. 1153, 1161 (D. Minn. 1997). *See also, United States v. Harford Sands, Inc.*, 575 F. Supp. 733, 735 (D. Md. 1983)(while not relevant to a determination of liability, defendant's lack of knowledge may affect its culpability and, therefore, the amount of a civil penalty which would be appropriate). Thus, if CU's representations concerning its misplaced reliance on erroneous information provided to it by others proves out at trial, it can be accounted for at that point in establishing an appropriately reduced penalty.

Accordingly, Respondent CU's Motion to Dismiss is hereby, **DENIED**.

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Susan L. Biro
Chief Administrative Law Judge

Date: March 23, 2004
Washington, D.C.