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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY HEARINGS CLERK EPA--REGION 10 BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
NORMA J. ECHEVARRIA AND FRANK J.)
ECHEVARRIA, dba ECHECO ENVIRONMENTAL)
SERVICES,)
)
Respondents)

DOCKET NO. [CAA X]-1091-06-13-113

- 1. 42 U.S.C. Sections 7412 and 7413: The Clean Air Act and the NESHAP establish strict liability for civil violations of their provisions.
2. 40 C.F.R. Part 61, Subpart M: In order to establish liability under the asbestos NESHAP, there must be a two fold showing that (a) the minimal threshold requirements of the NESHAP have been met, and (b) the work practice requirements of the NESHAP have not been satisfied.
3. 40 C.F.R. Sections 61.145(c)(3) and (c)(6)(i): Complainant need not prove that visible emissions of asbestos occurred in order to prove a violation of 40 C.F.R. Sections 61.145(c)(3) and (c)(6)(i).
4. 40 C.F.R. Part 61, Subpart M: In a case involving alleged violations of the asbestos NESHAP, it is routine to rely on the observations of inspectors to determine whether asbestos was adequately wetted.

5. 40 C.F.R. Sections 61.145 and 61.150: The requirements of Section 61.145 do not apply to RACM which has been collected and contained, i. e., bagged for disposal; instead, the requirements of Section 61.150 apply to such RACM.

Appearances:

For Complainant: Deborah E. Hilsman, Esquire
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For Respondent: John B. Ingelstrom, Esquire
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Before: Henry B. Frazier, III
Chief Administrative Law Judge

INITIAL DECISION

I. Complaint and Answer

This proceeding was initiated by a two count complaint issued by the United States Environmental Protection Agency (EPA, Complainant, or the Agency) pursuant to Section 113(d) of the Clean Air Act (CAA or Act), 42 U.S.C. Section 7413(d), for the assessment of a civil penalty. The complaint alleges that Norma J. Echevarria and Frank J. Echevarria, dba Echeco Environmental Services, (Echeco or Respondents) violated 40 C.F.R. Section 61.145(c) and Section 112 of the CAA, 42 U.S.C. Section 7412. More specifically, the complaint alleges in two counts, the following violations of the Act:

Count I: Respondents, while stripping regulated asbestos-containing material (RACM) from facility components, had used insufficient water during the stripping operation to prevent the release of particulates in violation of 40 C.F.R. Section 61.145(c)(3).

Count II: Respondents had failed to keep RACM that had been stripped or removed from facility components adequately wet and to treat such material in preparation for disposal in accordance with 40 C.F.R. Section 61.150, in violation of 40 C.F.R. Section 61.145(c)(6)(i).

For these alleged violations, Complainant seeks a civil penalty of \$43,400.

In its answer, Echeco admitted the following allegations in the complaint:

1. This is an administrative action instituted pursuant to Section 113(d) of the CAA, 42 U.S.C. Section 7413(d), for the assessment of a civil penalty. The Complainant is Region 10, United States EPA, which has been delegated the authority to institute this action.

2. Section 112 of the CAA, 42 U.S.C. Section 7412, requires the Administrator to promulgate regulations establishing emission standards (or work practice standards, if necessary) for listed hazardous air pollutants, including asbestos. These emission standards are known as the National Emission Standards for Hazardous Air Pollutants (NESHAPs).

3. Pursuant to Section 112 of the CAA, 42 U.S.C. Section 7412, the Administrator promulgated regulations that govern the emissions, handling and disposal of asbestos. These asbestos NESHAP regulations are found at 40 C.F.R. Part 61, Subpart M (1991) (asbestos NESHAP).

4. The requirements of 40 C.F.R. Section 61.145(b) and (c) of the asbestos NESHAP apply to each owner or operator of a demolition or renovation activity if the combined amount of regulated asbestos-containing material in the facility is at least 260 linear feet on pipes or 160 square feet on other facility components, or, where the length or area could not be measured previously, at least 35 cubic feet. 40 C.F.R. Section 61.145 (a)(1).

5. Norma J. Echevarria and Frank J. Echevarria are wife and husband who do business as Echeeco Environmental Services.

6. At the time of the violations alleged in this complaint, employees of Norma J. Echevarria and Frank J. Echevarria, dba Echeeco Environmental Services, were removing asbestos from the North Gem School.

7. On May 23, 1991, Echeeco Environmental Services filed a notification of the removal of asbestos from the North Gem School, Bancroft School District, in Bancroft, Idaho.

8. On June 4, 1991, an EPA inspector inspected the North Gem School site in order to determine compliance with the asbestos NESHAP (EPA inspection).

9. The asbestos removal activity in the buildings at the North Gem School site constitutes a "renovation" activity as that term is defined in 40 C.F.R. Section 61.141.

10. The buildings at the North Gem School site are a "facility" as that term is defined in 40 C.F.R. Section 61.141.

11. The piping and boiler in the buildings on the North Gem School site are "facility components" as that term is defined in 40 C.F.R. Section 61.141.

12. The dry, friable asbestos-containing material observed by the EPA inspector at the North Gem School site on June 4, 1991, is RACM as defined in 40 C.F.R. Section 61.141.

13. At the time Respondents began renovation of the buildings on the North Gem School site, at least 260 linear feet or 160 square feet of RACM as defined in 40 C.F.R. Section 61.141 was scheduled to be stripped, removed, dislodged, cut, drilled, or similarly disturbed.

14. At the time of the EPA inspection, Respondents were each the "owner or operator of a demolition or renovation activity" as that term is defined in 40 C.F.R. Section 61.141.

Respondents, however, denied the violations alleged in the complaint. More specifically, Respondents denied the following allegations in the complaint: that piles of dry, uncontained debris from the asbestos removal activity were scattered around the boiler room floor; that there was a pile of pipes covered with dry friable asbestos-containing insulation and pipes from which such insulation had been stripped in the boiler room; that the

inspector collected samples of dry friable pipe insulation material, which were inadequately wet; that the inspector opened the bags which contained pipe insulation which had been stripped and collected samples of dry friable asbestos-containing material, which were inadequately wet; that the inspector opened bags containing boiler insulation material and collected a sample from each of several bags of insulation material that was dry, friable asbestos-containing material, which was inadequately wet; that the samples were tested and found to contain between 35% and 95% asbestos; that Respondents failed to comply with 40 C.F.R. Section 61.145(c) (3); or that Respondents failed to comply with 40 C.F.R. 61.145(c) (6) (i).

II. Background — Processing of the Case

A hearing was held in this matter in Pocatello, Idaho on July 20, 21, and 22, 1993. Thereafter, the Complainant and the Respondents filed their proposed findings of fact and conclusions of law, together with supporting briefs, on December 1, 1993, and November 30, 1993, respectively. Reply briefs were filed by both parties on December 17, 1993.

III. Contentions of the Parties

A. Complainant's Contentions

In its posthearing brief, Complainant advances the following legal arguments: The CAA and the asbestos NESHAP impose strict liability. The validity of the asbestos NESHAP cannot be challenged during an enforcement proceeding. The threshold requirements in 40 C.F.R. Section 61.145 establish the applicability of the work practice standards of the asbestos NESHAP. An asbestos inspector's observations are sufficient to establish asbestos NESHAP violations. Proof of visible emissions is not necessary to establish liability for violation of 40 C.F.R. Section 61.145(c).

Complainant also contends that the preponderance of the evidence demonstrates that Respondents violated the asbestos NESHAP wetting requirements. In support of this position, Complainant asserts: The observations of the EPA inspector document that Respondents failed to adequately wet the RACM while stripping and failed to adequately wet the RACM to ensure that it remain wet until collected for disposal. An independent contractor observed RACM that had been removed during this renovation that was not adequately wet. The testimony presented by Respondents' asbestos worker confirmed that RACM removed during the renovation was not adequately wet. The additional testimony presented by Respondents' witnesses does not refute the violations alleged. The testimony presented by Complainant's witnesses was more credible than that of Respondents' witnesses.

Finally, Complainant insists that the penalty sought by Complainant should be assessed against Respondent. In support, Complainant maintains that the CAA statutory criteria as incorporated into the CAA penalty policy establish the method for calculating the penalty and the proposed penalty was calculated in accordance with the asbestos penalty policy.

B. Respondents' Contentions

In their posthearing brief, Respondents advance the following legal arguments: 40 C.F.R. Section 61.145(c)(3) and Section 61.145(c)(6)(i) are unconstitutionally vague and ambiguous. The EPA's publication on adequate wetness demonstrates the vagueness of the regulations and there is no consensus as to the definition of "adequately wet" in the regulation.

Respondents also contend that the asbestos-containing material at the North Gem School was adequately wet when stripped. In support of this position, Respondents assert that the EPA's inspector's testimony and

inspection should not be given much weight and that the language of 40 C.F.R. Section 61.145(c)(3) applied to the evidence presented does not warrant the finding of a violation. Respondents also contend that the asbestos-containing material removed and stripped from the North Gem School was kept wet until collected for disposal in accordance with the asbestos NESHAP.

Finally, Respondents insist that the proposed civil penalty is unwarranted and misapplied based upon Respondents degree of cooperation and the inequitable application of the factor of economic benefit of noncompliance. Respondents request that I exercise my discretion to withhold a penalty in the event a violation is found.

IV. Findings of Fact

At the outset, I must dispose of Respondents' contention that the testimony of Ms. Goehring, the EPA inspector, evidences a potential bias against one of Respondents' employees and, hence, calls into question her credibility. In support of their request that I give little or no weight to Ms. Goehring's testimony, Respondents allege that she committed "several unprofessional oversights" during her inspection at the North Gem School site.

Ms. Goehring testified that the RACM which she observed at North Gem School was not adequately wetted during stripping and was not adequately wetted after stripping to ensure that it remained wet until collected and contained for disposal.^{1/} This determination was based upon her observation and examination of the RACM at the site and on her training and experience in determining whether asbestos has been adequately wetted;

^{1/} Tr. 39.

Ms. Goehring has conducted over 300 inspections for compliance with the asbestos NESHAP.^{2/} In this case, Ms. Goehring documented her observations in her inspection report and in the photographs which were introduced into evidence. She also took samples of the RACM for analysis.

Ms. Goehring's testimony as to the failure to adequately wet the RACM cannot be said to have been refuted by that of Mr. Brad Browning, the only one of Respondents' employees to remove the asbestos-containing material (ACM) in the boiler room. Although Mr. Browning testified that his goal is "to wet the material as best you can," he admitted that "on every job I have ever been on I have seen visible emissions of some type."^{3/} Presumably, "every job" would include the abatement project in this case. None of Respondents' remaining witnesses refuted Ms. Goehring's observations that the RACM had not been adequately wetted. Indeed, none of these witnesses were in a position to refute her testimony in this regard because none had observed the stripping and removal process in the boiler room.

Ms. Goehring testified that she did not harbor any personal animosity against Respondents or Echeco Environmental Services.^{4/} She also testified that she had inspected other jobs performed by Echeco in which she did not find any apparent violations.^{5/}

Respondents assert that Ms. Goehring's testimony nevertheless "evidences a potential bias against Mr. Browning." In her testimony, Ms. Goehring stated that she had worked for Brad Browning in 1989 and that she could not

^{2/} Tr. 26, 94, 246.

^{3/} Tr. 649.

^{4/} Tr. 256.

^{5/} Tr. 255-256.

recall any tension between them on that occasion.^{6/} Instead, she testified that Mr. Browning told her that she had been so good about working long hours and in helping him out that he ought to buy her a dozen roses.^{7/} The conflicting testimony of Ms. Goehring and Mr. Bird^{8/} regarding a telephone^{9/} conversation which they had in 1992 may be attributed to differing recollections of the conversation; certainly such testimony does not evince a personal bias toward Mr. Browning.

The list of "several unprofessional oversights" which Respondents offer to support their attack of Ms. Goehring's credibility constitute little more than criticisms of the manner in which she performed her duties in conducting the inspection in this case. None demonstrate a bias toward Mr. Browning or toward Respondents. The fact that one sample which Ms. Goehring collected was described as damp by the laboratory technician is in keeping with Ms. Goehring's description of the "semi-wet" pile from which it was taken.

In conclusion, I find Ms. Goehring's testimony to have been credible. An inspector's observations are sufficient to prove liability for failure to adequately wet RACM during and following stripping.^{10/} Respondents have failed to demonstrate bias or prejudice on Ms. Goehring's part which would call into question her observations during the inspection or her testimony as to the violations alleged in the complaint.

^{6/} Tr. 100-101.

^{7/} Tr. 254-255.

^{8/} Tr. 235-236.

^{9/} Tr. 572-576.

^{10/} See FN 46, *infra*.

On the basis of the entire record, including the testimony elicited at the hearing, the exhibits received in evidence and the submissions of the parties, and giving such weight as may be appropriate to all relevant and material evidence which is not otherwise unreliable, in addition to the admissions made by Respondents in the answer, I make the findings of fact which follow. Each matter of controversy has been determined upon a preponderance of the evidence. All contentions and proposed findings and conclusions submitted by the parties have been considered, and whether or not specifically discussed herein, those which are inconsistent with this decision or which are otherwise irrelevant or immaterial to the specific violations alleged, are rejected.

1. Mr. Frank J. Echevarria and his wife, Mrs. Norma J. Echevarria, are the sole owners of Echeco Environmental Services, a sole proprietorship engaged in asbestos abatement work. (Transcript (Tr.) 435-36.)

2. Echeco submitted a bid of \$6,900.00 to perform asbestos abatement work in the boiler room at North Gem School. This bid covered abatement work on both the boiler and the pipes in the boiler room. Echeco submitted a bid of \$8,200.00 to perform the abatement work on the pipes under the gymnasium at the North Gem School. These bids, which totaled \$15,100.00, were based upon \$8.20 per linear foot for the removal of pipe insulation and \$15.50 per square foot for the removal of the insulation on the boiler. Echeco's bids were accepted. Echeco's bids for the removal of boiler material is generally in the range of \$10.00 to \$15.00 per square foot. (Tr. 447-449, 473; Respondent's Exhibits (Resp. Exhs.) 7 and 8.)

3. There were only two bids on the abatement project at North Gem School. The second bid was submitted by Pacific Mechanical Insulation, Inc. (PMI). PMI bid \$6,847.00 for the boiler room work and \$8,873.00 for the work on the pipes beneath the gymnasium for a total of \$15,720.00. (Tr. 482, 534, 547; Resp. Exh. 26.)

4. Mr. Claylon Perkins, Head Custodian at North Gem School, served as the owner's representative or Project Manager on the asbestos abatement project at North Gem School. (Tr. 524, 526.)

5. The insulation on the boiler and pipes in the boiler room and on the pipes beneath the school had been encapsulated in late 1985 and early 1986 with several layers of cheese cloth and latex paint. The result was a super hard, almost cast-hard encapsulant on the boiler and pipes. (Tr. 536-38.)

6. Mr. Claylon Perkins had sprayed water from a hose on the boiler encapsulant quite a few times after the installation of the encapsulant and before the abatement project began while in the process of cleaning soot from the boiler. The water did not penetrate the encapsulant and, hence, was not absorbed by the insulation on the boiler. Instead, the water simply ran off the encapsulant. (Tr. 538-39.)

7. The magnesium block insulation which was against the surface of the boiler was covered by a layer of canvas (over which the encapsulant had been placed), a quarter inch layer of asbestos paste and some asbestos paper, all of which had been wrapped by four or five wire loops and by chicken wire. The chicken wire was wrapped entirely around the boiler except for a few patched spots where past repairs had been made to the boiler. (Tr. 639.)

8. The pipe insulation consisted of plain corrugated pipe lagging with crinkly paper inside and corrugated paper with white powder silica or magnesium powder inside each wrap, together with asbestos block and some fiberglass in places on the pipe. The insulation was affixed to the pipe with the use of small snap bands over which a canvas cover had been placed or with the use of wire which had been twisted and over which a canvas cover had been placed. The encapsulant covered the canvas. (Tr. 638-40.)

9. Prior to the beginning of the abatement project on June 3, 1991, loose insulation debris was lying on the floor of the boiler room; there were holes or cracks in the insulation on the boiler; there was a hole in the insulation on the hot water holding tank; and some of the pipe insulation was hanging loose. (Tr. 565-67, 635, 651.)

10. Echeco notified EPA of the asbestos removal project at North Gem School prior to the beginning of the work on June 3. (Complainant's Exhibit (Compl. Exh.) 1 D.)

11. Echeco notified the Bancroft Police Department, the Bancroft Health Department and the Bancroft Fire Department of the asbestos removal project at North Gem School prior to the beginning of the work on June 3. (Tr. 451; Resp. Exhs. 12, 13 and 14.)

12. Prior to beginning the project, Echeco personnel installed a double layer of critical barriers, using clear plastic and PVC piping, over the windows and doors of the boiler room and installed a decontamination unit at the entrance to the containment area. The decontamination unit consisted of a clean room, a shower room and a small space of 1 1/2 to 2 feet between the entrance to containment and the shower room which was considered the dirty room. The drain in the center of the floor of the boiler room was sealed so that no water could go into the waste water system. (Tr. 640-41.)

13. Mr. Brad Browning, a member of the Echeco crew, removed the insulation from the boiler and the pipes in the boiler room. When Mr. Browning first entered the boiler building on June 3, 1991, he found it to be very dirty due to the coal dust that had been generated by the coal burning heating system. Two to three inches of coal dust covered the top of the rafters in the ceiling area of the building. He used a water hose to wash the coal dust to the floor. (Tr. 455-56, 477, 634-35, 651.)

14. Echeco had an airless sprayer on site at the North Gem School. It was located outside the boiler room and the hose from the airless sprayer went through a window into the boiler room containment area. A surfactant, or amending agent, was added to the water of the airless sprayer to increase the absorption of the water by the asbestos. The airless sprayer rig was attached to a joist in the ceiling so that it would spray the entire containment area with a constant mist. The airless sprayer was in operation on June 4, 1991. (Tr. 454, 456, 540, 642-644, 653.)

15. A negative air machine was used by Echeco in the boiler room. The machine, which was a 2000 cfm unit, served as an air filtration device to remove airborne fibers with a 99.7 degree of accuracy. The machine filtered the air in the boiler room containment area about six or seven times an hour. Mr. Echevarria changed the filters on the negative air machine on June 3, 1991. (Tr. 55, 333, 454, 456, 640, 642; Resp. Exh. 27; Compl. Exh. 9 E, 12 A.)

16. To remove the insulation from the pipes, Mr. Browning used a utility knife to cut holes in the material covering the pipes because the encapsulant covering the insulation prevented the absorption of water. He then inserted a water hose into the holes to wet the insulation material as it was being removed from the pipes. (Tr. 647, 679.)

17. To remove the insulation from the boiler, Mr. Browning began by pounding holes into the encapsulant at the very top of the boiler and inserting a water hose into those holes to wet the magnesium blocks. Some of the blocks came off as a single unit while others, which adhered tightly to the boiler, came off in pieces. (Tr. 644-46, 649-50, 678-79.)

18. Mr. Browning was wetting the insulation material when Mr. Echevarria entered the containment area in the boiler room at approximately 3:00 PM on June 3 and again on the morning of June 4. (Tr. 454, 477, 505.)

19. As Mr. Browning removed the insulation material, he would put it on the floor to absorb the water that had collected on the floor and to help fulfill the requirement for adequate wetting. When he left the containment area for lunch on June 4, Mr. Browning left some asbestos-containing material, which had been removed that morning, unbagged and on the floor where it had been sprayed down with the airless spray rig. (Tr. 650, 653.)

20. There were about 70 or 80 bags of insulation material in the containment area of the boiler room by noon on June 4, 1991. These included the bags of material which had been removed on June 3 and bagged at the end of the shift on June 3. These bags had been sealed with duct tape. About 25 of the bags contained insulation material removed on the morning of June 4; these bags had not been sealed. (Tr. 660-62, 669.)

21. Ms. Rebecca Goehring, the EPA inspector, arrived at North Gem School at approximately 12:45 PM on June 4, 1991. (Tr. 30, 35.)

22. No one was outside the boiler room or in the containment area of the boiler room of the North Gem School when the EPA inspector arrived on the site. (Tr. 35-36.)

23. Ms. Goehring proceeded to the Principal's office and sought and received from Mr. Robert L. Stevens, Superintendent of North Gem School District No. 149, permission to conduct an inspection. (Tr. 36.)

24. When the Echeco personnel returned from lunch on June 4, they discovered that Ms. Goehring was in the containment area of the boiler room. Ms. Goehring remained in the containment area for 10 to 15 minutes after the Echeco personnel returned to the site. Although they had the opportunity to go into the containment area at that time and observe what Ms. Goehring was doing, none of the Echeco personnel did so. (Tr. 457-58, 478-79, 656.)

25. Ms. Goehring was in the containment area of the boiler room for a total of approximately 20 minutes. (Tr. 153.)

26. When Ms. Goehring entered the boiler room containment area, she found that all of the insulation had been removed or stripped from the boiler and all of the boiler insulation which she observed was in bags. (Tr. 210.)

27. Ms. Goehring found that approximately one-fourth of the pipe insulation which had been removed at the time of her inspection in the boiler room containment area had been bagged; the remaining three-fourths was lying on the floor unbagged. (Tr. 214.)

28. Ms. Goehring found about 1/16th of an inch of water on approximately 50% of the floor of the boiler room containment area. At other times during the abatement project, the water would collect on the floor until it was over the ankles of Mr. Brad Browning while he worked in the boiler room containment area. (Tr. 216, 224-25, 651; Compl. Exh. 1 at p. 4.)

29. After the EPA inspector entered the containment area, she saw in the boiler room a pile of air cell pipe insulation which she estimated to be 70 cubic yards in size. The insulation appeared white in color and the ends of the pieces of pipe showed evidence of wetting. (TR. 39, 183.)

30. Ms. Goehring found that the pile of unbagged pipe insulation in the boiler room containment area was "semi-wet". (Tr. 217-18; Compl. Exh. 1 at p. 3.)

31. Ms. Goehring took one sample of the air cell pipe insulation in the "semi-wet" pile. When Ms. Goehring tore this pipe insulation, she found that it was "very stiff, very dry" and that it "emitted fibers, released dust." She placed the sample in a "whirly pack" sample container. (Tr. 39, 52-53, 218; Compl. Exh. 1 E.)

32. Ms. Goehring saw a pile of bags -- 20 to 30 in her estimation -- which she believed contained asbestos-containing materials, namely, magnesium block. She estimated that these bags contained about 30 cubic feet of material. She picked up one bag to test its weight and concluded that it weighed approximately 20 pounds. In some of the clear bags she saw water in the corners; in others she did not see any evidence of water. She concluded that "[t]hey had at some point used water." (Tr. 44-46.)

33. Ms. Goehring opened one of the bags and pulled out a piece of magnesium block. She ran her thumbnail across the top of the piece of magnesium block and scraped off a thin coat of wet material. She broke the piece of magnesium block and it emitted dust. She crumbled a portion of it. She found the piece of magnesium block to be dry between the wet outside layers. (Tr. 50-51, 222-224, 252.)

34. Ms. Goehring took two samples of the piece of magnesium block insulation. She placed one sample in a "whirly pack" container and placed a larger sample (approximately 6" by 4" by 2") in a zip lock bag. (Tr. 51-53; Compl. Exh. 1 E.)

35. The two samples which Ms. Goehring placed in "whirly packs" were numbered as follows: the air cell pipe insulation — 91240011 and the magnesium block insulation — 91240012. These samples were sent by Ms. Goehring to the Manchester Environmental Laboratory in Port Orchard, Washington for analysis. The larger piece of magnesium block in the zip lock bag was not submitted for testing or analysis. (Tr. 69-70, 150; Compl. Exhs. 1 E and 1 F.)

36. The air cell pipe insulation material (sample 91240011) was analyzed by Ms. Susan Davis, a laboratory technician for the Manchester Environmental Laboratory. She found the sample to be off-white, light tan/grey, paper-like and fibrous. The sample arrived at the laboratory in a "damp" condition. Using polarized light microscopy, she concluded that the sample was 95% chrysotile asbestos. (Tr. 267-73, 282, 285, 287, 292-93; Compl. Exhs. 6 B and 12.)

37. The magnesium block insulation (sample 91240012) was analyzed by Ms. Susan Davis, a laboratory technician for the Manchester Environmental Laboratory. She found the sample to be white with a slight yellow tinge, soft and fibrous. She reported that the fibers were very fine and straight. Using polarized light microscopy, she concluded that the sample was 35% amosite asbestos. (Tr. 267, 271, 273, 282-83, 286; Compl. Exhs. 6 C and 12.)

38. Ms. Goehring saw white dust on some of the bags in the boiler room containment area. (Tr. 40, 46-47, 50.)

39. Ms. Goehring did not take a sample of the dry powdery substance which she had observed on the exterior creases of some of the bagged material in the boiler room containment area. (Tr. 220.)

40. While Ms. Goehring was in the containment area of the boiler room she did not observe any visible emissions to the outside air. (Tr. 167.)

41. At the conclusion of her inspection, Ms. Goehring spoke with Mr. Browning of Echeco to tell him that the materials inside the bags were not sufficiently wet and that the bags should be reopened and water added before the bags left the containment area for disposal. Before Ms. Goehring left the site, a sufficient amount of water had been added so that there was good evidence of water in the bags. (Tr. 62-63, 230-32, 250-51, 304-05, 461, 479, 658-59; Compl. Exh. 1 at p. 6.)

42. Echeco employees performed the final bagging operation as follows: Mr. Brad Browning took each sealed bag of asbestos-containing material to the shower in the decontamination unit where he washed the exterior of the bag. Mr. Browning then placed the bag inside a second bag held by a second Echeco employee stationed inside the decontamination unit. This employee then handed the double bag to a third Echeco employee outside the decontamination unit who sealed the second bag with duct tape. Mr. Echevarria then affixed a sticker to the second or outside bag and loaded the bag into the trailer for transportation to the disposal unit. (Tr. 459-61, 662.)

43. The bags which Mr. Echevarria loaded into the trailer were heavy. Mr. Clayton Perkins, the Head Custodian at North Gem School, assisted Mr. Echevarria in the loading process on June 4, 1991, and observed water in the transparent bags and found the bags to be heavy. (Tr. 461-62, 540-42, 564.)

44. Following completion of the stripping and removal of the RACM, the surfaces throughout the boiler room were washed and wiped, the floor was mopped and the water which was so used was filtered through a water filtration unit to remove asbestos fibers that may have been released during the renovation project. (Tr. 680-82.)

45. Mr. Robert Johnson, who had been hired by the school district to conduct air monitoring on the abatement project as required under the Asbestos Hazard Emergency Response Act (AHERA), was on site when Ms. Goehring completed her inspection. (Tr. 59-60, 300.)

46. On June 8, 1991, Mr. Johnson took thirteen (13) air monitoring samples in connection with the boiler house abatement project. Five of the samples were taken inside the boiler room containment area. All five of the samples taken inside the boiler room were below the clearance level of 70 structures with results as follows: sample No. 1 = 17.8 structures; sample No. 2 = 0 structures; sample No. 3 = 53.3 structures; sample No. 4 = 0 structures; and sample No. 5 = 0 structures. (Tr. 306-08, 326-29; Compl. Exh. 10.)

47. Contrary to the allegation in paragraph 10 of the complaint, there were no "pipes covered with dry friable asbestos-containing insulation and pipes from which such insulation had been stripped" in the pile which Ms. Goehring found in the boiler room. Ms. Goehring found only insulation material in the pile. (Tr. 194-97; 370.)

48. Contrary to the allegation in paragraph 11 of the complaint, Ms. Goehring did not open "bags" containing pipe insulation material, nor did she collect "samples of dry friable asbestos-containing material from those 'bags'." Ms. Goehring did not open any bag containing pipe insulation material. (Tr. 221-22, 370-71.)

49. Contrary to the allegation in paragraph 12 of the complaint, Ms. Goehring did not open "bags" of boiler insulation material which had been removed from the boiler, nor did she collect "a sample from each of several bags." Ms. Goehring opened only one bag containing the magnesium block insulation which had been removed from the boiler and she took only one sample of the material from that bag. (Tr. 220-21, 371-72.)

V. Discussion and Conclusions

A. Liability

The complaint herein was brought pursuant to the authority of the ^{11/}CAA. One of the many purposes of the CAA is to "protect and enhance the quality of the Nation's air resources."^{12/} As one component of the program to protect the Nation's air, Section 112(b)(1) of ^{13/}the CAA establishes a list of hazardous air pollutants; asbestos is on that list.

Under Section 112 of the CAA, the Administrator of EPA is authorized to promulgate emissions standards for sources of hazardous air pollutants, i.e., the NESHAPS. "However, in some cases regulation in this form [emission standards] would not be effective or appropriate for significant source categories. For instance, emissions of asbestos fibers from construction or demolition sites cannot be controlled or even measured by focusing on a point source of emissions. To assure that adequate control is, nevertheless, achieved, it is in some cases possible to prescribe the use of specific equipment or procedures in the design of a facility or conduct of an activity. In the 1977 amendments to the Clean Air Act. . . the Congress authorized the use of other regulatory requirements including design, equipment, work practice or operational standards as an alternative to emissions standards to carry out the objectives of Section 112."^{14/}

^{11/} 42 U.S.C. Sections 7401 et seq.

^{12/} 42 U.S.C. Section 7401(b)(1).

^{13/} 42 U.S.C. Section 7412(b)(1).

^{14/} S. Rep. No. 101-228, 101st Cong., 2d Sess. (1990) reprinted in 1990 U.S.C.C.A.N. 3385, 3567. In 1990 this authority was amended in the new section 112(h) to add operator training requirements to the list of other regulatory requirements to be used in lieu of emission standards and to assure that these alternative forms of control were available to EPA as it implemented new statutory authority to set technology-based standards for major sources and area sources of hazardous air pollutants.

The NESHAP for asbestos is contained in 40 C.F.R. Part 61, Subpart M. The standard for demolition and renovation, in the form of work requirements, is found in Section 61.145. The CAA and the NESHAP provide strict liability for civil violations of their provisions.^{15/}

In order to establish liability under the asbestos NESHAP, Complainant must make a twofold showing. First, EPA must show that the minimal threshold requirements of the NESHAP have been met.^{16/} The minimal requirements applicable to this matter are contained in 40 C.F.R. Section 61.145(a). Under Section 61.145(a), the minimal threshold requirements applicable in this case would be met where the amount of RACM involved in renovation or removal is at least 260 linear feet on pipes or 160 square feet on other components. Given the admissions by Respondents (pp. 2-3), it is clear that the minimal threshold requirements have been met and, hence, the work practice requirements of Sections 61.145 (c) (3) and 61.145(c) (6) (i) apply to Respondents.

As to the second part of the twofold showing, the Complainant must establish that the work practice requirements of the NESHAP have not been satisfied.^{17/} The work practices relevant to this complaint required Echeco to adequately wet RACM when it was being stripped from facility

^{15/} U.S. v. Sealtite Corp., 739 F. Supp. 464, 468 (E.D. Ark 1990); U.S. v. Ben's Truck and Equipment, Inc., 25 Env't. Rep. Cas. (BNA) 1295 (E.D. Cal 1986); U.S. v. Hugo Key and Son Inc., 30 Env't. Rep. Cas. (BNA) 1697 (D. R.I. 1989); U.S. v. Calaberas Asbestos Ltd., Civ. No. F-84-650, Order at 2 (E.D. Cal. October 30, 1985).

^{16/} U.S. v. Sealtite Corp., 739 F. Supp. at 468; U.S. v. MPM Contractors, Inc. 767 F. Supp. 231, 232 (D. Kan. 1990).

^{17/} Id.

components (40 C.F.R. Section 61.145(c)(3)) and to adequately wet the material and ensure that it remained wet until collected and contained or ^{18/} treated in preparation for disposal (40 C.F.R. Section 61.145(c)(6)(i)).

Respondents contend that the EPA regulations in this matter are unconstitutional and, hence, unenforceable, because the regulations are vague and ambiguous.

Mr. Steve Harrington, who was called by Respondents as an expert witness, testified as to the vague and ambiguous nature of the asbestos NESHAP "adequately wet" requirements; ^{19/} as to the absence of uniform, demonstrable, objective and quantifiable standards or methods for the evaluation or measurement of adequately wet RACM; ^{20/} and as to the practical impossibility of preventing all asbestos fiber release or emissions in the course of asbestos removal and/or stripping operations. ^{21/}

18/ Section 61.145(c) states:

(c) Procedures for asbestos emission control. Each owner or operator of a demolition or renovation activity to whom this paragraph applies, according to paragraph (a) of this section, shall comply with the following procedures.

* * * * *

(3) When RACM is stripped from a facility component while it remains in place in the facility, adequately wet the RACM during the stripping operation.

* * * * *

(6) For all RACM, including material that has been removed or stripped:

(i) Adequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with Section 61.150. . . .

19/ Tr. 596, 599.

20/ Tr. 599, 602.

21/ Tr. 595, 598, 600-601, 606-607, 619-620, 622.

As a "general rule. . . challenges to rulemaking are rarely entertained in an administrative enforcement proceeding. . . . The decision to accept administrative review of a rulemaking challenge is at best discretionary."^{22/} As the Court of Appeals for the D. C. Circuit has so aptly stated:

An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents.

* * * * *

A properly adopted substantive rule establishes a standard of conduct which has the force of law. In subsequent administrative proceedings involving a substantive rule, the issues are whether the adjudicated facts conform to the rule and whether the rule should be waived or applied in that particular instance. The underlying policy embodied in the rule is not generally subject to challenge before the agency. ^{23/}

This is especially true with respect to a constitutional challenge to the asbestos NESHAP regulations. Section 307(b)(1) of the CAA, 42 U.S.C. Section 7607(b)(1), limits judicial review of any emission standard or requirement promulgated under Section 112 of the Act to the filing of a petition for review in the U. S. Court of Appeals for the District of Columbia within 60 days of the promulgation of the regulation.

^{22/} In re American Ecological Recycle Research Corp. and Donald Gums, RCRA (3008) Appeal No. 83-3 at 5-6 (July 18, 1985).

^{23/} Pacific Gas and Electric Co. v. Federal Power Comm'n., 506 F. 2d 33, 38 (D.C. Cir. 1974).

Furthermore, Section 307(b) (2) of the Act, 42 U.S.C. Section 7607(b) (2), specifically prohibits judicial review of such regulations in civil and criminal enforcement actions.^{24/}

24/ Section 307(b) provides, in pertinent part:

- (1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, . . . may be filed only in the United States Court of Appeals for the District of Columbia. . . . Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.
- (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

Respondents contend that "on their face, the provisions of 42 U.S.C. Section 7607(b) purport only to limit judicial review. There are no provisions limiting the scope of the review in this administrative proceeding." To suggest that Congress intended to limit the role of the Federal judiciary in this regard, while leaving Administrative Law Judges with unfettered discretion to consider and pass upon constitutional challenges to the asbestos NESHAP is patently ridiculous. This provision of the Code establishes the sole method to determine "whether the Administrator has complied with appropriate procedures in promulgating the regulation in question, or whether the particular regulation is arbitrary, capricious, or supported by the administrative record. . . . [and] to pursue any of the other familiar inquiries which arise in the course of an administrative review proceeding." Adams Wrecking Co. v. United States, 434 U.S. 275, 285 (1978). A civil administrative proceeding, such as the present case, does not and cannot provide a forum for resolving challenges, constitutional or otherwise, to the asbestos NESHAP.

I must reject Respondents' challenge to the constitutionality of the asbestos NESHAP on the basis of this provision in the CAA. "This restriction on judicial review has been found to apply to a claim that a regulation is unconstitutionally vague."^{25/} Moreover, at least one court has found that an earlier and somewhat similar version of the asbestos NESHAP regula-^{26/} tion was not unconstitutionally vague.

^{25/} United States v. Sierra Environmental Group, Inc., Civil Action No. C-2-93-248, slip op. at 11 (E.D. Ohio, August 31, 1993); See also United States v. Walsh, No. 92-35088, slip op. at 12073-74 (9th Cir. October 26, 1993).

Respondents challenge any reliance upon United States v. Walsh on the grounds that a provision of the CAA which was cited by the Court is no longer part of the amended version of 42 U.S.C. Section 7412. Respondents, however, overlook the fact that, with the 1990 amendments to the CAA, a new subsection (b) was added. It provides, in pertinent part:

(1) In general

For purposes of this section, if it is not feasible in the judgment of the Administrator to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants, the Administrator may, in lieu thereof, promulgate a design, equipment, work practice, or operational standard, or combination thereof, which in the Administrator's judgment is consistent with the provisions of subsection (d) or (f) of this section. In the event the Administrator promulgates a design or equipment standard under this subsection, the Administrator shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

See FN 14 supra.

^{26/} United States v. Sierra Environmental Group, Inc., at 13.

The history of the "adequately wet" requirements in the asbestos NESHAP regulations demonstrates that the regulated public clearly had adequate opportunity to raise questions and to challenge the requirements prior to their publication as final rules. Indeed, some of the very issues that Respondents are attempting to raise here were raised by those who commented on the proposed regulations and on the various revisions to the regulations and those comments were considered by EPA.

When the initial NESHAP for asbestos demolition work was first proposed it prohibited visible emissions to the atmosphere of asbestos particulate matter during demolition work.^{27/} The absolute prohibition of visible emissions was dropped in the final rule because, as EPA acknowledged, "it would be impracticable, if not impossible, to do such work without creating visible emissions."^{28/}

EPA subsequently extended the asbestos NESHAP "to cover renovation operations with emission potential of a magnitude similar to that of demolition operations covered by the standard."^{29/} The new renovation rule required asbestos to be "adequately wetted during stripping" and required "asbestos materials that have been removed or stripped. . . be adequately wetted to ensure that such materials remain wet during all remaining stages of demolition or renovation and related handling operations."^{30/}

^{27/} 36 Fed. Reg. at 23242 (December 7, 1971).

^{28/} 38 Fed. Reg. at 8821 (April 6, 1973).

^{29/} 39 Fed. Reg. at 38065 (October 25, 1974).

^{30/} 40 Fed. Reg. at 48300 (October 14, 1975).

At that time some of those who commented on the proposed rule requested that EPA "describe more specifically a proper wetting operation."^{31/} EPA responded by explaining that the purpose of the wetting requirements is "to reduce the amount of asbestos dust generated during demolition operations."^{32/} EPA declined to specify proper wetting procedures because it concluded that many different procedures would accomplish the necessary wetting and that those engaged in demolition work were familiar with proper wetting procedures. Hence, such specification was "neither necessary nor appropriate."^{33/}

EPA did add a definition of "adequately wetted": "sufficiently mixed or coated with water or an aqueous solution to prevent dust emissions."^{34/} Moreover, the regulation was revised to state that the asbestos NESHAP procedures were to "be used to prevent emissions of particulate asbestos material to outside air."^{35/} Thus, the adequate wetting requirement in the asbestos NESHAP was broadened or extended from reducing the amount of dust emissions in renovation and demolition work to preventing dust emission altogether, even though EPA had, only two years before, acknowledged that demolition without visible emissions was impracticable, if not impossible.^{36/}

^{31/} 40 Fed. Reg. at 48296 (October 14, 1975).

^{32/} Id. (emphasis added).

^{33/} Id.

^{34/} 40 Fed. Reg. at 48299 (emphasis added).

^{35/} 40 Fed. Reg. at 48300 (emphasis added).

^{36/} Supra, FN 28.

Although the regulation has been revised and renumbered since that time to delete the specific reference to "prevent" in the standard for demolition and renovation, the intention to prevent the release of particulates has been retained through the current definition of adequately wet.^{37/}

In 1990, EPA issued a pamphlet entitled "Asbestos/NESHAP Adequately Wet Guidance" (guidance),^{38/} the purpose of which was to provide guidance to asbestos inspectors and the regulated community on how to determine if friable ACM is adequately wet. The guidance contained a disclaimer emphasizing that it consisted solely of recommendations which, even though followed, do not constitute a guarantee against findings of violation.

In this guidance, EPA acknowledged that "thermal block" insulation used on boilers does not absorb water readily and may be hard to penetrate by water or a wetting agent. In recognition of this fact, the guidance tacitly acknowledged that the interior of such materials may remain dry during removal: "Whenever such materials are broken during the removal process, the exposed, dry surfaces must be wetted immediately to reduce emissions."

The guidance also explicitly recognized that ACM will not always be soaked completely even with repeated spraying: "Adequate wetting of ACM is typically accomplished by repeatedly spraying it with a liquid or a wetting agent, usually amended water (water to which surfactant chemicals

^{37/} Supra p. 28.

^{38/} Resp. Exh. 16.

have been added), until it can absorb no more. However, this does not necessarily mean that the ACM will be soaked throughout."

While Respondents may view the adequate wetting requirements in the asbestos NESHAP as "Mission Impossible", the impossibility of preventing asbestos fiber emissions during the course of renovation work or the impossibility of adequately wetting all RACM before or during stripping or removal does not relieve Respondents of liability in this matter. Impossibility of compliance is generally no defense to liability for violations of the CAA.^{39/} Thus, the CAA envisions situations where standards which are currently economically or technologically infeasible will nonetheless be enforced.^{40/} While a defense that a regulatory requirement is technically or economically infeasible is not relevant to the issue of liability, such infeasibility, coupled with good faith efforts, can be considered with respect to the penalty in an enforcement action.^{41/}

EPA need not prove that visible emissions of asbestos occurred in order to prove a violation of 40 C.F.R. Section 61.145(c)(3) or (c)(6)(i). It is the failure to follow the work practice to adequately wet the RACM rather than the release of visible emissions which creates liability.^{42/}

The EPA inspector testified, and it has been so found,^{43/} that when she tore a piece of "semi-wet" air cell pipe insulation lying on the floor of the boiler room, she discovered that it was very stiff and very dry and that

^{39/} Union Electric Co. v. EPA, 427 U.S. 246, 258-9 (1976).

^{40/} Friends of the Earth v. Potomac Electric Power Co., 419 F. Supp. 528, 535 (D. D.C. 1976).

^{41/} United States v. Ford Motor Co., 814 F. 2d 1099, 1103-4 (6th Cir. 1987).

^{42/} U. S. v. Ben's Truck and Equipment, Inc., 25 Env't. Rep. Cas. (BNA) at 1299; U. S. v. MPM Contractors, Inc., 767 F. Supp. at 233.

^{43/} Finding of Fact 31 at p. 15.

when torn, it emitted fibers and released dust. The EPA inspector further testified, and it has been so found,^{44/} that when she removed a piece of magnesium block from a sealed bag in the boiler room, she discovered that it was dry beneath the thin layer of wet material on the outside and that, when broken, it emitted dust.

"Adequately wet" is defined in the regulation as meaning "sufficiently mix or penetrate with liquid to prevent the release of particulates. If visible emissions are observed coming from asbestos-containing material, then that material has not been adequately wetted. However, the absence of visible emissions is not sufficient evidence of being adequately wet."^{45/} Since the piece of air cell pipe insulation which had been stripped from facility components and which was lying on the floor of the boiler room emitted fibers and released dust when the EPA inspector broke it, I conclude that the material was not adequately wet. "In cases involving alleged violations of NESHAP for asbestos, courts have routinely relied on the observations of inspectors to determine whether asbestos was adequately wetted."^{46/} Thus, violations of both 40 C.F.R. Section 61.145(c) (3) and 40

^{44/} Finding of Fact 33 at p. 15.

^{45/} 40 C.F.R. Section 61.141.

^{46/} U.S. v. MPM Contractors Inc. 767 F. Supp. at 233 and cases cited therein. (It should be noted that there has been a change in the wording of the regulatory definition of "adequately wet" since those cases were decided. The definition in effect until November 20, 1990 was "sufficiently mixed or coated with water or an aqueous solution to prevent dust emissions." 40 C.F.R. Section 61.140 (1990). The new definition, applicable to the case at hand appears to make it easier for EPA to prove a violation ("if visible emissions are observed [presumably by an inspector] coming from asbestos-containing material, then that material has not been adequately wetted"), and more difficult for Respondents to refute a violation ("the absence of visible emissions is not sufficient evidence of being adequately wet") 40 C.F.R. Section 61.141 (1991).)

C.F.R. Section 61.145(c) (6) (i) can be found on the basis of an inspector's observation of RACM debris which remains after stripping has occurred.^{47/}

Therefore, I must conclude that Respondents have violated 40 C.F.R. Section 61.145(c) and Section 112 of the CAA, 42 U.S.C. Section 7412, as alleged in the complaint. More specifically, I conclude that Respondents failed to comply with the NESHAP work practices to adequately wet the RACM during the stripping operation from the pipe in the boiler room and to adequately wet the RACM stripped from the pipe and ensure that it remained wet until collected and contained or treated in preparation for disposal. Since the RACM which was lying on the floor had not been bagged, it had not yet been collected and contained in preparation for disposal. Asbestos materials are considered "collected" when they are properly bagged.^{48/} Until the stripped RACM was so collected, i.e., bagged, Respondents were required to adequately wet the RACM to ensure that it remain wet. Respondents had failed to adequately wet the stripped pipe insulation.

There is some question as to the nature and extent of Respondents' responsibility to continue to wet the RACM once it had been collected and contained (i.e., bagged) for disposal. When the asbestos NESHAP was amended in 1984 to require adequate wetting "to ensure that they [asbestos materials] remain wet until they are collected for disposal. . .,"^{49/} EPA explained that this revision was made in response to an inquiry as to whether "asbestos has to stay wet even after it is properly bagged and sealed."^{50/} In further

^{47/} Id.

^{48/} 49 Fed. Reg. 13659 (April 5, 1984).

^{49/} 49 Fed. Reg. 13663 (April 5, 1984).

^{50/} 49 Fed. Reg. 13659 (April 5, 1984).

explanation, EPA said:

The intent of the requirement to keep friable asbestos materials wet during all remaining stages of demolition was to ensure that the asbestos materials that have been removed or stripped but not yet disposed of are not allowed to dry out so that asbestos fibers become airborne. If they are properly sealed in leak tight containers or bags while wet, they should not dry out before they can be transferred to an acceptable disposal site. In any case, after they are bagged, the waste disposal requirements in Section 61.152 [now Section 61.150] (and not Section 61.147) [now Section 61.145] would apply to the handling of the asbestos materials. To clarify the meaning of this portion of the standard, the wording of Section 61.147(c) (1) [now Section 61.145(c) (6) (i)] has been revised to indicate that the asbestos materials must be kept wet until they are collected for disposal in accordance with Section 61.152 [now Section 61.150]. They would be considered "collected" when they are properly bagged. 51/

Therefore, I conclude that the requirements of Section 61.145(c) did not apply to the wet magnesium block RACM which was found sealed in a leak tight bag. However, the condition of the stripped pipe insulation is a sufficient basis upon which to find that Respondents violated Section 61.145(c) (3) and Section 61.145(c) (6) (i) as alleged in the complaint.

VI. The Penalty

A. Introduction

Section 22.27(b) of the Consolidated Rules of Practice (CROP) (40 C.F.R. Section 22.27(b)) states, in pertinent part:

If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

51/ Id.

Section 113(e)(1) of the CAA, 42 U.S.C. Section 7413, provides, in pertinent part, that "[i]n determining the amount of any penalty to be assessed under this section or section 7604(a) of this title, the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation."

EPA has issued a penalty policy to serve as civil penalty guidance when calculating administrative penalties under Section 113(d) of the CAA.^{52/} The penalty policy contains two components: the gravity of the violation and the economic benefit of noncompliance. (Appendix III to the policy covers the economic benefit and gravity components for asbestos NESHAP renovation violations.) After calculating these components, they are combined to yield the "preliminary deterrence amount". Thereafter, adjustment factors, which are described in the body of the policy, are applied so that a fair and equitable penalty will result.

EPA determined that a proposed penalty of \$43,400 was appropriate for the two violations found. This figure was reached by setting the gravity component at \$12,000 and the economic benefit component at \$31,400

^{52/} Clean Air Act Stationary Source Civil Penalty Policy (Revised October 25, 1991).

and by permitting no adjustments to this "preliminary deterrence amount" to ensure that the final penalty amount was fair and equitable.

I concur with the Complainant's calculation of the gravity component. The amount of \$12,000 is the minimal amount provided under penalty policy for the gravity of the two violations found. It is based upon one day of violation, the removal of the lowest number of units of asbestos material (less than ten units) and the smallest size violator (net current assets under \$100,000).

However, I cannot adopt the Complainant's calculation of the economic benefit component of \$31,400 for two reasons. First, it is based upon an assumed cost of \$20 per square foot or linear foot for the removal of the RACM at North Gem School. The cost, based upon the two bids submitted by Echeco and PMI, was \$8.20 or \$8.87 per linear foot for removal of the RACM from the pipes. The cost for removal of the RACM from the boiler, based upon the two bids submitted by Echeco and PMI, was \$15.50 and \$14.84, respectively, per square foot.^{53/}

My second reason for not adopting Complainant's calculation of the economic benefit component is that it is based upon an assumption that the work which Respondents did in the crawl space was done in violation of the asbestos NESHAP work requirements.

^{53/} Echeco's bid of \$6,900 for the boiler room work was based upon \$8.20 per linear foot for the removal of the pipe insulation and \$15.50 per square foot for the removal of the boiler insulation. Thus, the total of \$6,900 was rounded up from a bid of \$6,864 ($\8.20×270) + ($\$15.50 \times 300$) = $\$2,214 + \$4,650 = \$6,864$. The PMI bid for the crawl space pipe was \$8,873 or \$8.87 per linear foot. Therefore, I conclude that the cost per square foot on the boiler in the PMI bid was approximately \$14.84: $\frac{\$6,847 - (270 \times \$8.87)}{300} = \$14.84$.

Complainant never alleged in the complaint or at the hearing that the stripping of the pipes in the crawl space was done improperly. Indeed, counsel for Complainant stated at the hearing: "There have been no allegations of violations in the crawl space area."⁵⁴ The EPA inspector did not^{55/} conduct an inspection under the main building (i.e., in the crawl space). The only evidence that was introduced concerning the work in the crawl space supports the proposition that the removal of the RACM therein was done with a large quantity of water and, based upon the post-abatement air sampling, microscopically minimal release, if any, of asbestos particulates. Thus, Mr. Clayton Perkins, the Project Manager for the Bancroft School District on the asbestos abatement project at North Gem School and Head Custodian at the school, testified that after the abatement project beneath the gymnasium floor was completed, the tongue-in-groove flooring throughout the gymnasium flooring cupped as a result of the presence of excessive moisture in the crawl space beneath the floor.^{56/} Moreover, each of the five air monitoring samples which Mr. Johnson took in the crawl space beneath the gymnasium after the completion of the project showed zero (0) structures.^{57/} In determining the penalty, the statute requires me to consider the economic benefit of noncompliance. It has been neither alleged, nor found, that there was noncompliance by Respondents on the project in the crawl space. I am

^{54/} Tr. 463.

^{55/} Tr. 212.

^{56/} Tr. 542-43.

^{57/} Tr. 326-29, 463; Compl. Exh. 10.

also required to consider the duration of the violation as established by any credible evidence. No credible evidence has been offered to show that the violations committed by Respondents in the boiler room continued as the abatement work was begun in the craw space later on June 4 and continued on June 5, June 6 and June 7.

Although the Penalty Policy states that "[i]t should be assumed, unless there is convincing evidence to the contrary, that all stripping, removal, disposal and handling was done improperly if such improper practices are observed by the inspector," I must reject such an approach. While this may be an appropriate policy for the calculation of a proposed penalty at the time a complaint is issued, it has no application to my calculation of the penalty to be assessed following a hearing under the CROP. Under Section 22.24, the Complainant herein had the burden of going forward with and of proving any violation and that the proposed penalty is appropriate for such violations; as Presiding Officer, I am required to determine each matter of controversy upon a preponderance of the evidence -- not upon an assumption. The Respondent is not required to present a defense where no prima facie case has been established concerning possible violations in the crawl space area. Here the Complainant established no such prima facie case; indeed, as noted, the Complainant did not allege any violations in the crawl space. In fact, the only evidence offered on the work done in the crawl space supports a conclusion that the work was done properly.

Therefore, I shall set the economic benefit of noncompliance at \$6,900.00 which is the amount of Echeco's calculation for the boiler room work after it was rounded up to \$6,900.00.

The preliminary deterrence amount would be, therefore, \$12,000.00 + \$6,900.00, or \$18,900.00.

Although the Agency made no adjustments to the preliminary deterrence amount, the statute requires me to take into consideration the violator's good faith efforts to comply and such other factors as justice may require. In recognition of the fact that Respondents took numerous measures to prevent the release of asbestos emissions and to otherwise ensure that the project was accomplished without damage to public health and the environment, I believe that such good faith efforts and justice dictate a downward adjustment of the penalty. Among the many measures which Respondents took, and which have been found as facts herein, were: notification to local authorities and to EPA; installation of critical barriers in the containment area; installation of a decontamination unit; sealing the drain in the boiler room; use of an airless sprayer with a surfactant; use of a negative air machine; use of a water hose when removing the RACM; use of a water filtration unit; and double bagging and sealing of the RACM after removal.

It should also be noted that Respondents did use water while removing the RACM in the boiler room. Indeed, water was used from two different sources -- a water hose and from the airless sprayer. Thus, this case is totally unlike one in which the contractor fails altogether to use water. See, for example, U.S. v. Hugo Key and Son Inc.^{58/} where "at no time during the demolition operation did it [Hugo Key] wet the asbestos-covered boilers" and Hugo Key was found to have failed to adequately wet friable asbestos materials during stripping and to keep them wet until collected for disposal.

^{58/} 30 Env't. Rep. Cas. (BNA) at 1702.

In full recognition of these factors, I conclude that the "preliminary deterrence amount" of \$18,900.00 should be reduced by 50 per cent. Accordingly, I determine that the appropriate final penalty amount is \$9,450.00.

59/
O R D E R

Pursuant to Section 113(d) of the CAA, 42 U.S.C. Section 7413(d), a civil penalty in the amount of \$9,450.00 is hereby assessed against Respondents Norma J. Echevarria and Frank J. Echevarria, dba Echeco Environmental Services, for the violation of Section 112 of the CAA, 42 U.S.C. Section 7412.

IT IS ORDERED that Respondents Norma J. Echevarria and Frank J. Echevarria dba Echeco Environmental Services, pay a civil penalty to the United States in the sum of \$9,450.00. Payments shall be made by cashier's or certified check payable to "Treasurer, United States of America." The check shall be sent to:

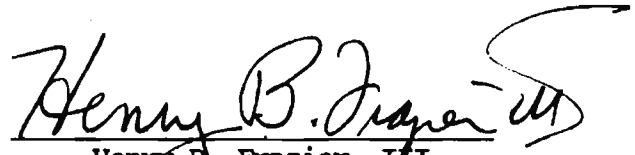
U. S. Environmental Protection Agency
(Region 10 Hearing Clerk)
P. O. Box 360903M
Pittsburgh, PA 15251

59/ Pursuant to 40 C.F.R. Section 22.27(c), this initial decision shall become the final order of the Environmental Appeals Board unless an appeal to the Environmental Appeals Board is taken by a party or the Environmental Appeals Board elects to review the initial decision upon its own motion. 40 C.F.R. Section 22.30 sets forth the procedures for appeal from this initial decision.

Respondents shall note on the check the docket number specified on the first page of this initial decision. At the time of payment, Respondents shall send a notice of such payment and a copy of the check to:

Regional Hearing' Clerk
U. S. Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle, WA 98101

Attention: Marian L. Atkinson


Henry B. Frazier, III
Chief Administrative Law Judge

Dated: December 22, 1993

Washington, D. C.