UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
INDUSTRIAL WASTE CLEANUP, INC.,	)	**Docket No. CAA-5-99-019**
	)	
Respondent	)	

ORDER ON MOTIONS FOR ACCELERATED DECISION AND DISMISSAL

This proceeding was initiated by the Environmental Protection Agency, Region 5 (the "Region" or "Complainant") on July 9, 1999, pursuant to section 113(d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7413(d). The Complaint charged Respondents Industrial Waste Cleanup, Inc. ("IWC" or "Respondent"), and St. Lawrence Church and School in three counts with violating section 112 of the CAA and its implementing regulations as set forth in the National Emissions Standard for Hazardous Air Pollutants for Asbestos ("asbestos NESHAP") found at 40 C.F.R. Part 61, Subpart M. On April 10, 2000, the Complaint was amended, leaving two counts[1] and one Respondent, IWC.[2] The Amended Complaint alleges that Respondent violated the asbestos NESHAP when it failed to ensure that regulated asbestos containing material ("RACM") remained wet until collected or treated in preparation for disposal, and when it failed to seal asbestos containing material ("ACM") in leak-tight containers while wet.

Respondent filed its Answer to the Complaint on August 6, 1999, and filed an Amended Answer on May 9, 2000. On May 22, 2000, Complainant filed a Motion for Accelerated Decision on the issue of liability ("Motion"). Respondent opposed Complainant's Motion on June 1, 2000, and moved for accelerated decision in its favor as to liability and penalty ("Cross Motion"). Additional memoranda were filed by Complainant on June 16, 2000, responding to IWC's Cross Motion and requesting accelerated decision as to penalty; and by IWC on June 26, 2000, in response to Complainant's June 16th filing.

1. Standards for Accelerated Decision

Section 22.20(a), 40 C.F.R. provides for entry of accelerated decision when "no genuine issue

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[1] The Amended Complaint dropped Count 1 of the original Complaint and renumbered Counts 2 and 3 of the original Complaint as Counts 1 and 2.

[2] St. Lawrence Church and School entered into a Consent Agreement and Final Order with EPA Region 5 on February 23, 2000. As a result, it was not named as a Respondent in the Amended Complaint.

of material fact exists and a party is entitled to judgment as a matter of law." A motion for

accelerated decision is the administrative analog to a motion for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure. *In re: ICC Indus.*, TSCA Appeal No. 91-4, 1991 TSCA Lexis 61, at *16 (Dec. 2, 1991); *In re: CWM Chemical Services*, TSCA Appeal No. 93-1, 1995 TSCA Lexis 10 (May 10, 1995); *Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995). Interpreting the standard of Federal Rule 56, the Supreme Court has stated that the proper inquiry is "whether the evidence presents a sufficient disagreement to require submission to a [fact finder] or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 251 (1986).

The party moving for summary judgment bears the initial burden to show the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Upon such showing, the non-moving party "may not rest upon the mere allegations or denials" in its pleadings, it "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. 56(e). If the non-moving party "does not so respond, summary judgment, if appropriate, shall be entered against [it]." *Id*. The non-moving party must demonstrate that the issue is "genuine" by referencing probative evidence in the record, or by producing such evidence. *Clarksburg Casket Company*, EPCRA Appeal No. 98-8, slip op. at 9 (EAB, July 16, 1999); *Green Thumb Nursery*, 6 E.A.D. 782, 793 (EAB 1997). However, in evaluating a motion for summary judgment, the record must be viewed in a light most favorable to the non-moving party, indulging all reasonable inferences in that party's favor. *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990).

2. Statutory and Regulatory Background

Section 112(b) of the CAA, 42 U.S.C. § 7412(b), lists air pollutants that Congress has determined present, or may present, a threat of adverse human health or environmental effects. Asbestos is a pollutant listed under section 112(b). Section 112(d) of the CAA directs the Administrator of the EPA to promulgate NESHAPs for point sources of pollutants listed under section 112(b). However, in order to control emissions of certain pollutants, including asbestos, for which point source controls alone would not be sufficient, Congress authorized EPA to promulgate work practice standards to achieve the statute's objectives. 42 U.S.C. § 7412(h). The work practice standards of the asbestos NESHAP are codified at 40 C.F.R. §§ 61.140-157.

In the instant case Respondent is charged with violating two provisions of the asbestos NESHAP, 40 C.F.R. §§ 61.145(c)(6)(i) and 61.150(a)(1)(iii). Section 61.145 establishes the standard for demolition and renovation activities where the amount of RACM involved is 260 linear feet or more on pipes or 160 square feet or more on other components. RACM is defined in pertinent part at 40 C.F.R. § 61.141 as "friable asbestos material." "Friable," in turn, is defined as any material found by specified testing methods to contain more than 1% asbestos "that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure." 40 C.F.R. § 61.141.

Subsection 61.145(c)(6)(i) directs that "[f]or all RACM, including material that has been removed or stripped" the owner or operator of a demolition or renovation activity must

"[a]dequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with § 61.150." The term "adequately wet" as defined at 40 C.F.R. § 61.141 means:

> 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.

The waste disposal standard for demolition, renovation and certain other activities is set forth at 40 C.F.R. § 61.150. Owners and operators of any source covered under § 61.145 must either discharge no visible emissions to the outside air in the collection, processing, packaging or transporting of asbestos-containing waste material, or use one of the emission control and waste treatment methods detailed in paragraphs (a)(1) through (4). Paragraph 61.150(a)(1)(iii) directs in pertinent part that owners and operators must "[a]fter wetting, seal all asbestos-containing waste material in leaktight containers while wet."

3. Factual Background

In May of 1997, St. Lawrence Catholic Church and School in Utica, Michigan hired IWC to perform asbestos abatement work as part of a renovation of the church property. IWC timely submitted its Notification of Intent to Renovate to the Michigan Department of Environmental Quality ("MDEQ") on May 6, 1997, stating that asbestos removal would start on May 20, 1997 and end on May 29, 1997. Respondent's Prehearing Exchange Exhibits ("RX") 2; Complainant's Prehearing Exchange ("CX") 16c. Respondent submitted an amended notification on May 23, 1997, listing dates of May 20 and May 30, 1997 for starting asbestos removal, and listing dates of May 21 and May 30, 1997 for ending asbestos removal. RX 3; CX 16d. Respondent commenced work in St. Lawrence's boiler room and adjoining tunnels on May 20, 1997, continued work on May 21, and finished, pursuant to the amended notice, on May 30, 1997.

On May 28, 1997, Gary Knight, an inspector for the MDEQ, conducted an inspection at the church. No IWC personnel were present at the job site that day. Mr. Knight inspected the boiler room, collected a sample of debris he found on the floor, and took photographs of the debris that he observed. Complainant's Prehearing Exchange Exhibits ("CX") 5, 6, and 7.

4. Arguments of the Parties

Complainant submits that the undisputed facts establish Respondent's liability for both counts in the Amended Complaint. As to the allegation in Count 1, that Respondent failed to keep RACM adequately wet after it was stripped, Complainant asserts that the amount or RACM subject to abatement by IWC was above the regulatory threshold of at least 260 linear feet or 160 square feet as evidenced by the bill issued by IWC to St. Lawrence Church and School for its asbestos abatement work. CX 15(b). To establish the remaining elements of the violation, Complainant relies upon Mr. Knight's inspection report and the laboratory analysis of the sample he collected in the boiler room. Complainant represents that the laboratory analysis determined that the sample collected by Mr. Knight contained 30% chrysotile asbestos. CX 9. Mr. Knight, in the summary of his inspection provided with his enforcement referral, characterized the ACM as "friable." CX 6 at 2. Complainant also relies on Mr. Knight's description of the material he observed on the boiler room floor as "dry" in support of its contention that RACM was not "adequately wet" for purposes of the asbestos NESHAP. CX 6 at 2. These facts, Complainant maintains, are uncontroverted and establish Respondent's liability for the violation alleged in Count 1.

As to Count 2, Complainant submits that, as demonstrated under Count 1, and by admissions in Respondent's Prehearing Exchange (p. 10), the material observed by Mr. Knight on the boiler room floor was ACM. Complainant further avers that Mr. Knight's inspection report and admissions in Respondent's Prehearing Exchange establish that dry, friable asbestos debris was on the floor and, therefore, was not sealed in a leak-tight container while wet. Accordingly, Complainant submits that it is entitled to accelerated decision on Count 2.

Respondent makes several arguments in opposition to Complainant's Motion, and moves for accelerated decision in its favor, or dismissal, as to liability and penalty. First, Respondent asserts that Complainant does not establish that the debris at issue contained asbestos and that it was friable. Respondent characterizes Complainant's case as relying on only one "single speck of debris" as a sample of the material at issue. Respondent avers that it was not part of a contiguous piece of material, but was among scattered debris, and that there is no evidence as to the condition of the material. Respondent requests a finding that the inspector's mere visual observation of a piece of material that was later destroyed is insufficient to support Complainant's case.

Second, Respondent asserts that documents it has submitted with its Cross Motion, namely the results of the independent inspection and testing conducted by Tammy Gordon and Environmental Testing and Consulting Corporation ("ETC"), confirm that Respondent complied with all regulatory requirements when Respondent was on the site on May 21, 1997, including keeping materials adequately wet and properly sealing materials that were removed, and that there was no debris. RX 5-20. According to Respondent, these documents raise an issue of fact as to whether Respondent violated the work practice requirements alleged in the Complaint. Complainant counters that the documents do not indicate the state of the boiler room after Respondent's crew finished removing the enclosure and all of the equipment. Respondent argues that Complainant cannot establish that the debris observed by Mr. Knight existed from May 21 to May 28, 1997. Respondent asserts that an adjoining tunnel system was in the process of being demolished by other contractors, and suggests that the debris observed by the inspector resulted from material not yet subject to abatement.

Third, Respondent asserts that there is an issue of fact as to whether the material was adequately wet. Respondent states that it will present testimony that the material at issue would have been sprayed with a wetting agent and with a penetrating liquid encapsulant that prevented particulate emissions, and therefore the material was "adequately wet" and submits a document describing encapsulant products. RX 28. Respondent distinguishes these facts with those of *Indspec Chemical Corp.*, 1999 WL 118178 (ALJ, January 26, 1999), in which, Respondent asserts, the encapsulant did not appear to be a penetrating encapsulant and the inspector's testimony indicated that the material was creating visible dust. In response, Complainant asserts that once the encapsulant dries, the material is not adequately wet. Complainant maintains that Mr. Knight's observations that the material on the boiler room floor on May 28, 1997 was dry and friable negate Respondent's claim that an encapsulant it applied on May 20 or 21, 2000 would have ensured that any material remained adequately wet.

Fourth, as to Count II, Respondent points out that 40 C.F.R. § 61.150 is the standard for waste disposal, and would not be applicable until the material was actually collected on May 30, 1997. Respondent asserts that its records for work clearly indicated that Respondent collected and sealed the material on the latter date, and not before that date. Respondent argues that a requirement that material be placed in leak-tight containers before it is collected or stripped is an impossibility. Complainant maintains that the fact that ACM has been stripped but not bagged, and that it was dry and friable, establish a violation of 40 C.F.R. § 61.150.

Fifth, Respondent requests consideration of its defense of laches, as EPA's unjustified delay in bringing this action resulted in severe prejudice to Respondent. Specifically, Respondent asserts that it was not even contacted by the State, informing Respondent that an inspection had occurred, until four months after the material was removed, and that EPA did not submit a request for information to Respondent until nearly two years after the work was completed. Moreover, Respondent asserts it is not able to challenge the asbestos testing results themselves because EPA routinely destroys its samples after several months. Further, IWC asserts that most of the employees involved in the renovation at issue are no longer with IWC. In response, Complainant argues that when the State contacted Respondent four months after the inspection, Respondent bore the responsibility for maintaining appropriate records, and that Respondent "curiously claims that he returned to the boiler room two days after the inspection to remove the remaining RACM." Complainant's submittal dated June 16, 2000, at 6.

As to the proposed penalty, IWC claims that it is entitled to accelerated decision that no penalty should be imposed, on grounds that the amount of material is below the threshold requirements of 40 C.F.R. § 61.145. EPA's photographs and narrative description of debris within an area of eight square feet do not establish that the remaining debris, other than the one sample, contained asbestos, Respondent contends. Respondent also challenges Complainant's assessment as to the gravity component of the penalty, asserting that it included in its calculation the amount of asbestos material removed from the St. Lawrence School, a separate facility, pursuant to separate and subsequent agreements between IWC and St. Lawrence.

5. Discussion

Respondent is not entitled to a dismissal of the Complaint on grounds that Complainant failed to establish *prima facie* a violation of the asbestos NESHAP. First, the Region's report of the laboratory analysis performed on the sample collected by Mr. Knight shows that the debris found in the boiler room was ACM. CX 9. Second, Mr. Knight's inspection report summary states "[a]ll of the suspect material was dry," and that "[a]ll material observed on the floor, boiler, pipes, and fittings/valves was friable and looked identical to the material collected for analysis." CX 6; Cross Motion Exhibit 4. In addition, the inspection report, dated May 28, 1997, states that "[t]he debris shown in the photos looked identical to the material sampled." CX 5 at 15. "In cases involving alleged violations of the NESHAP for asbestos, courts have *routinely* relied on the observations of inspectors to determine whether asbestos was adequately wetted." *Norma J. Echevarria and Frank J. Echevarria*, 5 E.A.D. 626, 639 (EAB 1994)(*quoting United States v. MPM Contractors, Inc.*, 767 F. Supp. 231, 233 (D. Kan. 1990)).

The Respondent's claim that it treated the material with an encapsulant, and the ETC air monitoring reports (RX 5-20), do not entitle Respondent to judgment as a matter of law, where Complainant has presented the inspection report summary indicating that the material was dry and friable, and where the record must be viewed in a light most favorable to Complainant, and reasonable inferences must be indulged in favor of Complainant, as the party opposing Respondent's Cross Motion. *See*, *Indspec Chemical Corp., and Associated Thermal Services, Inc.*, 1999 WL 118178, at *5 (ALJ, January 26, 1999)(claim that ACM was adequately wet and not friable because it was treated with an encapsulant can be overcome by the observations and testimony of government inspector). The claim, however, raises an issue of fact as to whether the material was "adequately wet," or "friable," *i.e.*, whether when dry it can be "crumbled, pulverized, or reduced to powder by hand pressure." 40 C.F.R. § 61.141..

Respondent's argument about the "single speck of material" does not support a dismissal of the Complaint. If one sample of a particular homogenous material is found to contain more than one percent asbestos, it may be considered to be ACM. *See,* 40 C.F.R. § 763.87(c)(2). In *L&C Services*, EAJA Appeal No. 98-1 (EAB, January 15, 1999), cited by Respondent, dismissal of the complaint, and ultimately an award to the respondent of costs and attorney's fees under the Equal Access to Justice Act, was based upon the failure of the inspector to sample certain material, and the failure to present sufficient evidence that other material, that was sampled, was friable. In contrast, in the case at bar, Mr. Knight collected a sample of the material he observed during his inspection, which sample was found to contain asbestos, and described in his inspection summary the ACM he collected, and the other material he observed, as identical to the sampled material. CX 6; Cross Motion Exhibit 4. Accordingly, Respondent's request for dismissal of Count 1 on this ground is denied.

As to the independent inspection and testing conducted at the job site by ETC, the "end of day procedures" section of ETC's "daily air monitoring checklist" for May 21, 1997, indicates that all material on the floor was bagged before IWC left the site. RX 12. This raises an issue of fact as

to whether the debris found by Mr. Knight may have been dislodged by another party, although Respondent merely alludes, without offering any evidence, to other demolition/renovation activities going on at the site between May 22 and May 28, 1997.

Respondent raises several issues of material fact concerning the debris observed and sampled by Mr. Knight on May 28, 1997, that can only be resolved at an oral evidentiary hearing. These issues include the following: whether the material was adequately wet; whether it was friable; how the debris came to be on the boiler room floor if, as Respondent asserts (Cross Motion at 3), the site was not accessible to others; where the debris came from if it was not a result of Respondent's abatement work; who had access to the boiler room area between the end of the day on May 21 and May 28, 1997; and what other work took place at the site during that time period.[3]

As to Respondent's affirmative defense of laches, such a defense is rarely if ever successfully asserted against "the federal government when it is acting in its sovereign capacity to protect the public welfare." *United States v. CPS Chem. Co.*, 779 F. Supp. 437, 451 (E.D. Ark. 1991) (*citing United States v. California*, 332 U.S. 19, 40 (1947)). Complainant's delay in filing the Complaint, two years after the inspection, does not alone warrant dismissal of the Complaint in this matter.

Nevertheless, the two year delay and other issues raised as part of Respondent's laches defense, in the context of the following additional facts, may be significant and warrant further examination at the hearing. It is noted that the facts show that Mr. Knight conducted an inspection, apparently unannounced, when no employees or representatives of Respondent were at the site. CX 5. Although Respondent's notification indicated an ending date for the job of May 29, 1997, Mr. Knight's inspection summary acknowledges that "[o]ur records indicate that we received a call from the [Respondent] on May 23, 1997, indicating they would be off site beginning May 23, 1997 and would return May 30, 1997." CX 6. Mr. Knight took one sample, which Respondent had no opportunity to observe or split, and then Respondent alleges, that "EPA routinely destroys its samples after several months," before this case was initiated, preventing any supplementary testing. Respondent's Supplemental Memorandum, dated June 26, 2000, at 2. At the inspection, Mr. Knight met only with St. Lawrence Church's maintenance supervisor. CX 5. Respondent was not notified of the inspection until four months afterward, when the material had been removed. CX 11; Cross Motion Exhibit 8. Considering these facts in view of a recent finding by a Federal district court that EPA's collection of evidence during an inspection was "suspect," albeit in a different context from the present case, warrants a thorough review of these facts at the hearing. *United States v. Knott*,

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[3]Another case involving asbestos NESHAP violations presented similar issues in the context of the complainant's allegation of a continuing violation. In *First Capital Insulation, Inc.*, 1998 WL 482774 (ALJ, July 28, 1998), it was held that the complainant had not presented sufficiently detailed evidence to establish liability for a continuing violation where several weeks passed between the first inspection and the follow-up inspection; the area where the abatement work was done was open to others, raising the possibility that another party could have dislodged ACM; and an independent inspection conducted at the conclusion of the abatement work showed that no ACM remained in the area.

Respondent is charged in Count II with "failure to seal all asbestos containing waste material in leak-tight containers while wet," based on Mr. Knight's observation of white dry friable ACM scattered on the floor of the boiler room, "constitut[ing] a violation of 40 C.F.R. § 61.150(a)(iii)." Complaint ¶ 42. This citation, presumably a typographical error, should be section 61.150(a)(1)(iii), which provides as follows, in pertinent part:

> **61.150 Standard for waste disposal for manufacturing, fabricating, demolition, renovation, and spraying operations.**
>
> Each owner or operator of any source . . . shall comply with the following provisions:
> (a) Discharge no visible emissions to the outside air during the collection, processing . . . packaging or transporting of any asbestos-containing waste material generated by the source, or use one of the emission control and waste treatment methods specified in paragraphs (a)(1) through (4) of this section.
> (1) Adequately wet asbestos containing waste material as follows:
> * * * *
> (iii) After wetting, seal all asbestos containing waste material in leak-tight containers while wet * * * *

Respondent's argument that this requirement did not apply until the material was "actually collected on May 30, 1997" appears to be based upon its interpretation of Section 61.150 as applying only to the day that the materials are transported for disposal. The Preamble to the 1984 Final Rule revising the asbestos NESHAP explains the term "collection" under 40 C.F.R. § 61.150, and its relationship to Section 61.145, as follows:

> The regulation [formerly § 61.147(e)(1), recodified as § 61.145(c)(6)] requires that asbestos materials be adequately wetted to ensure that they remain wet during all remaining stages of demolition or renovation and related handling operations.* * * * 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** § 61.152 [recodified as **§ 61.150**] (and not § 61.147 [recodified as 61.145]) **would apply to the handling of the asbestos materials**. To clarify the meaning of this portion of the standard, the wording of § 61.147(e)(1) [recodified as § 61.145(c)(6)] has been revised to indicate that the asbestos materials must be kept wet until they are collected for disposal in accordance with § 61.152 [recodified as § 61.150]. **They would be considered "collected" when they are properly bagged**.

49 Fed. Reg. 13658, 13659 (April 5, 1984)(emphasis added).[4]

ETC's Daily Monitoring Checklists for May 20 and 21, 1997, presented by Respondent in its prehearing exchange, indicate in the "end of day procedures" that all material on floor was bagged before leaving and that the bags were properly sealed. RX 11, 12. According to such Checklists, on May 20 and 21, 1997, the materials were "collected" and "bagged," and at that point were subject to the requirements of 40 C.F.R. § 61.150. Any failure on the part of Respondent to comply with the requirements to "[d]ischarge no visible emissions to the outside air" or to "seal all asbestos-containing material in leak-tight containers while wet" at that point would constitute a failure to comply with Section 61.150, notwithstanding any additional collection, bagging, sealing and/or disposal activities on May 30, 1997.

Issues as to Penalties

Complainant moved for accelerated decision as to the appropriate penalty to be assessed for IWC's alleged violations. Because Complainant's motion for accelerated decision as to liability is denied, Complainant's motion for accelerated decision as to penalty is also necessarily denied.

Respondent argues that no penalty is warranted because the amount of asbestos involved in the violations alleged is below EPA's threshold for assessing a penalty, and quotes a passage from the revised Asbestos Demolition and Renovation Civil Penalty Policy of May 1992 ("Penalty Policy") which provides:

> Where there is evidence indicating that only part of a demolition or renovation project involved improper stripping, removal, disposal or handling, the Region may calculate the number of units based upon the amount of asbestos reasonably related to such improper practice."

Penalty Policy, Section I, subsection B.

The quoted statement is from an EPA policy document, not a rule, and as such is not binding on the Region. The statement itself indicates, by the use of the permissive term "may," that any such adjustment in the number of units is discretionary on the part of the Region. Respondent's request for an accelerated decision is denied.

To the extent that Respondent's argument applies to the issue of liability, the relevant threshold is set forth in 40 C.F.R. § 61.145(a)(4)(i): a combined amount of at least 260 linear feet of

[4] The term "collection" is not defined in 40 C.F.R. § 61.141 (nor in the definitions in the regulations for Asbestos-Containing Materials in Schools, 40 C.F.R. § 763.83). Bagging the material is consistent with the common definition of "collect:" "to bring together into one body or place." Webster's Ninth New Collegiate Dictionary 259.

RACM to be stripped or removed from pipes, or at least 160 square feet on other components. Respondent's Notification of Intent to Renovate, dated May 6, 1997, and amended Notification dated May 23, 1997, include an estimate of 1,900 linear feet of RACM to be removed and 120 square feet of RACM to be removed. Cross Motion Exhibits 2, 3; Respondent's quotation for the work performed included as a description of the scope of work "Removal of all ACM within church boiler room and adjoining tunnel system approximately 100 sq. ft. of boiler and tank insulation and approximately 1,200 ln. ft. and associated fittings of pipe insulation." Cross Motion Exhibit 1; Complainant's June 16 submittal, Exhibit 1. TEC's Asbestos Survey, dated May 1, 1997, identifies 50 square feet of boiler insulation, 12 linear feet of boiler exhaust stack insulation, and 38 square feet of tank insulation in the boiler room, and identifies 1,200 linear feet of pipe insulation in tunnels. CX 16b. This documentation supports a prima facie showing that the threshold amount of RACM for the work practice standards of the asbestos NESHAP was met.

Respondent also suggests in its Cross Motion (at 2, 7, 12) that it is entitled to attorney's fees and costs under the Equal Access to Justice Act ("EAJA"). The EAJA allows parties who prevail against the government in certain adversary proceedings, including administrative adjudications,[5] to recover attorneys' fees and other expenses when the government's position is not "substantially justified." Respondent's claim, lodged in a brief filed before a final judgment establishing it as a prevailing party, is premature. *See, e.g., H.E.L.P.E.R., Inc.*, EPCRA Appeal No. 98-3, slip op. at 26, n. 27 (EAB 1999) (citing *J.M.T. Mach. Co. v. United States*, 826 F.2d 1042, 1047 (Fed. Cir. 1987)). Moreover, Respondent has not established that it qualifies for relief under EPA's regulations implementing the EAJA found at 40 C.F.R. Part 17. *See* 5 U.S.C. § 504(a)(2); *see also J.M.T. Mach.*, 826 F.2d at 1046-48.

ORDER

1. Complainant's Motion for Accelerated Decision, and Counter-Motion for Accelerated Decision on the Penalty are **DENIED.**

2. Respondent's Cross-Motion for Accelerated Decision on Liability and Damages is **DENIED.**

3. The parties shall continue in good faith to attempt to settle this matter. Complainant shall report on the status of settlement on September 29, 2000.

3. The hearing in this matter shall proceed as scheduled, commencing on October 3, 2000, on issues of liability and the assessment of any penalty, as appropriate.

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[5] 5 U.S.C. § 504 is the section of the EAJA that governs adversary administrative proceedings.

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Susan L. Biro
Chief Administrative Law Judge

Dated: August 30, 2000
Washington D.C.