UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
ALLEGHENY POWER SERVICE CORPORATION	)	Docket No. CAA- III -067
and CHOICE INSULATION, INC.	)	
	)	
Respondents	)	

INITIAL DECISION

By: Charles E. Bullock
Administrative Law Judge

Issued: December 14, 1999
Washington, D.C.

Appearances

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INTRODUCTION

The Complaint in the instant case was filed on February 12, 1996. This case has been brought by the United States Environmental Protection Agency ("Complainant" or "EPA") under section 113(d) of the Clean Air Act. Section 113(d) authorizes the assessment of administrative penalties by the Administrator of the EPA if it is found that a person has violated any of the requirements of the Clean Air Act. The Complaint alleges that the Respondents, Choice Insulation, Inc. ("Choice") and Allegheny Power Service Corporation ("Allegheny"), violated the Clean Air Act and the regulations promulgated thereunder. Respondents filed the Answer to the Complaint on March 12, 1996. Respondents deny that they have violated the Clean Air Act as alleged in the Complaint. The Complainant and the Respondents presented their cases at a hearing which was held on November 18 and 19, 1998, in Pittsburgh, Pennsylvania.

BACKGROUND

A. Liability

1. General

Choice is an asbestos abatement contractor that is a subsidiary of Choice Industries, Inc. and is headquartered in Washington, West Virginia. Joint Exhibit 1 ("Ex. J-1") at 2. Allegheny, a wholly-owned subsidiary of Allegheny Energy, Inc., is a Maryland corporation with its primary place of business in Greensburg, Pennsylvania. Id. Choice was hired to remove asbestos from Allegheny's Fort Martin Power Station ("Facility") which is located in Maidsville, West Virginia.[1] Choice submitted a Notification of Abatement, Demolition or Renovation dated March 15, 1995, to Region III of the EPA. Complainant's Exhibit 1 ("Ex. C-1 "). This notification was received by the EPA on March 17, 1995, and indicated that the asbestos abatement project would begin on March 29, 1995, and would be completed on May 5, 1995. Id. According to the information provided in the notification, the project would be conducted from Monday through Saturday and would begin at 7:00 in the morning and end at 4:30 in the afternoon every day. Id. The Complainant alleges that the Clean Air Act was violated during this asbestos abatement project and proposes that both Choice and Allegheny should be assessed a penalty for these violations.

Section 113(d)(1) of the Clean Air Act states: " [t]he Administrator may issue an administrative order against any person assessing a civil administrative penalty . . . whenever, on

[1] Monongahela Power Company, Potomac Edison Company, West Penn Power Company and Duquesne Light Company are the other subsidiaries of Allegheny Energy, Inc. Ex. J-1 at 2-3. These companies are the current owners of the Facility and were the owners of the Facility when Choice conducted the asbestos abatement project. Id. In addition, Monongahela Power Company is the operator and was the operator of the Facility during the abatement project. Id. However, the parties have stipulated that Allegheny is the owner of the facility for the purposes of this proceeding. Id.

the basis of any available information, the Administrator finds that such person . . . has violated or is violating any . . . requirement or prohibition of this subchapter . . . including, but not limited to, a requirement or prohibition of any rule, order, waiver, permit, or plan promulgated, issued or approved under this chapter . . . ." 42 U.S.C. § 7413(d)(1)(B).

Each of the Respondents in this case falls under the definition of a "person" within the meaning of section 113(d)(1) of the Clean Air Act. A person "includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State . . . . " 42 U.S.C. § 7602(e). As described above, Choice is a West Virginia corporation and Allegheny is a Maryland corporation. Ex. J-1 at 2. Thus, each is subject to the administrative penalty assessment authority of the EPA Administrator under section 113(d)(1) of the Clean Air Act. Id.

Asbestos is listed as a hazardous air pollutant by the National Emissions Standards for Hazardous Air Pollutants and by the initial list of hazardous air pollutants compiled by Congress in section 112(b)(1) of the Clean Air Act. The Complaint alleges that the Respondents failed to comply with the National Emissions Standards for Hazardous Air Pollutants: National Emission Standard for Asbestos ("NESHAP"), which consist of emission regulations promulgated pursuant to the Clean Air Act. Violations of NESHAP constitute violations of the Clean Air Act and as a result, penalties can be imposed for NESHAP violations in accordance with section 113 of the Clean Air Act. See 42 U.S.C. § 7413.

Complainant bases its case primarily on the observations made by Douglas E. Foster, an EPA inspector, when he inspected the Facility on April 12, 1995. During this inspection Mr. Foster allegedly discovered dry RACM in leak-tight bags being stored in a dumpster at the site. Two counts have been alleged against the Respondents in the Complaint for their alleged NESHAP violations during their asbestos removal project: 1) failure to adequately wet regulated asbestos material ("RACM") during the asbestos stripping operation and 2) failure to keep the stripped RACM adequately wet until it was collected for disposal.

During the hearing and in their briefs the Respondents have asserted that they had not violated the regulations as alleged in the Complaint. They contend that the Choice employees used airless sprayers while removing the asbestos material from the Facility to ensure that the material was adequately wet during stripping. Respondents also argue that the bagged asbestos material was kept adequately wet. In addition, they assert that the EPA inspector lacked credibility. Therefore, Respondents argue that his observations of allegedly dry material are meritless, and therefore should not be used as the basis for a decision in the EPA's favor.

Complainant presented the testimony of Douglas Foster, Richard Ponak, C. Michael Hutson, Edward Helmick, David Hefner, and Gary Justice; plus Exhibits C-1 through C-8, C-10 through C-12, C-15 and C-16. Respondent also presented testimony from David Hefner; the testimony of J. Dean Ellis, Daryl Krugh, James Prettyman, and John Martin; plus Exhibits R-1, R-2, R-3, R-3A, R-4 and R-4A. The parties jointly submitted Exhibit J-1 which reflects joint stipulations agreed to by the parties.

2. Facts

From March 29, 1995, until May 5, 1995, Choice removed approximately 2,300 linear feet of asbestos-containing pipe insulation from the first through seventh floors of the Facility. Ex. J-1 at 3. During this time period Choice was engaged in the "stripping, disturbing and/or removal of asbestos-containing material which could be crumbled, pulverized, or reduced to powder by hand pressure." Id. at 5.

The Facility was inspected by Douglas Foster on April 12 and April 26, 1995. During Mr. Foster's April 12th inspection of the Facility, he observed the alleged violations which are the subjects of this proceeding. On April 12, 1995, Mr. Foster arrived at the Facility at 9:24 in the morning. Hearing Transcript ("Tr.") 24. He spoke with David Hefner, who at the time was a superintendent at Choice, and asked Mr. Hefner to show him where the waste from the project was being stored. Id. at 25. Mr. Foster was then shown to the south end of the Facility where he found two 40-yard blue roll-off dumpsters, one of which was empty and the other contained leak-tight bags of material. Id. at 26. During his testimony at the hearing, Mr. Foster described these bags as being sealed by having duct tape wrapped around them in "a gooseneck style" which was then "turned back over and then wrapped again." Id. at 42-43.

At the time of Mr. Foster's April 12th inspection, there were approximately 325 bags of material stacked in the dumpster. Tr. 26; Ex. J-1 at 4. Mr. Foster lifted eight of the bags at the front of the dumpster and found them to be very light in weight and when he squeezed the material inside the bag he found it to be very stiff. Tr. 27; Ex. C-8 at 2 (unpaginated). Mr. Foster also lifted and squeezed 15 to 20 bags of material at the rear of the dumpster which he also found to be very light and stiff. Tr. 28-29. Mr. Foster pulled four of the bags from the dumpster as samples: two bags from the front and two from the back. Tr. 28-35; Ex. C- 8 at 2 (unpaginated). He then took samples from each of the bags by slicing open each bag and placing material into a Ziploc bag. Tr. 30. When these samples were subjected to Polar Light Microscopy it was found that they contained more than one percent dry asbestos material. Ex. C- 4; Ex. J-1 at 4. Mr. Foster photographed the dry material in these bags and these photographs were presented at the hearing. Tr. 30; see also Ex. C-15.

After Mr. Foster collected samples of material from the bags, he then moved on to the containment area. Ex. C-8 at 2 (unpaginated). He walked through the area surrounding the containment area and took photographs but he did not enter the enclosed area where the stripping of material had taken place. Id. ; Tr. 45, 82. While Mr. Foster was in this area of the Facility, he observed a bag of material which he described during the hearing as being "heavy laden with water." Tr. 84. Mr. Foster then returned to Choice's trailer at the Facility and looked at Mr. Hefner's certificate of training for asbestos and the waste shipment records for the Facility. Tr. 60-62; Ex. C-8 at 2-3 (unpaginated). He then explained to some of the Choice staff: Mr. Hefner; Gary Justice, who was in charge of safety at the project; and C. Michael Hutson, the job coordinator, that he (Mr. Foster) had found dry asbestos material in the bags which were stored in the dumpster. Tr. 62-63; Ex. C-8 at 2 (unpaginated).

Mr. Foster memorialized his observations in an "Asbestos D/R Field Data Report" (Ex. C-2), and in an inspection report (Ex. C-8) which he completed on the same day as his inspection. On April 26, 1995, Mr. Foster returned to the Facility to conduct another inspection. He found that the conditions at the Facility were in accordance with the NESHAP regulations.

DISCUSSION

A. Basic Findings

The Clean Air Act and the NESHAP regulations "provide strict liability for civil violations of their provisions." United States v. Ben's Truck and Equipment, Inc., No. S-84-1672-MLS, 1986 U.S. Dist. LEXIS 25595, at *8 (E. D. Cal. 1986). Liability can be found under the NESHAP regulations only if the Agency has made a two-fold showing: 1) that the NESHAP requirements apply and 2) that the work practice standards have not been satisfied. Norma J. Echevarria and Frank J. Echevarria, CAA Appeal No. 94-1, 5 E.A.D. 626, 633 (EAB, Dec. 21, 1994).

The Respondents were required to comply with the NESHAP regulations. Under section 61.141 of NESHAP, Choice is an operator of a renovation activity and Allegheny is the owner of a renovation activity. Ex. J-1 at 5. An owner or operator of a renovation activity is "any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation operation, or both." 40 C.F.R. § 61.141. The term "facility" includes "any institutional, commercial, public, industrial, or residential structure, installation, or building . . . ." Id. Renovation is defined by section 61.141 as "altering a facility or one or more facility components in any way including the stripping or removal of RACM from a facility component . . . ." Id. RACM is defined by section 61.141 of the NESHAP regulations as:

> (a) Friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by [the National Emission Standard for Asbestos].

Id.

On the basis of the above definitions and the fact that Choice was in charge of removing the asbestos from the Facility, a building which was owned by Allegheny and falls under the NESHAP definition of a facility, Choice is the operator of a renovation activity and Allegheny is the owner of the renovation activity. Ex. J-1 at 3.

According to the Complaint, Respondents have violated sections 61.145(c)(3) and 61.145(c)(6)(i) of the NESHAP regulations. Section 61.145(c)(3) requires owners and operators to "adequately wet the RACM during the stripping operation" when the RACM is being stripped from a facility component. 40 C.F.R. § 61.145(c)(3). This is the subject of Count I of the Complaint. Section 61.145(c)(6)(i) requires that all RACM, "including material that has been removed or stripped," is "adequately wet" and "remains wet until collected and contained or treated in preparation for disposal in accordance with section 61.150." 40 C.F.R. § 61.145(c)(6)(i). This is the subject of Count II of the Complaint. The term "adequately wet" is defined by section 61.141 as "sufficiently mix[ing] or penetrat[ing] with liquid to prevent the release of particulates." 40 C.F.R. § 61.141. This definition also provides that "[i]f 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." Id.

B. Mr. Foster's Credibility As a Witness

Respondents argue that they have not violated either section 61.145(c)(3) or section 61.145(c)(i) of the NESHAP regulations. The cornerstone of this argument is that Mr. Foster's observations during his inspection of the Facility on April 12, 1995, were flawed. Respondents' Initial Post-Hearing Brief ("R. In. Br.") at 14. Respondents allege that Mr. Foster did not follow the Asbestos/NESHAP Adequately Wet Guidance ("guidelines") during his inspection and assert that this failure means that Mr. Foster lacks credibility. In their Initial Post-Hearing Brief ("Initial Brief"), the Respondents state that Mr. Foster did not follow the "procedure mandated by the EPA" during his sampling of the asbestos material stored at the Facility. R. In. Br. at 21.

This allegation does not serve to damage Mr. Foster's credibility because these guidelines are not mandatory. The guidelines state that:

> The purpose of this document is to provide guidance to asbestos inspectors and the regulated community on how to determine if friable ACM is adequately wet as required by the Asbestos NESHAP. The recommendations made in this guidance are solely recommendations. They are not the exclusive means of complying with the Asbestos NESHAP requirements. Following these recommendations is not a guarantee against findings of violation. Determinations of whether asbestos materials are adequately wetted are made by EPA inspectors on site.

Ex. C-12 at 1 (emphasis added). The language used in the guidelines clearly indicates that these provisions are not mandates. Therefore, it was not incumbent on Mr. Foster to follow the

guidelines and so his alleged failure to follow them does not mean that his observations during his inspection should be discarded. This interpretation of the EPA guidelines is consistent with several decisions. In the case of Condor Land Company, the respondents challenged an EPA finding that land that the respondents had cleared was a wetland and argued that the government personnel who had made this finding had failed to follow the procedures set forth in the applicable manual. Condor Land Company, No. CWA-404-95-1, 1998 EPA ALJ LEXIS 72 at *6 (ALJ, Dec. 8, 1998). However, the Administrative Law Judge ("Judge") found that the manual was a guidance document which was only intended to assist government personnel in making their determinations. Id. at *6-7. In the case of Boliden Metech, the respondents argued that samples collected by an EPA engineer were unrepresentative because the collection procedures were not in accordance with those delineated in the TSCA inspection manual. Boliden Metech, Inc., No. TSCA-I-87-1097, 1989 EPA LEXIS 3 at *60 (ALJ, June 30, 1989). The Judge in that case found that the inspection manual was not binding on the inspector and so the samples could still be used. Id. at *62-63. Furthermore, the Environmental Appeals Board ("EAB") has found that guidelines like the ones in the instant case "which have not been published in the Federal Register and have not been promulgated, are not properly 'promulgated rules.' Therefore, they do not have the force and effect of law and are not binding on either the public or the Agency." Electric Services Company, TSCA Appeal No. 82-2, 1 E.A.D. 947, 954 (EPA JO, Jan. 7, 1985). Consequently, Mr. Foster's alleged failure to comply with EPA procedure described in the guidelines does not mean that the evidence he gathered is in anyway suspect nor does this alleged failure damage his credibility. Therefore, this argument made by Respondent is rejected.

Respondents also argue in their Initial Brief that Mr. Foster's conduct (presumably his failure to follow the guidelines) was "inexcusable," (R. In. Br. at 16), and assert that the "only question this court should have to answer is whether Mr. Foster's actions are a result of his gross negligence, the negligence of the EPA in contracting with Mr. Foster's employer, or a personal vendetta Mr. Foster had against Choice. Or all three." R. In. Br. at 17. As discussed above, Mr. Foster's alleged failure to follow the procedures described in the EPA guidelines does not provide a basis for discarding his testimony, nor does it impugn his credibility. The Respondents' assertion that the only issue in this case is determining the underlying reasons for Mr. Foster's "conduct" is not supported by any evidence or testimony in the record and is not supported by any arguments propounded by the Respondents. Respondents have not provided any substantive basis for their assertions of negligence and bias on the part of Mr. Foster. Therefore, they are rejected.

Mr. Foster has been with the EPA since 1991 and he testified at the hearing that he had conducted approximately 1,000 inspections. Tr. 16. This experience certainly provides him with the ability to assess whether or not the asbestos material which he found at the Facility was dry and to determine whether or not it had been adequately wetted. It has been established that the determination by an EPA inspector that asbestos material has not been adequately wetted is probative evidence of a violation and is sufficient to support the inference that the material was not adequately wet. Echevarria, 5 E.A.D. at 639; United States v. MPM Contractors, Inc.,

767 F. Supp. 231, 234 (D. Kan.1990). [2] The EAB has also determined that liability under the NESHAP regulations should be found "[w]hen an inspector trained to determine compliance with the applicable regulations reasonably determines that a violation has occurred and provides a rational basis for that determination, . . . [unless there is] . . . proof that the inspector's testimony lacks credibility." Echevarria, 5 E.A.D. at 639-640. Respondents have failed to present any substantive reasons for their attacks on Mr. Foster's credibility and there is no evidence in the record which sullies his credibility. Mr. Foster is therefore found to be a credible witness. Thus, Mr. Foster's observations can be used as a basis for the determination of whether the asbestos material which had been removed from the Facility had been adequately wet in accordance with the NESHAP regulations.

Count I

It is alleged in Count I of the Complaint that Respondents did not adequately wet the RACM during the stripping operation and, as a result, they violated section 61.145 of the NESHAP regulations. This section of the NESHAP regulations states that "[w]hen RACM is stripped from a facility component while it remains in place in the facility, adequately wet the RACM during the stripping operation." 40 C.F.R. § 61.145 (c)(3).

David Hefner testified during the hearing that on the morning of April 12, 1995, there was metal being removed from the piping but no asbestos insulation. Tr. 284. However, he did testify that there had been asbestos removal via glove bagging. Tr. 285. A glove bag is defined by the NESHAP regulations as "a sealed compartment with attached inner gloves used for the handling of asbestos-containing materials. Properly installed and used, glove bags provide a small work area enclosure typically used for small-scale asbestos stripping operations." 40 C.F.R. § 61.141. Stripping is defined as "tak[ing] off RACM from any part of a facility or facility components." Id. On the basis of the definition of the glove-bagging process, it is clear that it falls under the definition of "stripping" under the NESHAP regulations. Thus, the Respondents were engaged in asbestos stripping on April 12, 1995, and were therefore required by section 61.145 to adequately wet the asbestos material during this operation.

Respondents have raised the fact that Mr. Foster did not observe Respondents' stripping operations as part of their argument that Mr. Foster did not have sufficient basis for his finding that the material had not been adequately wet during stripping. R. In. Br. at 13. They assert that this failure resulted in his submission of "inaccurate and incorrect information" to the EPA. Id. This rationale is unsupported by existing precedent. The EAB has said in the Echevarria case that "[t]here is no requirement . . . that the inspector observe the removal activities. If an inspector was required to observe the stripping operation, regulated entities could effectively halt any

[2] "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." MPM Contractors, 767 F. Supp. at 233.

enforcement activity by stopping work whenever an inspector appears on site." Echevarria, 5 E.A.D. at 643 (citation omitted). Consequently, a finding can be made in this case that the material was not kept adequately wet during stripping, despite the fact that Mr. Foster did not witness the stripping operation.

Douglas Foster testified that the bags which he handled were extremely light in weight and contained stiff material. Tr. 27-29. Mr. Foster testified that "if they adequately wetted the material, [the bags] would be heavy [with] water . . . ." Id. at 27. He said that the bags would have weighed "two or three times more" than they did. Id. at 28. Respondents have raised the fact that there were 325 bags of material in the dumpster at the time of Mr. Foster's inspection and point out that it is extremely unlikely that all or most of that material had been stripped on April 12, 1995, the day of Mr. Foster's inspection. Respondents' Post-Hearing Reply Brief ("R. R. Br.") at 5. However, since some stripping of material had occurred that morning it stands to reason that some of the bags in the dumpster contained material which had been stripped on April 12, 1995, and the fact remains that Mr. Foster lifted approximately 28 of the bags in the dumpster and he determined that each was not adequately wet. [3]

The bags which were used at this site for RACM storage were sealed in a manner which would prevent moisture from escaping. Tr. 42-43. As is set forth in more detail in Count II it is clear that the material in the bags was not adequately wet. If the material removed on April 12, 1995, had been adequately wet during stripping, it should have been wet when Mr. Foster examined the bags later that morning. The EAB has found that dryness at the time of an inspection cannot be found to be due to evaporation when the bags used are sealed and airtight. Ocean State Asbestos Removal, Inc., CAA Appeal Nos. 97-2 and 97-5, 1998 EPA App. LEXIS 82, at *28 (EAB, Mar.13, 1998). Under this view, when dry material is found in bags which are sealed and airtight it is reasonable to conclude that the RACM had not been adequately wet when bagged. Id. Therefore, according to this rationale, the material which was discovered at the Facility was not dry because of evaporation, but rather, the material was dry because it had not been adequately wet at the time it was bagged. Thus, the discovery at the Facility of dry RACM in leak tight bags supports the inference that the RACM had not been adequately wet during stripping.

[3] Respondents argue in their Initial Brief that since Mr. Foster saw a bag containing ACM which was "heavy laden with water" outside of the containment area, it should be concluded that Choice had been adequately wetting the ACM during its stripping operation. R. In. Br. at 10. This one bag does not offset the fact that Mr. Foster randomly selected 28 bags containing ACM from the dumpster and concluded that each of these bags had not been adequately wet. Furthermore, there is additional evidence and testimony in the record which indicates that Respondents did not adequately wet the material during the April 12, 1995, stripping operation.

Respondents argue in their Reply Brief that since Mr. Foster could not attest to the time when the material in the dumpster had been stripped, the EPA cannot prove that the RACM had not been adequately wet during the April 12, 1995, stripping operation. R. Br. at 4. This argument is grounded on the Respondents' reading of the D & H Contractors case. D & H Contractors, Inc., No. CAA-III-022, 1997 EPA ALJ LEXIS 111 (ALJ, Feb. 4, 1997). The undersigned found in D & H that an inspector's observations which were made after an overnight break from an asbestos removal operation were not made "during" the stripping operation so they did not constitute direct evidence of the RACM's condition during the stripping operation. Id. at *21-22. The D & H case can be distinguished from the instant set of facts in a number of ways. D & H involved the removal of asbestos material as part of a demolition project. Id. at *2. In that case the inspector arrived at the site before stripping had begun and after an overnight break from the previous day's stripping. In contrast, in the present case Mr. Foster conducted his inspection after the stripping of asbestos material had already begun. Id. at *21. The material involved in D & H consisted of transite shingles; some of which were on the roof of the building, some lying on the ground and some in plastic bags on the ground near the building. Id. at *3. In contrast, the material in the instant case had been placed in leak-tight bags which were being stored in a dumpster. In D & H, three witnesses testified that the material had been wetted during the stripping operation, while in the instant case there were no witnesses at the hearing who had observed the stripping and could attest to the conditions which existed on the morning of April 12, 1995. Id. at *23. Furthermore, unlike the present case, in D & H "[t]he weight of the testimony and evidence show[ed] that RACM at the site was adequately wetted during the stripping activities." Id. at 24. Consequently, in light of the above highlighted differences, the rationale used in D & H Contractors cannot be applied to the present set of circumstances.

There is further evidence in the record which indicates that the material had not been adequately wet during the stripping operation. Respondents admit in their Initial Brief that there was low water pressure coming from the garden hose in the containment area in the Facility on the morning of April 12, 1995. R. In. Br. at 18. However, they argue that the low water pressure had no effect on Choice's ability to adequately wet the asbestos material because airless sprayers were used to wet the material. Id. This argument is unsupported by the record. After the inspection, Mr. Hefner wrote two letters: one was directed to Douglas Foster and the other to John Dailey, who at the time was an Asbestos/NESHAP coordinator at Region III of the EPA. Tr. 80. Mr. Hefner admitted in these letters that Choice's ability to adequately wet the material during the stripping operation had been affected by the low water pressure. Mr. Hefner begins each of these letters with the phrase: "[t]his letter is to inform you of the corrective measures." Ex. C-5; Ex. C-16. In his letter to Mr. Foster he writes that:

> It wasn't till after your inspection that our workers made me aware that the water supply was inadequate [sic]. The only access was on the 3rd floor and the pressure was greatly diminished through the hose on the 5th floor. We then notified Mike Hutson of the Fort Martin Power Station. He immediately resolved the problem by giving permission to use the fire main located by the 5th floor elevator. Since then all the bags leaving the containment have been adequately [sic] wet.

Ex. C-5 (emphasis added). Mr. Hefner's letter to Mr. Dailey states:

> After [Mr. Foster's] inspection of the asbestos in the bags located in the dumpsters, it was evident that we had a problem with the quantity of water in the bags. After the inspection, we investigated the situation and found that the water pressure coming from the 3rd floor up to the 5th floor was greatly reduced and ineffective for proper wetting of the materials. We had just begun bulk removal in this containment and unfortunately the men had not informed us of the problem. The workers made an attempt to wet the materials with the airless sprayers, this was not effective. After notifying the Fort Martin Power Station of the problem they immediately gave permission to utilize the fire main. This corrected the problem immediately.

Ex. C-16 (emphasis added).

The above excerpts support the inference that the airless sprayers were ineffective in adequately wetting the material. The last line of Mr. Hefner's letter to Mr. Foster indicates that the material had not been adequately wetted until the Choice workers began using the water from the fire main. The sixth line of Mr. Hefner's letter to Mr. Dailey is particularly revelatory: Mr. Hefner describes the workers' use of the airless sprayers as an "attempt" and he states that this attempt was not "effective." These letters, therefore, indicate that the airless sprayers were ineffective in sufficiently wetting the material being removed from the building. The Choice employees, therefore, did not adequately wet the asbestos material during their stripping operation of April 12, 1995.

During the hearing Mr. Hefner testified that the comments he made in the above letters were merely in response to Mr. Foster's inspection and did not reflect his personal opinion. Tr. 435. However, the language of the letters does not support this assertion. For example, in his letter to Mr. Foster, Mr. Hefner states that his workers made him aware of the fact that the water supply at the site was inadequate and in his letter to Mr. Dailey he states that "we investigated the situation and found that the water pressure. . . was greatly reduced and ineffective for proper wetting of the materials . . . ." Ex. C-16. In addition, Mr. Hefner testified that after the inspection he told Mr. Foster on the phone that there had been a problem with the water pressure at the Facility. Tr. 274. Mr. Foster testified that during a meeting with C. Michael Hutson (the job coordinator during the asbestos project), Mr. Hefner and Gary Justice (in charge of safety at Choice during the asbestos abatement project), which occurred after his inspection, he informed them that the bags which he had inspected contained dry asbestos material and their response was that "they [were] having trouble with the water supply." Tr. 62-63. Additionally, after Mr. Foster's inspection Respondents obtained permission from Edward Helmick, the fire chief at the Facility, to use the fire main as the source of their water for the stripping operations. Tr. 267. Furthermore, the Respondents did not come forward with any witnesses who had directly observed the use of airless sprayers during the stripping of the asbestos material on the morning of April 12, 1995, and could testify that the airless sprayers were effective in adequately wetting the material during that morning's stripping operation. Thus, Mr. Hefner's letters, when viewed in the context

of the surrounding circumstances, support the inference that the material was not adequately wet during stripping.

Respondents assert that air monitoring data collected by James Prettyman, a consultant with Allegheny Asbestos Analysis which was a company hired by Choice to provide monitoring, inspection and analytical services, support their contention that the material was adequately wet during the stripping operation. Respondents argue that Mr. Prettyman's reports demonstrate that there were very low levels of asbestos exposure at the site, a characteristic which he testified is consistent with the adequate wetting of materials during the stripping operation. R. In. Br. at 12. Mr. Prettyman's monitoring results indicated that the asbestos fibers per cubic centimeter on April 12, 1995, represented a tenfold increase since March 27, 1995, (two days prior to the beginning of the project). Tr. 492-493; see also Ex. R-3A; Ex. R-3. During the hearing Mr. Prettyman testified that the failure to use proper asbestos removal techniques would increase the emission of asbestos fibers. Id. at 493. Thus, the air monitoring data is not contrary to finding that Respondents violated the NESHAP regulations by failing to adequately wet the material during stripping and does provide some support for this proposition. In any event, case law indicates that air monitoring data is not determinative in assessing whether asbestos material has been adequately wet. See Schoolcraft Construction, Inc., CAA Appeal No. 98-3, 1999 EPA App. LEXIS 22 at *27 (EAB, July 7, 1999).[4]

Respondents also argue that Choice's Daily Project Progress Log provides support for their assertion that the material at the site was adequately wet during the stripping operation. R. In. Br. at 12. They assert that this log indicates that Choice had been using a surfactant --- a material which is added to water to create amended water --- during the asbestos abatement project. Id. They also point out that this daily log shows that Choice did not have any equipment breakdowns or any other problems on April 12, 1995. Id. at 12-13. These arguments are not persuasive. Even if Choice had been using a surfactant at the site on April 12, 1995, this does not mean that the material was adequately wet. In addition, the daily log for April 12, 1995, supports the idea that there was a problem with the water pressure at the site; it states: " Mike told me at 11:15 we needed to use more water, we had water hooked up but had no pressure." Ex. R.-1. Choice's daily log, therefore, does not support Respondents' argument.

Thus, the evidence and testimony on the record indicate that the material being removed from the Facility had not been adequately wetted during the stripping operation. As a result, Respondents are now found to have violated section 61.145(c)(3) of the NESHAP regulations.

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[4] "The absence of asbestos particles in . . . air samples cannot conclusively show whether the RACM was adequately wet 'to prevent' the release of asbestos . . . ." Schoolcraft Construction, 1999 EPA App. LEXIS 22 at *27.

Count II

Count II of the Complaint alleges that Respondents violated section 61.145(c)(6)(i) of the NESHAP regulations. Section 61.145(c)(6)(i) provides that RACM must be "adequately wet" and remain adequately wet "until collected and contained or treated in preparation for disposal in accordance with § 61.150." 40 C.F.R.§ 61.145(c)(6)(i).

During his April 12, 1995, inspection Mr. Foster found dry material which had a greater than one percent asbestos content being stored in sealed yellow bags in a dumpster at the Facility. Mr. Foster photographed this asbestos containing material and these photographs were then submitted at the hearing. The Respondents assert in their briefs that these photographs show that the bags were wet. R. In. Br. at 19; R. Brief at 8. They also point out that there were no visible emissions coming from the RACM in the photographs and attempt to use the EPA guidelines as support. R. In. Br. at 19; R. Brief at 23. Specifically, they cite to the provision which states: "[i]f visible emissions are observed coming from ACM, then that material has not been adequately wetted." Id.; Ex. C-12 at 2. However, their argument cannot be supported by the guidelines because directly after the above cited portion the guidelines state: "[h]owever, the absence of visible emission is not sufficient evidence of being adequately wet." Ex. C-12 at 2 (emphasis added). Thus, the guidelines do not support Respondents' proposition that the absence of visible emissions means that the asbestos material was adequately wet. Additionally, the NESHAP regulations themselves offer no support for this proposition since the language in the guidelines was adopted from the NESHAP regulations. Furthermore, it has been found that visible emissions are not a prerequisite to finding that RACM was not adequately wet. MPM Contractors, 767 F. Supp. at 233-234; Schoolcraft Construction, 1999 EPA App. LEXIS 22 at *26-27; Echevarria, 5 E.A.D. at 641. Therefore, on the basis of the NESHAP regulations, the guidance document and existing case law, Respondents' assertion is rejected.

Mr. Foster's photographs, which are compiled in Complainant's Exhibit 15, offer more support for Complainant's allegation that the material in the bags had not been adequately wetted than for Respondents' contrary assertion. See Ex. C-15. The material in the photographs appears to be dry material; there are no visible signs of moisture. Id. Respondents offer a reason for the dry appearance of this material in their Initial Brief, namely that Mr. Foster "threw" the bags of material around during his inspection which caused the material to break and this breakage exposed "surfaces which had not previously been exposed" which could lead to "the mistaken conclusion that the ACM was not adequately wet for disposal." R. In. Br. at 19. This argument is unsupported by any evidence or testimony presented by the Respondents at the hearing and is inconsistent with Mr. Foster's testimony. Mr. Foster, the only person who actually observed and handled the material, testified at the hearing that there were no signs of moisture in the bags. Tr. 41. In addition, Mr. Foster also testified that he could tell that the material had not been properly matted down because whenever he lifted one bag of material, the surrounding bags would fall over because they were so light in weight. Tr. 96. Consequently, in light of Mr. Foster's testimony and photographs, Respondents' argument is unpersuasive.

Respondents also argue that the material appeared to be dry in the photographs because of the "wick effect." R. Br. at 11. Mr. Hefner raised the "wick effect" during his testimony at the hearing as a possible explanation for Mr. Foster's discovery of material at the site which appeared to be dry. According to Mr. Hefner, the asbestos material would "absorb a large quantity of water in a short period of time and the water will typically continue working its way through the material, and as the water that was on the outside and then maybe at the bottom of the bag would diminish by the wick effect, then the outside edges would then become less wet and even to the point of almost dry because of it suctioning the water to the center." Tr. 386; see also Tr. 415-416. This explanation was unsupported by evidence other than Mr. Hefner's testimony, and is directly contradicted by Mr. Foster's finding, during his sampling of the material, that the asbestos containing material appeared dry on the outside and was also dry on the inside. Tr. 517. The fact remains that Mr. Foster is an experienced EPA inspector who handled several bags of material and who sampled the material stored in four of these bags and found them to contain asbestos material which was both dry on the outside and on the inside. Thus, the wick effect cannot serve as an explanation for the dry appearance of the asbestos material stored at the site.

Under the Ocean State case, once it has been established that RACM was not adequately wet at the time of the inspection, the Region has sustained its burden of proof regarding an alleged failure to keep RACM adequately wet until disposal. Ocean State, 1998 EPA App. LEXIS 82, at *27 citing to Echevarria, 5 E.A.D. at 633. The asbestos material discovered by Mr. Foster was not adequately wet as demonstrated by his photographs and testimony in the record. In addition, it is clear from Mr. Hefner's letters discussed in Count I of this Order that the RACM had not been adequately wet at any point in the stripping operation at the Facility---- from the time the material was actually being stripped from the Facility components until the point when the bagged material left the containment area to be stored for disposal. It has therefore been established that Respondents have violated section 61.145(c)(6)(i) of NESHAP by failing to keep the asbestos material wet until disposal.

Penalty

Civil penalties can be imposed against violators of the Clean Air Act under section 113(d). Penalties of up to $25,000 per day of violation may be assessed against any person found to have violated the Act. 42 U.S.C. § 7413(d)(1)(B). Several factors can be taken into consideration in developing an appropriate penalty: "the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence, . . . payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, the seriousness of the violation" and any other factor which justice may require. 42 U.S.C. § 7413(e)(1). The Clean Air Act Stationary Source Civil Penalty Policy provides guidelines for the assessment of penalties under the Clean Air Act and can be described as consisting of two sections: (1) general provisions applicable to any violation of the Clean Air Act ("General Penalty Policy") and (2) appendices which provide specific guidance for the assessment of penalties for specific categories of Clean Air Act violations. Appendix III of the Clean Air Act Stationary Source Penalty Policy is

entitled the "Asbestos Demolition and Renovation Civil Penalty Policy" ("Asbestos Penalty Policy") and is applicable to cases involving NESHAP violations.

Part 22 of EPA's Regulations, 40 C.F.R. Part 22, directs the Presiding Judge to consider the Agency's Penalty Policy.[5] A Presiding Judge may deviate from the Penalty Policy after considering these guidelines,[6] if the decision to do so is supported by adequate reasoning and evidence in the initial decision. In this case, the record supports the use of the Clean Air Act Stationary Source Civil Penalty Policy as a basis for determining the penalty amount.

Complainant has proposed that the Respondents should be assessed a penalty of $32,000. This represents a reduced amount from the original figure of $74,000 proposed in the Complaint. On October 30, 1998, Complainant submitted a Motion to Amend the Proposed Penalty and a Memorandum in Support Thereof. This motion sought the reduction of the originally proposed penalty amount because Complainant had obtained waste disposal records from the Respondents which showed that some of the asbestos-containing material at the Facility had been disposed prior to the April 12, 1995, inspection and so, any days of violation prior to the date of the inspection could not be calculated with certainty.[7] Complainant's motion proposed an additional reduction based on Complainant's re-examination of the Respondents' Dun and Bradstreet reports. The original penalty was, therefore, reduced by subtracting the penalty amounts which had been imposed for the additional days of violation and by reducing the "size of violator" portion of the penalty from $5,000 to $2,000.

Asbestos is a very hazardous material and as a result, violations such as the release of visible emissions or the failure to adhere to work practice requirements are considered to be substantive violations and as such, generate a very high gravity factor. Ex. C-11 at 2. Respondents

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[5] If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.
40 C.F.R. § 22.27(b).

[6] In re Employers Insurance of Wausau and Group Eight Technology, Inc., TSCA Appeal No. 95-6, 6 E.A.D. 735 (EAB, Feb. 11, 1997).

[7] Mr. Foster examined the Respondents' waste shipment records and testified that Respondent shipped material from the site for disposal on April 10, 1995. Tr. 127. Respondents do not challenge this statement.

were engaged in the removal of approximately 2,300 linear feet of asbestos material from the Facility during their asbestos project. Ex. J-1 at 3. The Asbestos Penalty Policy addresses the quantity of asbestos in "units" rather than in linear feet. Consequently, in its proposed penalty the Complainant converted the amount of asbestos at Respondents' removal project into units of asbestos. According to Complainant's proposal, Respondents were engaged in the removal of 8.8 units of asbestos. Complainant's Initial Post-hearing Brief ("C. In. Br.") at 53. Under the Asbestos Penalty Policy a minimum of $5,000 can be assessed for a work practice violation involving less than 10 units of asbestos. Ex. C-11 app. III at 17.

Complainant proposes that Respondents should be assessed a penalty of $15,000 for each of their violations of the NESHAP regulations. This penalty amount is based on Complainant's consideration of the fact that Choice had been in violation of NESHAP during a previous asbestos removal project and its finding that Respondents' April 12, 1995, violations comprised a "second violation" of NESHAP. C. In. Br. at 53. The General Penalty Policy provides that the gravity component can be increased based on a party's prior violation of an environmental requirement. Ex. C-11 at 17. Under the Asbestos Penalty Policy:

> [A] second or subsequent violation should be determined to have occurred if, after being notified of a violation by the local agency, State or EPA at a prior demolition or renovation project, the owner or operator violates the Asbestos NESHAP regulations during another project even if different provisions of the NESHAP are violated. This prior notification could range from simply an oral or written warning to the filing of a judicial enforcement action.

Ex. C-11 app. III at 4. The Asbestos Penalty Policy goes on to state that "[i]f the case involves multiple. . . defendants and any one of them is involved in a second or subsequent offense, the penalty should be derived based on the second or subsequent offense." Id. Choice has been a respondent in a prior administrative action brought by the EPA on August 14, 1992, which alleged violations of the NESHAP regulations during an asbestos abatement project at a power station in West Virginia. Ex. J-1 at 5; see also Ex. C-6; Ex. C-7.[8] This matter was concluded by a settlement

[8] As in the instant matter, a subsidiary of Allegheny Energy, Inc., Monongahela Power Company, was a co-respondent in that administrative action. Ex. J-1 at 5. Although this issue will not be reached in the instant Order, the General Penalty Policy does provide that "if the same corporation was involved, the adjustment for history of noncompliance should apply." Ex. C-11 at 19. Furthermore,

> [t]he Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental protection. Consequently, the adjustment for history of noncompliance should apply unless the violator can demonstrate that the other violating corporate facilities are under totally independent control.

between the parties.[9] An increase in a penalty on the basis of a prior violation as proposed by Complainant has been found by the EAB to be appropriate under the Clean Air Act. Ocean State Asbestos Removal, 1998 EPA App. LEXIS 82, *56-61. Accordingly, the Respondents' April 12, 1995, violations of the NESHAP regulations are categorized as "second or subsequent" violations. The Gravity Component Matrix in the Asbestos Penalty Policy provides that for a second or subsequent work practice violation involving less than ten units of asbestos a penalty of $15,000 is appropriate. Ex. C-11 app. III at 17. Since Respondents have committed two work practice violations, they are assessed $15,000 for the violations described in Count I of the Complaint and $15,000 for the violations in Count II.

The above penalty amounts can be increased in accordance with the Asbestos Penalty Policy which provides that the gravity component for violations of the Clean Air Act can be increased in proportion to the size of the violator's business. Ex. C-11 app. III at 6. In a case like the present one wherein there is more than one respondent, the size of the violator's business can be based on any one or all of the respondents' assets. Id. Furthermore, the size of the more culpable respondent can be used as a basis for this increase in penalty. Id. Complainant has determined that Choice is the more culpable respondent in the instant case. According to Richard Ponak, the environmental scientist who calculated the penalty, this determination was based on the fact that Choice "actually did the work and they also had previous asbestos violations." Tr. at 209. In accordance with this rationale, Complainant has proposed that an additional $2,000 amount should be imposed to reflect Choice's business size as reflected by information in its Dun and Bradstreet report. More specifically, Complainant's witness Mr. Ponak noted that the Dun and Bradstreet report for Choice states that as of December 8, 1997, Choice had annual sales of $12,000,000. Tr. 210. Ex. C-10 at 1. Mr. Ponak concluded that, on this basis, Choice had the financial resources to pay the proposed penalty. Tr. 210. However, since Mr. Ponak was unable to calculate Choice's net worth with the financial information, he used the lowest category in the Penalty Policy grid (i.e., net worth between $0 and $100,000) [Ex. C-11, p. 14] to add $2,000 to the penalty. Since this increase is consistent with the Asbestos Penalty Policy and with section 113(e)(1) of the Clean Air Act, it will be assessed in full against the Respondents.

Id.

[9] The General Penalty Policy states that " a 'prior violation' includes any act or omission resulting in a State, local, or federal enforcement response (e.g., notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative and judicial order) under any environmental statute enforced by the Agency unless subsequently dismissed or withdrawn on the grounds that the party was not liable." Ex. C-11 at 18.

Since the above proposed penalty amounts are consistent with the violations committed by the Respondents, the Clean Air Act and with the Penalty Policy, a penalty in the amount of $32,000 as proposed by the Complainant will be assessed jointly, and severally against the Respondents in this matter.

Respondents have not raised the issue or come forward with any evidence that the payment of the above penalties will have a detrimental effect on either of their businesses. Thus, the penalty will not be adjusted downward based on this factor. The penalty will also not be increased any further on the basis of any other of the adjustment factors described in the General and Asbestos Penalty Policies because the Complainant has not requested such an adjustment and there is nothing on the record to indicate that such an adjustment is warranted.

Respondents have argued in their Initial Brief that the Complainant's proposed penalty is inappropriate. See R. In. Br. at 25-29. Respondents primarily base this argument on their contention that Mr. Foster's inspection was inadequate and on insinuations that Mr. Foster is not credible. R. In. Br. at 26. As discussed earlier in this Order, these assertions are unfounded. Furthermore, there is ample support in the record for finding that Respondents have violated the NESHAP regulations as alleged in the Complaint. The proposed penalty amount of $32,000 is consistent with the Clean Air Act and with the applicable penalty policies and will, therefore, be imposed in the full amount proposed by the Complainant.

ORDER

1. A civil penalty in the amount of $32,000 is assessed jointly and severally against Respondents, Choice Insulation, Inc., and Allegheny Power Service Corporation.

2. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service date of the final order by submitting a certified check or cashier's check payable to Treasurer, United States of America, and mailed to:

Mellon Bank
EPA Region 3
(Regional Hearing Clerk)
P.O. Box 360515
Pittsburgh, PA 15251

3. A transmittal letter identifying the subject case and the EPA docket number, plus Respondents' names and addresses, must accompany the check.

4. Failure upon the part of Respondents to pay the penalty within the prescribed statutory frame after entry of the final order may result in the assessment of interest on the civil penalties. 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

5. Pursuant to 40 C.F.R. § 22.27, this Initial Decision shall become the final order of the Environmental Appeals Board (EAB) within forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of the Initial Decision, pursuant to 40 C.F.R. § 22.28(a) ; (2) an appeal to the EAB is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.30(a), within thirty (30) days after the Initial Decision is served upon the parties or (3) the EAB elects, upon its own motion, to review the Initial Decision.

Charles E. Bullock
Administrative Law Judge