UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| In the Matter of | ) | |
| | ) | |
| ACE ENVIRONMENTAL, INC. | ) | Docket No. CAA-III-093 |
| | ) | |
| Respondents | ) | |

**ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR DEFAULT, AND ASSESSING PENALTY**

**INTRODUCTION**

On February 12, 1999, Complainant (EPA Region III) filed a Motion for Renewed Consideration for Default Judgement ("Motion for Default Judgement") against Respondent Ace Environmental, Inc. ("Ace" or "Respondent"). In its motion, Complainant requests a penalty of $171,278. For the reasons set forth below, the motion is granted in part and denied in part and a penalty of $161,278 is assessed.

The Complaint in this case was filed on September 30, 1997. Respondent did not file an answer to the Complaint. Co-respondent Oppenheimer Precision Products, Inc. ("Oppenheimer"), filed a timely answer to the Complaint.

The undersigned issued an Order to Show Cause on January 30, 1998. This order directed the Respondent to show cause no later than February 27, 1998, why it should not be found in violation of the Act and why the penalty, as proposed in the Complaint, should not be assessed against it for failure to file an answer to the Complaint. Respondent did not file an answer to the January 30, 1998, order.

On March 30, 1998, Complainant filed a motion for default judgement against Respondent for its failure to file an answer to the Complaint. Respondent did

not file an answer to the March 30, 1998, motion. By order issued April 29, 1998, the undersigned deferred action on the motion for default judgement and the Order to Show Cause based upon a finding that action favorable to Complainant on either the Order to Show Cause or the motion could prejudge issues of liability and penalty as to co-respondent Oppenheimer. The April 29, 1998, order also set dates for the filing of prehearing exchanges. By Notice issued November 16, 1998, a hearing was scheduled.

Co-respondent Oppenheimer entered into a Consent Agreement (CA) with Complainant. The CA was approved on January 26, 1999. The CA resolved all issues as to co-respondent Oppenheimer and required Oppenheimer to pay a penalty of $15,000 [(1)] By order issued February 5, 1999, the hearing was canceled and, in light of the approval of the CA, Complainant was directed to advise the Court by February 17, 1999, as to the specific relief it was now seeking from Respondent Ace. The order also permitted Respondent by February 26, 1999, to file a response to Complainant's filing. In response to this order, Complainant filed its "Motion for Renewed Consideration of Motion for Default Judgement Against Ace Environmental, Inc." (Renewed Motion) on February 12, 1999, in which it requested a penalty of $171, 278, [(2)] a figure which is $15,000 lower than the original total proposed penalty of $186,278. Respondent did not file an answer to the order.

Section 22.17 of the Consolidated Rules of Practice permits the entering of a default judgement "(1) after motion, upon failure to file a timely answer to the complaint; (2) after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer; or (3) after motion or sua sponte, upon failure to appear at a conference or hearing without good cause being shown." 40 C.F.R. § 22.17(a). Complainant has filed a motion for default and has submitted a draft default order in accordance with that provision. Since the Respondent has failed to file a response to the Complaint and filed no response to the Judge's January 30, 1998, Order to Show Cause, Respondent is found to be in default. [(3)]

Default by a respondent "constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations." 40 C.F.R. § 22.17(a).

Therefore, Respondent is deemed to have admitted all of the facts alleged in the Complaint and has waived its right to a hearing on these facts. The findings of fact and conclusions of law are set forth below.

## DISCUSSION

### Background

This case has been brought under the National Emissions Standards for Hazardous Air Pollutants: National Emission Standard for Asbestos ("NESHAP"). Liability can be imposed under these regulations only if the Agency has made a two-fold showing: 1) the Agency must show that the NESHAP requirements apply and 2) that the work practice standards have not been satisfied. *In re Norma Echevarria and Frank J. Echevarria* 5 E.A.D. 626, 633 (1994).

The Respondent in this case was the operator of a renovation activity as defined by section 61.141 of NESHAP. 40 C.F.R. § 61.141. An operator of a demolition or renovation activity under section 61.141 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, or both." *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 [regulated asbestos containing material] from a facility component . . . " *Id.*

Regulated asbestos-containing material ("RACM") is defined by section 61.141 as "(a) friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I nonfriable ACM that will 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]." 40 C.F.R. § 61.141.

Respondent was hired by Oppenheimer to remove asbestos insulation from Oppenheimer's facility located at 2475 Wyandotte Road, Willow Grove, Pennsylvania. Respondent submitted notification of asbestos abatement and demolition/renovation to the Pennsylvania Department of Labor and Industry. This notification indicated that Respondent would remove approximately 10,800 square feet of friable asbestos insulation from the ceiling of Oppenheimer's facility beginning on November 25, 1996, and ending on December 21, 1996. Thus, Respondent's activities fall under the definitions delineated above. As a result, Respondent was the operator of a renovation activity as defined by NESHAP. As the operator of a renovation activity, Respondent was required to comply with the Clean Air Act and the associated NESHAP regulations in its renovation of the Oppenheimer building.

After two failed attempts to inspect the Oppenheimer facility, Richard Ponak, an EPA inspector, conducted an inspection of the property on January 8, 1997. During this inspection, he discovered asbestos-containing materials at various locations on the premises. Mr. Ponak found material with a greater than one percent asbestos content (1) on the loading dock, (2) on the bumper of a truck (identified on its side as belonging to Ace) backed up to the loading dock, (3) in an uncovered dumpster in the parking lot, (4) in an open waste cart in the parking lot, (5) in the building's parking lot, and (6) on the rear steps of the building. He also observed dry dust and debris blowing around outside the building coming from the asbestos-containing material strewn around the building. Mr. Ponak did not observe anything which would suggest that any of the emission control or waste treatment methods required by section 61.150 were in use at the building during his January 8, 1997, inspection of the exterior of the Oppenheimer building. 40 C.F.R. § 61.150.

During the afternoon of January 8, 1997, Mr. Ponak met with Robert Oppenheimer, the President of Oppenheimer Precision Products, Inc., and with Steve Young, the President of Ace, at the facility so that he could inspect the interior. This inspection revealed that dry and friable asbestos-containing material had been "tracked" from the containment area of the facility, where removal was being performed, into uncontained areas. The inspection also uncovered the fact that there was asbestos-containing material still remaining on the ceiling of the facility in areas where the removal had supposedly been completed. Mr. Young told the inspector that Ace had been stripping insulation on January 7,

1997, and that the material which had been found outside the building had probably been dropped by his workers after he had already left for the evening.

The EPA issued a Compliance Order on January 9, 1997, in response to the violations which were discovered by Mr. Ponak. Respondent was ordered to undertake remedial measures at the Oppenheimer building site to come into compliance by January 13, 1997, with the Clean Air Act and NESHAP. This order also directed the Respondent to dispose of all asbestos waste or asbestos-contaminated waste in accordance with the requirements of section 61.150 of NESHAP by January 13, 1997.

On March 18, 1997, EPA inspector Richard Ponak went to Respondent's office in Hatboro, Pennsylvania in response to an anonymous complaint that barrels of asbestos were being kept in behind the building near residences. Mr. Ponak inspected the rear of the building and found 25-30 cardboard drums, some of which were damaged. Ponak took samples of suspected asbestos-containing material from an open dumpster, the ground by the dumpster, on the ground by the equipment, out of an unsealed drum, out of an open drum, and from the leaves on the side of the building. All of the samples were friable and could be crumbled or reduced to powder by hand pressure and all of them, except the sample from the open drum, were very dry. After analysis of six samples, five of them were found to contain greater than one percent asbestos.

When Mr. Ponak returned to Respondent's office on March 24, 1997, he found all of the drums, debris and equipment behind the building had been removed. In addition, he found that all of the furniture and equipment in the office had also been removed.

Complainant has set forth four counts against the Respondent. Complainant alleges that Respondent has violated sections 61.145(c)(3), 61.145(c)(6)(i), 61.150(a) and 61.150(b) of NESHAP. Complainant's case against the Respondent is based almost entirely on the inspections conducted by the EPA inspector of the Oppenheimer building and the Ace office building. If a trained inspector has found that a violation of the applicable regulations has occurred, the

Environmental Appeals Board has determined that such a finding is sufficient to find a Respondent liable. However, the evidence must show that (1) the inspector does not lack credibility and (2) he/she has provided a rational basis for his/her determination. *In re Norma Echevarria and Frank J. Echevarria* at 639. Thus, the Respondent in the instant case can be found to be liable for violations of NESHAP on the basis of Mr. Ponak's inspections.

**Count I**

Count I of the Complaint alleges that the Respondent did not comply with the requirements of section 61.145(c)(3) of NESHAP. This section requires each owner or operator of a renovation activity to adequately wet the RACM during the stripping operation whenever RACM is stripped from a facility component while it remains in place at the facility. 40 C.F.R. § 61.145(c)(3). Complainant alleges in its motion that Respondent has violated 40 C.F.R. section 61.145(c)(3) and section 112 of the Clean Air Act by failing to adequately wet the RACM during the stripping of insulation which took place on January 7, 1997, at the Oppenheimer building.

The Rules of Practice provide that a complainant has the burden of "going forward with and of proving that the violation occurred as set forth in the complaint . . ." 40 C.F.R. § 22.24. Complainant must, therefore, establish a prima facie case against the Respondent. The standard of proof under the Rules of Practice is a preponderance of the evidence standard. *Id.* This standard means that the evidence must be sufficient enough to support a finding that a fact is more likely to be true than untrue. *In re: Ocean State Asbestos Removal, Inc./Ocean State Building Wrecking and Asbestos Removal Co., Inc.*, CAA Appeal Nos. 97-2 and 97-5 (EAB, March 13, 1998), 1998 EPA App. LEXIS 82 *20. Thus, Complainant must prove that Respondent committed its alleged violation by a preponderance of the evidence.

Complainant supports its allegation that the Respondent did not adequately wet the RACM during its stripping on January 7, 1997, by merely pointing to the fact that the EPA inspector found dry asbestos-containing material outside of

the facility which had been stripped on January 7, 1997. Complainant also mentions the fact that neither Ace nor Oppenheimer had received approval to perform the stripping without wetting. These facts do not sufficiently buttress Complainant's allegation. Mr. Ponak was not present during any of Ace's stripping operations at the Oppenheimer site. He inspected the site on January 8, 1997, and the stripping had already taken place on the previous day. A finding that a violation of section 61.145(c)(3) of NESHAP has occurred can only be based on the inspection of a facility if the inspection was made "during the stripping operations." *In the matter of D & H Contractors, Inc. and St. John's Episcopal Church,* 1997 EPA ALJ LEXIS 111 *21. In the *D & H Contractors* case, it was found that the observations of an inspector who had not been present during the stripping operations were insufficient to establish that RACM had not been kept adequately wet during such stripping operations. The Judge found that an assumption that RACM was not adequately wet during stripping operations "cannot be made after [a] long overnight break from ACM removal activities." *Id*. The Judge went on to distinguish an overnight break from a shorter break like the one that had occurred in *Echevarria,* 5 E.A.D. at 628, where an inspector made his observations a few hours after stripping had occurred. The Judge stated that ". . . a short break from work does not significantly halt stripping operations, but an overnight does, in this context." *Id.* Count I of the instant case alleges that Mr. Ponak found dry RACM at the Oppenheimer site one day after stripping operations were alleged to have occurred. Under the

*D & H Contractors* rationale, the discovery by Mr. Ponak of dry RACM on January 8, 1997, is insufficient to establish that Ace failed to adequately wet the RACM during its stripping operations of January 7, 1997.

Complainant has, therefore, failed to establish this violation by a preponderance of the evidence. Consequently, Respondent cannot be found to have violated 40 C.F.R. section 61.145(c)(3) of NESHAP and section 112 of the Clean Air Act by acting in the manner alleged by the Complainant and so, Count I has not been proven.

**Count II**

Complainant alleges in Count II that the Respondent violated section 61.145(c) of NESHAP by failing to keep the RACM, that it removed from the Oppenheimer building, wet until it was disposed. Under section 61.145(c)(6)(i), all RACM which has been removed or stripped must be adequately wet and it must be ensured that the material remains wet until collected and contained or treated in preparation for disposal. 40 C.F.R. § 61.145(c)(6)(i).

During his January 8, 1997, inspection, Mr. Ponak found material, with a greater than one percent asbestos content which was dry and could be crumbled or reduced to powder by hand pressure, at various locations in the exterior of the Oppenheimer facility. This discovery of dry asbestos material is strong evidence that Respondent failed to keep the RACM adequately wet until it was collected, contained or treated in preparation for disposal. Thus, Respondent did not ensure that the asbestos-containing material remained wet and as a result, it violated the requirements of section 61.145(c).

**Count III**

Count III of the Complaint alleges that Respondent violated section 61.150(a). This section of NESHAP prohibits the "discharge of visible emissions into the outside air during the collection, processing, packaging, or transporting of any asbestos-containing waste material" and if is not possible, it requires the use of the "emission control and waste treatment methods" delineated in paragraphs (a)(1) through (4). 40 C.F.R. § 61.150(a).

Mr. Ponak observed dry dust and debris blowing around the exterior of the Oppenheimer building during his inspection. The source of this dust and debris was the asbestos-containing material scattered around the building. This directly supports Complainant's allegation that there were visible emissions of material during Respondent's renovation. Mr. Ponak did not see any evidence that emission control or waste treatment methodologies were in use at this site. This observation supports the inference that no such measures were undertaken. Thus, Respondent violated section 61.150(a) via its discharge of

visible asbestos emissions into the outside air and its failure to implement emission control and waste treatment methods.

**Count IV**

It is alleged in Count IV of the Complaint that Respondent did not dispose of the asbestos- containing material in accordance with the requirements of section 61.150(b). Section 61.150(b) requires that "all asbestos-containing waste material shall be deposited as soon as is practical by the waste generator at (1) [a] waste disposal site operated in accordance with [section] 61.154, or (2) [a]n EPA-approved site that converts RACM and asbestos-containing material into nonasbestos-containing (asbestos-free) material according to the provisions of [section]61.155 . . ." 40 C.F.R. § 61.150(b).

Respondent stored the asbestos-containing material which it had removed from the Oppenheimer building until April 1, 1997, more than one month after the material was first transported from the Oppenheimer site to Ace. In its response to a June 17, 1997, Information Request from the EPA, Respondent submitted Asbestos Waste Shipment Records indicating that the asbestos-containing material was transported to a waste disposal site on April 1, 1997. The January 9, 1997, Compliance Order directed the Respondent to dispose of all of the asbestos-containing material it had collected from the Oppenheimer building in accordance with section 61.150 by January 13, 1997. Respondent failed to comply with this order when it waited until April 1, 1997, to dispose of the asbestos-containing material and this non-compliance placed it in violation of section 61.150 of NESHAP. Thus, Respondent is found to have violated sections 61.145(c)(6)(i), 61.150(a)(2)(ii), and 61.150(b) of NESHAP as described in Counts II, III and IV of the Complaint.

**Penalties**

The Administrator is authorized to impose civil penalties on violators of the Clean Air Act by 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). The Administrator may consider several factors in developing an appropriate penalty: the size of the business, the economic impact of the penalty on the business, the violator's compliance history and any good faith efforts to comply, the duration of the violation, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncomplaiance, the seriousness of the violation and any other factor which justice may require. 42 U.S.C. § 7413(e)(2). The General Clean Air Act Civil Penalty Policy and the Asbestos Civil Penalty Policy provide guidelines whereby an appropriate penalty can be calculated in accordance with the provisions of the Clean Air Act.

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. Asbestos Penalty Policy at 2. The Asbestos Penalty Policy recommends that for work practice or emission violations involving the removal of more than 50 units of asbestos a penalty of $15,000 should be imposed. *Id.* at 23. Thus, a fine of $15,000 can be assessed against Respondent for its violation of section 61.150(a) of NESHAP (Count III). Respondent is also subject to a $15,000 penalty for its failure to keep the RACM adequately wet until it was collected, contained or treated as required by section 61.145 (c)(6)(i) (Count II).

A penalty can be assessed for each day of a violation of a provision of the Clean Air Act. Respondent was notified of its violation of the Clean Air Act by the EPA's Compliance Order of January 9, 1997, and was ordered to dispose of all of the asbestos containing material by January 13, 1997. Respondent failed to comply with this deadline and continued the storage of this asbestos-containing material until April 1, 1997, when it finally disposed of it. Thus, a penalty can be imposed for each of the seventy-seven days of this violation of section 61.150 of NESHAP. The Asbestos Penalty Policy provides that a penalty of $15,000 should be imposed for the violation of section 61.150. Asbestos Penalty Policy at 23. Respondent will be assessed $15,000 for its failure to dispose of the material on January 13, 1997, the first day of its violation. The Penalty Policy provides that $1, 500 be imposed for each additional day of the violation. *Id*. Consequently, $1,500 will be assessed against the Respondent for each day of its violation beginning on January 14,

1997. In addition, for the days after January 30, 1997, the penalty will be increased by 10% to account for inflation in accordance with the Civil Monetary Penalty Inflation Adjustment Rule. Rule 61 Fed. Reg. 69630 (December 31, 1996). Thus, Respondent is assessed a total penalty of $139, 278 for its violation of section 61.150(b) described in Count IV of the Complaint.

Respondent will not be assessed the full penalty amounts for Counts II and III described above. The penalty amounts will be adjusted to reflect the fact that $15,000 was collected from co-respondent Oppenheimer for the violations described in Counts I through III in its settlement with the Complainant. Complainant proposes that Respondent pays $32,000 instead of the original $47,000 amount which had been assessed against both Ace and Oppenheimer in the Complaint for the violations alleged in Counts I through III of the Complaint, and $139, 278 for the violations described in Count IV.

Complainant has not specified in its February 12, 1999, Renewed Motion how the penalty amounts should be allocated among Counts I, II and III in light of the settlement. The undersigned finds that a reasonable allocation is as follows: Count I is valued at $10,000; Count II is valued at $10,000; Count III is valued at $10,000; and Count IV will remain the same since the violations alleged were solely committed by Ace. The General Penalty Policy 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. General Penalty Policy at 9. The Complaint proposed that $2,000 be added to the penalty assessed for Counts I through III to reflect Respondent's size of business. This increase is reasonable in light of the Penalty Policy and will not be adjusted downwards to reflect the settlement since it is solely applicable to the Respondent. Since Complainant was unable to prove Count I, Respondent is now assessed a penalty of $22,000 for the violations alleged in Counts II and III [(4)] and $139, 278 for Count IV.

Respondent has not raised the issue or come forward with any evidence that the payment of the above penalties will have a detrimental effect on its business. Thus, the penalty will not be adjusted downward based on this factor. The penalty will also not be adjusted upward since Complainant has not requested

such an adjustment and there is nothing on the record to indicate that such an adjustment is warranted.

## CONCLUSION

Respondent Ace Environmental, Inc. shall pay the civil penalty of $161,278 by submitting a certified or cashiers check within 60 days of the effective date of this order. The check shall be made payable to the order of "Treasurer, United States of America" and shall reference the docket number in this action (CAA-III-093). The check shall be sent to :

Mellon Bank
U.S. Environmental Protection Agency
Region III (Regional Hearing Clerk)
P.O. Box 360515
Pittsburgh, PA 15251-6515

Simultaneously with the submission of the payment, Respondent shall send a notice of such payment, including a copy of the check, to the following persons:

Ms. Lydia Guy
Regional Hearing Clerk
Mail Code 3RC00
U.S. EPA
1650 Arch Street
Philadelphia, PA 19103

and

Douglas J. Snyder
Mail Code 3RC11

U.S. EPA
1650 Arch Street
Philadelphia, PA 19103

Since this order, as a default order, constitutes an initial decision, the provisions of 40 C.F.R. § 22.17(b), the effectiveness and appeal provisions of 40 C.F.R. § 22.27 and 40 C.F.R. § 22.30, respectively, are applicable.

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Charles E. Bullock
Administrative Law Judge

Dated: June 24, 1999
Washington, D.C.

1. There are no remaining issues as to co-respondent Oppenheimer in this proceeding. Accordingly, the term "Respondent" refers solely to Ace, and Oppenheimer's name has been removed from the caption in this order.

2. Complainant states that this lower amount reflects a reduction in the total of $47,000 requested from both Respondent and co-respondent in Counts I, II and III to reflect the CA approved with respect to co-respondent Oppenheimer. As a result, Complainant is now seeking $32,000 from Respondent for the violations contained in Counts I, II and III.

3. The undersigned has sent all of the orders issued in this proceeding by certified mail and first class mail to Respondent's last known address. The certified letters were returned unopened, but the first class letters were not returned.

4. Count I = $0. Count II = $10,000. Count III = $10,000. Add-on for size of Respondent's business is $2,000.