UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
CHIPPEWA HAZARDOUS WASTE	)	
REMEDIATION & ENERGY, INC. d/b/a	)	
CHIPPEWA HAZARDOUS WASTE, INC.	)	
	)	
and	)	**Docket No. CAA-03-2002-0144**
	)	
TRUSTEES OF THE OHIO VALLEY	)	
CHRISTIAN CENTER OF THE	)	
ASSEMBLIES OF GOD,	)	
	)	
Respondents	)	

INITIAL DECISION

I. Introduction

On April 24, 2002, the United States Environmental Protection Agency, Region III ("EPA" or "Complainant") filed a Complaint against Chippewa Hazardous Waste Remediation & Energy, Inc. d/b/a Chippewa Hazardous Waste, Inc. ("Chippewa") and the Trustees of the Ohio Valley Christian Center of the Assemblies of God ("OVCC") for violations of Section 112 of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7412, and its implementing National Emission Standard for asbestos ("asbestos NESHAP") found at 40 C.F.R. Part 61, Subpart M. Count I of the Complaint alleges that Respondents failed to adequately wet regulated asbestos-containing material ("RACM") during a stripping operation, in violation of 40 C.F.R. § 61.145(c)(3). Count II alleges that Respondents failed to keep RACM adequately wet, until collected and contained or treated in preparation for disposal, in violation of 40 C.F.R. § 61.145(c)(6)(i). Count III alleges that Respondents failed to carefully lower RACM to the ground, in violation of 40 C.F.R. § 61.145(c)(6)(ii). For these alleged violations, EPA proposed a civil penalty of $36,300 against Respondents. Subsequently, EPA entered into a Consent Agreement and Final Order ("CAFO") with OVCC on November 22, 2002 that included a $500 civil penalty, and EPA now seeks the balance of $35,800 against Chippewa.

In brief, OVCC hired Chippewa in April 2001 to remove asbestos-containing roofing shingles from a church building in Wheeling, WV. Chippewa filed a "Notification of Abatement, Demolition, or Renovation" with the West Virginia Department of Environmental

Protection ("WVDEP") on April 16, 2001, and the church roof was stripped and removed on May 1 and 2, 2001. EPA contends that Chippewa violated the cited work practice standards in 40 C.F.R. § 61.145(c) while performing the renovation activity at the church. Chippewa argues, however, that its employees were not responsible for any violations that may have occurred during the renovation, and that EPA has failed to establish a chain of custody for the roofing material sampled at OVCC.

For the reasons which follow, the Court finds that EPA has established by a preponderance of the evidence that Chippewa violated the work practice standards in 40 C.F.R. § 61.145(c) as alleged in Counts I-III of the Complaint. Chippewa is hereby assessed a civil penalty of $45,040.

II. Factual Background[1]

The Ohio Valley Christian Center, a church registered in the state of West Virginia, was founded in 1999 by Pastor Michael Amico. Transcript, Volume I ("Tr. I") at 15; Complainant's Exhibit ("CX") 32. OVCC owns two buildings, a church sanctuary and an annex, located at 595 National Road in Wheeling, WV ("the facility").[2] Tr. I at 15-16. The facility is situated in a residential area, and several businesses are located to the east along National Road. *Id.* at 58, 113, 184, 192, 198; CX 1, 4 (photos 23-24). The cornerstone on the church sanctuary indicates that the building was originally constructed in 1953, and OVCC was aware at the time of its purchase that several physical improvements would be necessary, including replacement of the roof.[3] Tr. I at 18-20, 177-78; CX 7.

During the spring of 2001, OVCC secured estimates for the removal and replacement of the church sanctuary and annex building roofs. Tr. I at 22-23. OVCC was informed that the shingles on the church roof contained asbestos and that a licensed contractor would be required to remove the material. *Id.* at 24-28. In April 2001, OVCC entered into a verbal agreement[4]

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[1] Unless otherwise indicated, the statements in this section represent findings of fact by the Court.

[2] OVCC purchased the buildings from the Wheeling-Charleston diocese in 1999, and the facility was formerly known as the St. Joan of Arc Catholic Church. Tr. I at 18.

[3] The peak of the church roof is located approximately 40 feet above the ground, while a gutter around the base of the roof is approximately 20 feet from the ground. Tr. I at 58, 63, 81, 113, 199-200.

[4] This agreement was later put in writing by Chippewa as a "Form of Proposal," dated April 23, 2003 and signed by "Operations Mgr." Russell Evans, which describes the project as the "Removal of 5600 Sq Ft of ACM Roofing Material" from OVCC at a cost of $6,000. CX 32; Tr. I at 36-38. Amico testified that he "never saw this proposal until after the work was completed." Tr. I at 36.

with Chippewa, a West Virginia corporation and licensed asbestos contractor, to remove the shingles from the church roof at a cost of $5,000.[5] CX 32; Tr. I at 30, 34-35.

On April 16, 2001, the WVDEP Office of Air Quality received a Notification of Abatement, Demolition, or Renovation ("notification")[6] from Chippewa "Operations Manager" Russell Evans regarding the roof removal at OVCC. CX 8; Tr. I at 102-09. The notification identifies OVCC as the facility owner, Chippewa as the asbestos contractor, the "Type of Operation" to be conducted at the facility as a "Renovation," and the "Asbestos Containing Material to be Removed" as 3,500 square feet of transite[7] roofing material. CX 8. In the "Description of planned demolition or renovation work and method(s) to be used," the notification states that "Chippewa was contacted by Pastor Mike Amico in regards to a roof tear off located at said Facility. The reason for the tear off is to allow for a new roof to be put on by another contractor." *Id.* The asbestos removal start date is identified as April 30, 2001 and the completion date is May 11, 2001. *Id.*

When Pastor Amico arrived at the facility on May 1, 2001, he observed workers on the west side of the church roof removing shingles, a large dump truck, a few pickup trucks parked on site, and yellow warning tape around the work area. Tr. I at 53-55, 58-60. Amico testified that the workers were "feverishly" removing shingles by scraping them off the roof into the dump truck and on the ground around the truck. *Id.* at 60-63, 65. Amico also stated that he did not observe any water being used as the shingles were removed, and that the workers were not wearing any type of facial protection or protective suits. *Id.* at 63-66.

Thomas Stahl, a building inspector for the city of Wheeling, visited the facility at approximately 11:00 a.m. on May 1, 2001 after his office received a phone call regarding the roof removal. *Id.* at 76-78; CX 38. When he arrived at the site, Stahl observed five workers using shovels to remove roofing shingles from the west side church roof and then dropping or throwing the shingles to the ground or into the back of the dump truck. Tr. I at 79-80. Stahl testified that he observed "a lot of broken shingles" and "dust rising up into the atmosphere above the roof," and stated that he "knew it was asbestos that was being broken up and that's what was causing the dust." *Id.* at 80-81. According to Stahl, the foreman at the facility identified the contractor removing the roofing material as Chippewa. *Id.* at 78-79. Stahl did not observe any kind of equipment being used to wet the shingles during their removal or anyone wetting the shingles in the dump truck, and he did not notice the workers wearing any kind of protective equipment. *Id.* at 81-82.

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[5] OVCC also hired Allen Jones of Hip & Gable Roofing to install a new roof on the church sanctuary building. Tr. I at 23, 273-74; CX 8.

[6] The notification requirements for demolition or renovation activities involving RACM are found at 40 C.F.R. § 61.145(b).

[7] Transite is a commonly used roofing and siding material composed of asbestos and cement. Tr. I at 123; CX 19 at 20.

After returning to his office, Stahl contacted Douglas Foster, an asbestos NESHAP and lead inspector for EPA in Wheeling, to inform him about the renovation activity and inquire about the proper procedures for asbestos removal. *Id.* at 85-86, 102; CX 38. Foster, who has completed several asbestos training courses and conducted over a thousand asbestos NESHAP inspections throughout his career, contacted WVDEP to determine if a notification had been submitted for the operation. Tr. I at 96-102. Thereafter, Foster gathered his equipment and arrived at the facility to conduct an inspection at approximately 2:00 p.m. *Id.* at 111-112. Upon his arrival, Foster observed workers on the church roof using a "prong-type shovel" to break the shingles loose from the roof, allowing them to fall into the gutter and on to the ground.[8] *Id.* at 113-15. Foster testified that "dry, friable, broken pieces of asbestos transite" roofing material were scattered around the front of the church, behind the dump truck, and in the back of the dump truck. *Id.* at 117-19; CX 4 (photos 1-17, 22). Foster also noted the presence of dust and particles on top of clear plastic sheeting that had been placed around the church and in the back of the dump truck. Tr. I at 149-56; CX 4 (photos 1, 7, 13). A water hose was available in the corner of the church near the dump truck, but Foster did not observe the workers wetting any of the roofing shingles at the facility. Tr. I at 116-18, 150-51, 201-04. Although barrier tape surrounded the perimeter of the church and asbestos warning signs had been placed on the dump truck, Foster testified that the workers were not wearing any kind of protective equipment such as respirators or Tyvek suits. *Id.* at 113-16, 158-59, 161-62, 172, 189; CX 4 (photos 12, 15-19, 21, 24-26).

Based on his observations at the facility, Foster spoke with Evans and informed him that he "needed to stop what he was doing and adequately wet everything down and put it in leaktight containers." Tr. I at 119, 163-64. Foster collected ten samples of roofing material from around the facility, and offered Evans the opportunity to take split samples. *Id.* at 120-23, 134-43; CX 4 (photos 1-8, 13-14), 6. Foster also took twenty-six photographs and approximately seven minutes of videotape during the course of the inspection.[9] CX 4, 7; Tr. I at 146-47, 166-67. After concluding his inspection around 3:15 p.m., Foster returned to his office, locked up the samples and videotape, finished filling out an asbestos field data report, and prepared a chain of custody record for the samples. Tr. I at 204-06; CX 1, 13.

When he arrived at the facility on the morning of May 2, 2001 to conduct a follow-up inspection, Foster observed workers on the east side of the church roof using a pry bar to strip roofing shingles that were dry and breaking apart during their removal. Tr. I at 206-07, 211-12,

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[8] Foster estimated that 2,050 square feet of transite roofing material was removed from the west side church roof on May 1, 2001. Tr. I at 199.

[9] At the hearing, Chippewa noted that Foster recorded taking some of his photographs at the same time that the videotape was being shot. Tr. I at 275-77. Foster explained that the time on the videotape was set in advance and checked against his office clock, while the time recorded for his photographs was based on his watch, which was later determined to be five minutes fast. *Id.* at 310-12. The Court concludes that there was no material inconsistency.

225-26; CX 5 (photo 13). The workers were then placing the broken shingles in asbestos waste bags, adding water from a hose, and lowering the bags to the ground. Tr. I at 210-12, 222-27; CX 5 (photos 12, 13). Foster also observed that most of the roofing shingles in the back of the dump truck were wet, although some dry and friable roofing material remained in the truck and in the west side roof gutter. Tr. I at 209-10, 213-15, 217-20; CX 5 (photos 1-10). While he considered these methods to be an improvement from the previous day, Foster stated that he was still concerned that the workers were breaking the shingles and "the outside air was being exposed with asbestos fibers." Tr. I at 212.

During his inspection, Foster collected three samples of dust and particles from the west side roof gutter. Tr. I at 213-17; CX 5 (photos 1-3). Foster also took thirteen photographs showing the renovation activity on the east side church roof as well as roofing material in the west side roof gutter and the back of the dump truck. Tr. I at 215-16; CX 5, 6. After completing his inspection at approximately 8:30 a.m., Foster filled out an asbestos field data report and returned to his office. Tr. I at 232-36; CX 2. Foster then prepared a chain of custody record for the samples, sealed the samples according to EPA procedure, and then sent them via Federal Express to Richard Ponak, an environmental scientist responsible for NESHAP enforcement at EPA in Philadelphia. Tr. I at 236-45, 277-81, 291-92, 303-10; CX 13, 14.

In response to a request from Foster during the inspection, Russell Evans promptly faxed his "Asbestos Contractor Supervisor" certification to Foster's office. Tr. I at 251-54; CX 18. Foster also contacted the Martin-Arden Landfill (the "landfill"), which was listed on the notification as the waste disposal site for the asbestos removed at OVCC, and he received two weigh tickets and two waste manifests for asbestos delivered to the landfill on May 3, 2001. Tr. I at 256-69; CX 9-11. The weigh tickets state that Chippewa delivered 3.37 tons and 3.11 tons of friable asbestos to Martin-Arden Landfill on May 3, 2001 in vehicles driven by Russell Evans and Mike Postelwait. CX 9, 10. The waste manifests[10] indicate that 5,600 square feet of asbestos, 75% friable and 25% nonfriable, was delivered to the landfill on May 3, 2001, and identify OVCC as the generator and Chippewa as the operator and transporter of the asbestos waste. CX 11.

Richard Ponak, who has performed case development duties at EPA for NESHAP violations since 1991, received the samples collected by Foster on May 3, 2001. Tr. II at 11-18, 29-34. After speaking with Foster about the samples and the potential violations at OVCC, Ponak completed the chain of custody record and sent the samples via Federal Express to Criterion Laboratories ("Criterion") for analysis. *Id.* at 35-37; CX 13, 14. The polarized light microscopy analysis conducted by Stephen Forostiak, a laboratory analyst with Criterion, found that the samples collected on May 1, 2001 contained between 30-35% chrysotile asbestos and the samples collected on May 2, 2001 contained 15% chrysotile asbestos. CX 15, 16, 39; Tr. II at 118-28.

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[10] Although his signature appears on both manifests, Amico testified that he did not sign the documents. Tr. I at 43-44.

After reviewing the documents, photographs, and videotape taken by Foster during his inspection, Ponak made an initial determination that NESHAP work practice violations had occurred at the facility. Tr. II at 48-52. Information request letters, authorized by Section 114 of the Act, 42 U.S.C. § 7414, were sent to OVCC and Chippewa on March 21, 2002, and EPA received a response to each letter. *Id.* at 53, 57-62; CX 31-34. The response from Chippewa, dated April 9, 2002, states that "Russell Evans, Michael Postelwait, and James McAbee removed asbestos containing material" from OVCC, and identifies the legal entity that removed the asbestos material as "Chippewa Hazardous Waste, Inc." CX 33, 34; Tr. II at 62-63.

On April 24, 2002, an Administrative Complaint and Notice of Opportunity for Hearing was filed against both OVCC and Chippewa for alleged violations of the asbestos NESHAP work practice requirements. The Complaint sought a total proposed civil penalty of $36,300, which Ponak calculated in accordance with the Clean Air Act Stationary Source Civil Penalty Policy and Appendix III, the Asbestos Demolition and Renovation Civil Penalty Policy. Complaint at 11-12; CX 21, 22; Tr. II at 77-78. In an Answer dated May 24, 2002, Chippewa admitted that it removed approximately 3,500 square feet of asbestos containing roofing shingles from the facility on May 1 and 2, 2001, but denied any violations of the asbestos NESHAP and stated that it would be "unable to pay the proposed civil penalty and to continue in business." Complaint ¶¶ 22, 23; Answer at 2-4. As mentioned, on November 22, 2002, EPA entered into a settlement agreement with OVCC that included a civil penalty of $500 based on OVCC's inability to pay. Tr. II at 102. EPA now seeks the remaining balance of the proposed penalty ($35,800) against Chippewa. *Id.* at 103-04.

In evaluating Chippewa's ability to pay the proposed penalty, EPA sent corporate income tax returns from 1999-2001 that it received from Chippewa to Industrial Economics, Inc., an economic and environmental consulting firm, for review and analysis. *Id.* at 96-97, 101-02, 159; CX 24-26. Joan Meyer, a principal with Industrial Economics who has conducted more than two hundred ability-to-pay analyses, testified that she evaluated Chippewa's ability to pay the proposed penalty using the financial information provided by EPA.[11] Tr. II at 159-60, 166-70; CX 36. Based on her analysis, Meyer concluded that Chippewa could afford to pay the full civil penalty amount without suffering undue financial hardship. Tr. II at 166-67, 185-86; CX 23.

The parties engaged in a prehearing information exchange and an evidentiary hearing was held on June 11-12, 2003 in Wheeling, WV.[12] After an issue arose at the hearing regarding

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[11] Meyer explained that the ability-to-pay analysis for Chippewa was originally conducted by a senior associate at Industrial Economics who was out of the country at the time of the hearing, but that she had reviewed the analysis, along with Chippewa's financial information, and fully concurred with the findings. Tr. II at 167-68.

[12] At the conclusion of the first day of the hearing, counsel for Chippewa informed the Court that he might not be present during the morning of the second day and requested that the Court "please go forward without me." Tr. I at 314-16. Chippewa's counsel was not present

Chippewa's presence at the facility during the roof removal, counsel for EPA was instructed by the Court to contact the West Virginia Department of Motor Vehicles to determine the ownership of the dump truck[13] parked at the facility on May 1 and 2, 2001 based on the license plate numbers in photographs taken by Foster.[14] Tr. I at 270-71, 313. The title histories of the license plates identified the owners as "Edgco, Inc." and "Edge Company." CX 41, 42. Based on this new evidence, in an Order dated July 21, 2003, the parties were directed to comment upon its impact on the case, if any, and to speak to the need for a supplemental hearing. Both parties replied that the title histories were not determinative of Chippewa's liability and that there was no need for a supplemental hearing related to this evidence. Complainant's Response to Order Directing Comment at 4; Comment by Chippewa Hazardous Waste, Inc. at 1-2. Additionally, the parties have submitted post-hearing briefs and post-hearing reply briefs in this matter.

III. Legal Issues

A. Introduction

Section 112 of the CAA, 42 U.S.C. § 7412, requires EPA to promulgate emission standards or, where necessary, design, equipment, work practice, or operational standards[15] for hazardous air pollutants listed in that section. The National Emission Standard for asbestos, found at 40 C.F.R. Part 61, Subpart M, consists primarily of notification and work practice requirements for various sources of asbestos emissions. Pursuant to the work practice standards for demolition and renovation activities set forth at Section 61.145(c), the owner or operator[16] of

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during the testimony of Richard Ponak and Steven Forostiak on June 12, 2003. Tr. II at 7-8, 155.

[13] The "dump truck" consisted of a red truck and grey trailer with separate license plates.

[14] Under the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), the ALJ has the obligation to "assure that the facts are fully elicited, adjudicate all issues, and avoid delay," and may "[o]rder a party...to produce testimony, documents, or other non-privileged evidence" and "[d]o all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues..." 40 C.F.R. § 22.4(c).

[15] The CAA provides that "if it is not feasible in the judgment of the Administrator to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants, the Administrator may, in lieu thereof, promulgate a design, equipment, work practice, or operational standard, or combination thereof, which in the Administrator's judgment is consistent with the provisions of subsection (d) or (f) of this section." 42 U.S.C. § 7412(h)(1).

[16] "Owner or operator of a demolition or renovation activity" is defined as "any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation

a renovation[17] activity that involves the stripping[18] or removal[19] of at least 160 square feet[20] of RACM[21] must comply with the following procedures:

> (3) When RACM is striped from a facility component while it remains in place in the facility, adequately wet the RACM during the stripping operation.
> ...
> (6) For all RACM, including material that has been removed or stripped:
> (i) Adequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with § 61.150; and
> (ii) Carefully lower the material to the ground and floor, not dropping, throwing, sliding, or otherwise damaging or disturbing the material.

40 C.F.R. §§ 61.145(c)(3), (6)(i)-(ii). In order to establish liability for the violations alleged in the Complaint, EPA must show, by a preponderance of the evidence, that (1) the asbestos NESHAP requirements apply; and (2) the work practice standards in Section 61.145(c) have not been met. *See In re Allegheny Power Serv. Corp.*, 9 E.A.D. 636, 642 (EAB 2001). While there is some contention regarding whether the work practice standards were followed, the main dispute between the parties involves whether Chippewa was the operator that stripped the

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operation, or both." 40 C.F.R. § 61.141.

[17] "Renovation" is defined as "altering a facility or one or more facility components in any way, including the stripping or removal of RACM from a facility component." 40 C.F.R. § 61.141.

[18] "Strip" means "to take off RACM from any part of a facility or facility components." 40 C.F.R. § 61.141.

[19] "Remove" means "to take out RACM or facility components that contain or are covered with RACM from any facility." 40 C.F.R. § 61.141.

[20] The asbestos NESHAP requirements in Section 61.145 provide that "[i]n a facility being renovated, including any individual nonscheduled renovation operation, all the requirements of paragraphs (b) and (c) of this section apply if the combined amount of RACM to be stripped, removed, dislodged, cut, drilled, or similarly disturbed is (i) at least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components..." 40 C.F.R. § 61.145(a)(4).

[21] "Regulated asbestos-containing material" is defined 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 this subpart." 40 C.F.R. § 61.141.

roofing shingles from the church roof on May 1, 2001 and whether EPA has adequately shown that the shingles were RACM.

B. Applicability of Asbestos NESHAP

1. Was Chippewa the owner or operator of a renovation activity?

During the hearing, Chippewa challenged several assertions made by EPA's witnesses that workers employed by Chippewa Hazardous Waste, Inc. stripped roofing shingles from OVCC on May 1, 2001. Tr. I at 51-54, 272-74, 292-93. In its post-hearing brief ("RPHB") and post-hearing reply brief ("RPHRB"), Chippewa asserts that EPA failed to establish that its employees stripped shingles from the west side of the church roof on May 1, 2001, and suggests that another contractor hired to install the new roof actually removed the shingles.[22] RPHB at 1, 11-14, 18-19 (Proposed Conclusion of Law ("PCL") 1); RPHRB at 2-3. Instead, Chippewa claims that it simply collected roofing materials from the grounds of the facility on May 1, 2001, and stripped roofing shingles from the east side of the church roof on May 2, 2001. RPHRB at 1, 4.

However, the record in this case strongly supports a finding that Chippewa stripped and removed roofing shingles from the church roof on May 1 and 2, 2001, and thus is within the ambit of the asbestos NESHAP as the operator of a renovation activity. In its Answer, Chippewa admitted paragraph 20 of the Complaint, which states that "[a]t all times relevant to the Complaint, Respondent Chippewa was the 'operator of a demolition or renovation activity' as that term is defined in 40 C.F.R. § 61.141." Complaint ¶ 20; Answer at 2. Chippewa also admitted that it entered into a contract with OVCC to remove "approximately 3,500 square feet of asbestos-containing roof shingles from the Facility," and that it in fact "removed asbestos containing material from the Facility from at least May 1, 2001 until at least May 2, 2001." Complaint ¶¶ 22-23; Answer at 2; *see Bright v. QSP, Inc.*, 20 F.3d 1300, 1305 (4th Cir. 1994) (noting that "admissions in the pleadings are binding on the parties and may support summary judgment against the party making such admissions"); *Lucas v. Burnley*, 879 F.2d 1240, 1242-43 (4th Cir. 1989) (finding that defendant was bound by an admission in its answer which directly contradicted its testimony at trial). The Answer is signed not only by Chippewa's counsel, but also by Russell Evans, who is identified as "President of Chippewa Hazardous Waste Remediation & Energy, Inc. d/b/a Chippewa Hazardous Waste, Inc." Answer at 6.

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[22] Chippewa also contends that another contractor who removed roofing shingles from the annex building informed OVCC that those shingles were probably asbestos-containing materials, and questions why EPA never filed a complaint against the contractor or OVCC regarding the annex building roof. RPHRB at 2, 5-6, 14. However, the work conducted on the annex building is not a part of this enforcement proceeding, and there is no evidence in the record to suggest that the annex roof contained asbestos. Tr. I at 23. In fact, the contractor that replaced the annex roof informed Amico that they could not remove the church roof because the shingles contained asbestos and they were not licensed to perform such work. *Id.* at 25-28.

Furthermore, the evidence presented at the hearing fully supports the admissions made by Chippewa in its Answer. Amico testified that he contacted Chippewa in the spring of 2001 to secure an estimate for replacement of the church roof, and that representatives from Chippewa inspected the roof and verbally agreed to remove the roofing shingles for $5,000. Tr. I at 22-23, 27-30. Subsequently, Chippewa sent a written "Form of Proposal" to Amico, dated April 23, 2001 and signed by Russell Evans, describing the scope of work as the "Removal of 5600 Sq Ft of ACM Roofing Material" at a cost of $6,000.[23] CX 32; Tr. I at 36-40. When Amico arrived at the facility on May 1, 2001, Russell Evans was at the site with a "crew of men" on the roof removing shingles, and a dump truck was parked nearby. Tr. I at 54-57. While Amico does not recall the workers identifying themselves as being with Chippewa or the name Chippewa printed on the dump truck,[24] he testified that Chippewa had been "contracted, there was a verbal agreement, they came at the date specified. I can't imagine another company, you know, rolling in on the very date they were supposed to be [there]." *Id.* at 52-57

When Wheeling inspector Stahl arrived at the facility after 11:00am on May 1, 2001, he observed workers "taking roofing material off" the west side church roof and spoke with the foreman:

> Q. And you said you spoke to a foreman. Did he identify what business or company he might have been with?
>
> A. Well, he was the contractor who was taking the roofing material off.
>
> Q. And did he identify the contractor by name, if you recall?
>
> A. Well, yeah. Chippewa was the name of the company.

Id. at 78-79. This testimony directly contradicts Chippewa's arguments that Amico and Stahl "did not testify that Chippewa's employees stripped shingles from the west side of the church roof on May 1, 2001" or "did not testify that they knew the workers were Chippewa employees." RPHB at 12-13; RPHRB at 5-8, 11.

Before conducting his inspection at the facility on May 1, 2001, Foster contacted the

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[23] Amico testified that he received "a phone call or two" from Chippewa after receiving the Form of Proposal "[a]sking for an additional thousand dollars." Tr. I at 40-41.

[24] The title history of the dump truck parked at the facility identifies the owner as "Edgco, Inc." or "Edge Company." CX 41, 42. As noted above, both parties have indicated that such evidence is not determinative of the operator issue and did not create the need for a supplemental hearing. Furthermore, Chippewa does not dispute that its employees were at the facility and placed roofing shingles in the truck on May 1 and 2, 2001. RPHB at 12, 14; RPHRB at 4, 10, 16.

WVDEP to determine if a notification had been submitted for the work being done at OVCC. Tr. I at 102. WVDEP had in fact received a notification on April 16, 2001 from Russell Evans, who is identified as the "Operations Manager" of Chippewa. CX 8. The notification indicates that 3,500 square feet of transite roofing material would be removed from OVCC between April 30, 2001 and May 11, 2001, and the asbestos contractor and waste transporter is identified as "Chippewa Hazardous Waste, Inc." *Id.*; *see In the Matter of LVI Envtl. Servs.*, Docket No. CAA-09-97-10, 2000 EPA ALJ LEXIS 49 at *33-35 (ALJ, June 28, 2000) (finding that statements made by respondent on a notification required under the asbestos NESHAP are persuasive on liability issues); *Sierra Club v. Simkins Indus.*, 847 F.2d 1109, 1115 n. 8 (4th Cir. 1988) (noting that reports required by law may be used as admissions in court to establish a defendant's liability).

Foster arrived at the facility at approximately 2:00 p.m. and observed workers "breaking up the transite and letting it fall off the roof." Tr. I at 112-14. Foster "explained right away" to Evans, whom he believed to be "a supervisor of the job site for Chippewa Hazardous Waste,"[25] that "he could not break up the transite and that he needed to – needed to stop what he was doing and adequately wet everything down and put it in leaktight containers." *Id.* at 119; CX 3. Foster also obtained the names of the workers removing shingles from the church roof on May 1, 2001 from Evans, and identified them on his inspection report as James L. McAbee, Michael White, and Mark I. Shores.[26] Tr. I at 166, 223; CX 3.

Thus, the Court finds no merit to Chippewa's arguments that "EPA's inspectors did not observe any stripping of roofing materials," that Evans "arrived at OVCC toward the end of Foster's inspection on May 1, 2001,"[27] or that "Foster did not obtain the workers' names or the company for whom they worked." RPHB at 18 (Proposed Finding of Fact ("PFF") 4); RPHRB at 9, 19. Furthermore, there is no requirement that an inspector observe the actual stripping or removal activities in order to find a violation of the asbestos work practice standards. *In re Echevarria*, 5 E.A.D. 626, 643 (EAB 1994) ("If an inspector was required to observe the stripping operation, regulated entities could effectively halt any enforcement activity by stopping work whenever an inspector appears on site"); *Allegheny*, 9 E.A.D. at 648-50 (holding that there is no legal requirement that an inspection take place during a stripping operation to find a violation of the asbestos NESHAP); *In the Matter of USA Remediation Servs., Inc.*, Docket No.

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[25] Foster was not certain if Evans specifically told him that he worked for Chippewa. Tr. I at 298-99.

[26] The Court notes that James McAbee was listed on Chippewa's Section 114 response along with Russell Evans and Michael Postelwait. CX 34. It is unclear from the testimony if Foster was able to visually identify any of the workers he saw removing shingles from the east side church roof on May 2, 2001 as workers that were removing shingles from the west side church roof on May 1, 2001. Tr. I at 208-09.

[27] There is no evidence that an another contractor arrived at the facility after Foster began his inspection on May 1, 2001.

CAA-03-2002-0159, 2003 EPA ALJ LEXIS 46 at *17-20 (ALJ, June 26, 2003).

The documentary evidence completed after the roof removal at OVCC further supports a finding that Respondent was the operator of a renovation activity at the facility on May 1 and 2, 2001. Chippewa's Section 114 response states that "Russell Evans, Michael Postelwait, and James McAbee removed asbestos containing material from the Facility located at 595 National Road, Wheeling, WV" and identifies "Chippewa Hazardous Waste, Inc." as the legal entity that removed the roofing material. CX 33, 34. The waste manifests sent to Foster indicate that Chippewa delivered 5,600 square feet of asbestos-containing roofing shingles to Martin-Arden Landfill on May 3, 2001, and identify OVCC as the generator and "Chippewa Hazardous Waste, Inc." as the operator[28] and transporter. CX 11; Tr. I at 256-57, 262-67. Similarly, the weigh tickets show that Chippewa delivered 3.37 and 3.11 tons of friable asbestos to the landfill on May 3, 2001 in vehicles driven by Russell Evans and Mike Postelwait. CX 9, 10; Tr. I at 256-62.

Finally, Chippewa has provided no evidence in support of its contention that another roofing contractor hired by OVCC stripped the shingles from the west side church roof on May 1, 2001. RPHB at 13; RPHRB at 2, 5. In fact, Amico testified that the other roofing contractor informed him that they were not licensed to remove the church roof because the shingles were asbestos-containing, and as a result, Amico hired Chippewa to remove the roof. Tr. I at 23-30. Chippewa's statements that "site conditions were not typical for an asbestos contractor" or that workers were removing shingles "in a manner that was not consistent with Chippewa's Notification and work practices" do not establish that another contractor stripped the roofing shingles as much as they show that the enforcement action brought by EPA was entirely appropriate. RPHB at 13-14; RPHRB at 6-7. Accordingly, the Court finds that Respondent was the operator of a renovation activity as that term is defined by 40 C.F.R. § 61.141 at the facility on May 1 and 2, 2001.

2. Were the roofing shingles regulated asbestos-containing material?

In order for the asbestos NESHAP to apply to Chippewa's renovation activity, EPA must show that at least 160 square feet of RACM was stripped or removed from the facility. 40 C.F.R. § 61.145(a)(4). While Chippewa does not dispute that the amount of transite roofing material removed from the church roof was greater than the threshold requirement,[29] it

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[28] "Operator" is defined on the manifest as "the company which owns, leases, operates, controls, or supervises the facility being demolished or renovated, or the demolition or renovation operation or both." CX 11.

[29] The Complaint alleges that Chippewa removed approximately 3,500 square feet of asbestos-containing roofing shingles. Complaint ¶¶ 22, 24. The notification submitted by Chippewa indicates that 3,500 square feet of transite roofing material would be removed from OVCC. CX 8. During his inspection, Foster estimated that 2,050 square feet of roofing material

challenges whether EPA has adequately shown that the roofing materials were RACM. Specifically, Chippewa questions the sampling procedures used by Foster during the inspection, and argues that EPA has failed to establish a chain of custody for the samples between their collection and the laboratory analysis. Tr. I at 277-83, 291-92; RPHB at 9, 15-16, 18 (PFF 8), 20-21 (PCL 5). However, the preponderance of the evidence in this matter strongly supports a finding that the roofing shingles removed from the facility were RACM.

Pursuant to the asbestos NESHAP regulations, RACM is defined to include:

> (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 this subpart.

40 C.F.R. § 61.141. In the Complaint, EPA alleges that the roofing material removed from the facility was "Category II nonfriable ACM"[30] that had become "friable asbestos material"[31] or had a high probability of becoming crumbled, pulverized, or reduced to powder by the renovation activity. Complaint ¶¶ 34-36. Accordingly, the roofing shingles removed from the facility by Chippewa will be considered RACM if (1) the material contains greater than 1% asbestos (i.e. the material is ACM[32]), and (2) the material has become or has a high probability of becoming

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was removed from the west side church roof. Tr. I at 198-99; CX 1, 2. The Form of Proposal and waste manifests completed by Chippewa estimate that 5,600 square feet of roofing material was removed. CX 11, 32. Ponak testified that he used the most conservative figure, 2,050 square feet, when calculating the penalty. Tr. II at 85-86.

[30] "Category II nonfriable ACM" is defined as "any material, excluding Category I nonfriable ACM, containing more than 1 percent asbestos as determined using the methods specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure." 40 C.F.R. § 61.141. Asbestos-containing transite roofing shingles are generally classified as "Category II non-friable ACM." Tr. II at 19, 55; 40 C.F.R. Part 61, Subpart M, Appendix A, § 1.A.2.

[31] "Friable asbestos material" is defined as "any material containing more than 1 percent asbestos as determined using the method specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy, that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure. If the asbestos content is less than 10 percent as determined by a method other than point counting by polarized light microscopy (PLM), verify the asbestos content by point counting using PLM." 40 C.F.R. § 61.141.

[32] The asbestos NESHAP provides that ACM is "material containing more than one percent asbestos as determined using the methods specified in appendix E, subpart E, 40 CFR

friable (i.e. the ACM is RACM).

a. ACM

While Chippewa now challenges EPA's handling of the samples collected at the facility, it previously admitted that the samples were asbestos-containing and has offered no evidence to counter EPA's assertion that the roofing material contained greater than 1% asbestos. In its Answer, Chippewa admitted that it enjtered into a contract with OVCC[33] to remove "approximately 3,500 square feet of asbestos-containing roof shingles," and in fact "removed asbestos containing material from the Facility from at least May 1, 2001 until at least May 2, 2001." Complaint ¶¶ 22-23; Answer at 2. In the notification submitted by Chippewa to the WVDEP, Chippewa is listed as the "Asbestos Contractor," and the "Asbestos Containing Material to be Removed" is identified as 3,500 square feet of transite roofing material. CX 8. The notification also shows that the presence of asbestos in the material is "Assumed - Treat as ACM," and Chippewa provided a "Description of procedures to comply with NESHAP (40 C.F.R. 61 Subpart M)."[34] *Id.*; *see LVI Envtl Servs.*, 2000 EPA ALJ LEXIS 49 at *33-35 (finding that statements made by respondent on a notification required under the asbestos NESHAP are persuasive on liability issues).

Similarly, the Form of Proposal later sent by Chippewa to OVCC identifies the scope of work as the "Removal of 5600 Sq Ft of ACM Roofing Material." CX 32. On the waste manifests, Chippewa indicated that it was delivering 5,600 square feet of asbestos-containing roofing shingles from OVCC to Martin-Arden Landfill. CX 11. As EPA points out, Chippewa completed Section 6 of the manifest, which is only required for asbestos waste. *Id.*; Tr. I at 45-46. Finally, Chippewa's Section 114 response states that "Russell Evans, Michael Postelwait, and James McAbee removed asbestos containing material from the Facility located at 595 National Road, Wheeling, WV" and identifies Chippewa as the legal entity that removed the ACM. CX 33, 34.

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part 763, section 1, Polarized Light Microscopy." 40 C.F.R. Part 61, Subpart M, Appendix A, § 1.1.

[33] Amico testified that the original roofing contractor contacted by OVCC to remove and replace the annex building roof informed him that they could not remove the church roof because the shingles contained asbestos. Tr. I at 23-27. Amico also stated that a representative of Chippewa surveyed the church roof, agreed that the shingles were asbestos-containing, and that thereafter a verbal agreement was entered with Chippewa to remove the shingles. *Id.* at 27-30, 38-40.

[34] According to the "Interpretive Rule Governing Roof Removal Operations" in Appendix A, "if a removal operation involves at least the threshold level of suspect material, a roofing contractor may choose not to test for asbestos if the contractor follows the notification and work practice requirements of the NESHAP." 40 C.F.R. Part 61, Subpart M, Appendix A, § 1.A.3.

Inspector Foster arrived at the facility on the afternoon of May 1, 2001 and collected three samples of transite roofing shingles from the ground along the west side of the church, six samples from the back of the dump truck, and one sample from the ground behind the dump truck.[35] Tr. I at 120-22, 149-59; CX 4 (photos 1-8, 13-14). On May 2, 2001, Foster collected three samples of dust and particles from the gutter on the west side church roof. Tr. I at 213-19; CX 5 (photos 1-3).

In its post-hearing briefs, Chippewa takes issue with the fact that Foster "did not observe the removal of any roofing material that he collected as samples," and argues that Foster "did not obtain any information that the shingles were regulated asbestos containing material." RPHB at 2-3, 5-9, 11, 15, 19 (PCL 2); RPHRB at 12. As noted above, however, there is no requirement that an inspector observe the asbestos removal activities in order for a finding of liability,[36] and thus certainly no condition that an inspector may only sample roofing material that he witnessed being stripped or removed. *Echevarria*, 5 E.A.D. at 643; *Allegheny*, 9 E.A.D. at 648-50. Foster has been trained and authorized by EPA to conduct asbestos NESHAP inspections and has performed more than one thousand such inspections over the course of twelve years of work for EPA. Tr. I at 95-99, 299. Given that the samples collected at the facility on May 1, 2001 were resting on top of clear plastic that had been placed around the church and in the dump truck, there is a strong inference that the roofing shingles had been very recently removed from the church roof.[37] CX 4 (photos 1-8, 13-14). Furthermore, Foster observed roofing shingles in the west side roof gutter on May 1, 2001, and testified that the samples of dust and particles he collected on May 2, 2001 resulted from "the transite sliding down and hitting the gutter." Tr. I at 157-58, 218-19, 287-88; CX 4 (photos 16, 21), 5 (photos 1-3). Finally, Foster stated that his job responsibilities include gathering information, taking samples and photographs, and conducting fact-finding inspections, and thus it is of no consequence that Foster did not "report as to the asbestos content of the roof shingles" and identified his samples only as "Suspected Asbestos." RPHB at 5-7. Since the Court has already found that Chippewa was the operator that stripped and removed roofing shingles from facility on May 1 and 2, 2001, the samples collected by Foster may be used to support a finding that the shingles were ACM.

Foster testified that each sample collected at the facility was placed in a plastic bag with a

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[35] Foster testified that he offered split samples to Russell Evans but that Evans declined. Tr. I at 143-44. Foster also noted the presence of red barrier tape around the site and asbestos warning signs posted on the dump truck. *Id.* at 113-14, 158-59, 161-62, 172, 189; CX 4 (photos 15, 18, 19, 24-26), 5 (photos 11-12), 7.

[36] While not a prerequisite to establishing liability, it is noted that workers were still removing roofing shingles from the west side church roof when Foster arrived at the facility on May 1, 2001. Tr. I at 113-15, 285-87.

[37] Chippewa admits that Foster observed roofing materials that "appeared to have been stripped from the west side of the Church" and "collected samples from the roofing materials." RPHB at 18 (PFF 5-7).

"Ziploc top" and sealed "immediately." Tr. I at 121-22, 134-36, 291-300. Foster then photographed each sample in the location where it was collected and filled out a label identifying the sample number, date, time, location, and a short description of the contents. *Id.* at 122, 136-41, 300-01; CX 4 (photos 1-8, 13-14), 5 (photos 1-3). Beginning with the time when Foster started collecting samples on May 1, 2001 and when the samples were sent via Federal Express to Ponak on May 2, 2001, Foster had the samples in his possession, locked in the trunk of his car, or locked in a cupboard at his office.[38] Tr. I at 204-05, 236, 279-80. After returning to his office following each day of the inspection, Foster prepared a chain of custody record for the samples collected and placed the bagged samples in a larger Ziploc bag sealed with an adhesive paper that must be ripped in order to access the samples. *Id.* at 141-43, 236-46, 291-92, 307-10; CX 13, 14. On May 2, 2001, Foster sent the samples he collected at the facility via Federal Express to Ponak at EPA's Philadelphia office. Tr. I at 237-39, 242, 245-46. Before the samples were picked up by a Federal Express representative, Foster signed the chain of custody record, placed the chain of custody record along with the sealed bags into a larger plastic bag, placed the larger plastic bag into a brown padded envelope, and then placed the brown padded envelope into a Federal Express envelope. Tr. I at 237-39, 242-46, 303-07.

Based on Foster's testimony, the Court finds little merit to Chippewa's arguments that Foster failed to (1) "place his samples in a sample bag with a sealed top," (2) "place any identification marks upon the samples that jjkkjkkjhe collected," (3) "place his label on the inside of a secure container where the sample was stored," or (4) "account for all persons who may have had access to the cupboard in his office from May 1, 2001 to May 3, 2001." RPHB at 20 (PCL 5). Furthermore, there is no requirement that Foster "deliver the package to the Federal Express representative" or "obtain the signature of the Federal Express representative on the Chain of Custody report" in order to establish an adequate chain of custody for the samples, and Chippewa has not offered any evidence to suggest that the samples were tampered with or mishandled. Tr. I at 277-81, 303-04; RPHB at 9, 15, 18 (PFF 8), 20 (PCL 5); *see LVI Envtl. Servs.*, 2000 EPA ALJ LEXIS 49 at *36-37 (finding that there is no authority which requires the signature of the person who shipped the samples or the particular laboratory analyst in order to prove the integrity of the samples).

Ponak received the samples collected by Foster on May 3, 2001, and testified that there was no sign that their had been tampering with the samples. Tr. II at 29-35, 54-55; CX 13, 14. After speaking with Foster about his inspection and verifying that the samples received matched the chain of custody record, Ponak sent the samples via Federal Express to Criterion for their analysis using polarized light microscopy ("PLM"). Tr. II at 35-37, 39-40; CX 13, 14. Criterion received the samples from Ponak on May 4, 2001, and the chain of custody record was completed by Criterion analyst Steve Siracki. Tr. II at 37-38, 111-16. The PLM analysis conducted by Criterion analyst Stephen Forostiak found that the ten samples collected at the facility on May 1, 2001 contained 30-35% chrysotile asbestos, while the three samples collected

[38] Foster testified that he possessed the only keys to the trunk of his car and the cupboard at his office. Tr. I at 279-80.

on May 2, 2001 contained 15% chrysotile asbestos.[39] *Id.* at 40-44, 67, 118-37; CX 15, 16, 39. The samples and chain of custody record remained at Criterion until they were returned to Ponak two weeks before the hearing. Tr. II at 38-39.

Contrary to the arguments made by Chippewa, it is of no consequence that Ponak failed to "open the sample bags" to identify the samples, "deliver the package to the Federal Express representative," or "obtain the signature of the Federal Express representative on the Chain of Custody report." RPHB at 15, 20-21 (PCL 5). Similarly, there is no merit to Chippewa's claims that "Criterion Laboratories did not maintain a Chain of Custody Record," EPA "did not establish how Criterion Laboratories stored the materials," or that "EPA did not know who had possession of the materials while they were stored at Criterion Laboratories." RPHB at 16, 18 (PFF 10), 21 (PCL 5). The Fourth Circuit has stated that the chain of custody is not an iron-clad requirement, and even the existence of a "missing link" would not prevent the admission of real evidence "so long as there is sufficient proof that the evidence is what it purports to be and has not been altered in any material aspect." *U.S. v. Howard-Arias*, 679 F.2d 363, 366 (4th Cir. 1982), *cert. denied*, 459 U.S. 874 (1982); *see U.S. v. Ricco*, 52 F.3d 58, 61-62 (4th Cir. 1995). Having made this observation, the Court wants to make clear that it finds there was no such "missing link" in the chain of custody in this case. Since Respondent has not offered any evidence to suggest that the samples analyzed by Criterion were not the samples collected by Foster at the facility on May 1 and 2, 2001, the Court finds that EPA has shown by a preponderance of the evidence that the samples collected by Foster were those tested by Criterion, and that the test results demonstrated that the roofing shingles contained greater than 1% asbestos and thus were ACM.

b. RACM

As noted above, the transite roofing shingles removed from the facility on May 1 and 2, 2001 are generally classified as "Category II nonfriable ACM." Tr. II at 19, 55; 40 C.F.R. Part 61, Subpart M, Appendix A, § 1.A.2. However, Category II nonfriable ACM is considered to be RACM in two instances: (1) when it has become friable, and (2) when it has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act upon the material in the course of demolition or renovation operations. 40 C.F.R. § 61.141. Essentially, ACM that becomes friable or has a high probability of releasing asbestos fibers is considered to be RACM and must be handled in accordance with the asbestos NESHAP requirements. *See* CX 19, EPA Asbestos/NESHAP Regulated Asbestos Containing Materials Guidance (Dec. 1990) ("RACM Guidance") at 20 ("If [Category II nonfriable ACM is] crumbled, pulverized or reduced to a powder, [it is] friable and thus covered by the Asbestos NESHAP. Broken edges of these materials typically are friable. The fractured surface should be rubbed to see if it produces powder").

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[39] Chippewa's counsel chose not to attend the hearing during the testimony of Ponak and Forostiak and does not challenge the PLM analysis conducted by Criterion. Tr. I at 315-16; Tr. II at 7-8, 155.

The record in this proceeding strongly supports a finding that the shingles from the church roof had become friable by the time they were stripped and removed by Chippewa. Amico testified that the roof removed by Chippewa was believed to be the original roof installed on the church when it was constructed in 1953. Tr. I at 20-21, 67. Stahl stated that workers on the west side church roof were using shovels to loosen the roofing material, and he observed "a lot of broken shingles" and "dust rising up into the atmosphere above the roof." *Id.* at 79-81. During his inspection on May 1, 2001, Foster observed workers on the west side church roof using a prong-type shovel to strike the roofing shingles and break them loose from the roof. *Id.* at 114-15. He testified that dry and powdery pieces of roofing material were "all around" the front of the church, in the west side roof gutter, and in the back of the dump truck, and noted the presence of dust and fibers at the edges of the shingles and on top of the clear plastic placed at the facility. *Id.* at 117-19, 149-63, 176-80, 183-90; CX 4, 7. Foster also testified that each of the ten samples he collected was "dry and friable and powdery to the touch," and that dust and powder came off the material when hand pressure was applied. Tr. I at 120-22, 126-33, 149-56; CX 4 (photos 1-8, 13-14). On May 2, 2001, Foster returned to the facility and collected three samples of "dry and friable" dust and particles from the west side roof gutter. Tr. I at 213-19, 234-35; CX 2, 5 (photos 1-3). Chippewa has offered no evidence to contradict the observations of EPA's witnesses regarding the condition of the roofing material, and in fact, indicated on the waste manifests that the shingles removed from OVCC were 75% friable. CX 11. Accordingly, the Court finds that the asbestos-containing roofing shingles stripped and removed from the facility on May 1 and 2, 2001 constituted "friable asbestos material" and thus were RACM. As a result, Chippewa's renovation activity at the facility was subject to the asbestos NESHAP requirements.

C. Asbestos NESHAP Violations

1. Count I - Failure to Adequately Wet RACM During Stripping Operations

Count I of the Complaint alleges that Chippewa failed to adequately wet the RACM during stripping or removal operations at the facility on May 1, 2001 in violation of 40 C.F.R. § 61.145(c)(3). Complaint ¶¶ 39-42. According to Section 61.141:

> Adequately wet 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.

40 C.F.R. § 61.141. Under the asbestos NESHAP, wetting to prevent the release of particulates is the primary method of controlling asbestos emissions during demolition and renovation activities. CX 20, EPA Asbestos/NESHAP Adequately Wet Guidance (Dec. 1990) ("Adequately Wet Guidance") at 1; Tr. II at 23.

The uncontroverted testimony of EPA's witnesses supports a finding that Chippewa

failed to adequately wet the RACM when it was stripped from the west side church roof on May 1, 2001.[40] Foster testified that the workers on the church roof on May 1, 2001 were removing shingles without any type of wetting agent and had no equipment on the roof that could have been used to wet the shingles. Tr. I at 116. Although Foster noted a water hose in one corner of the church behind the dump truck, he only observed workers using it to wash their hands. *Id.* at 118, 180-82. Furthermore, Foster testified that the shingles that had already been removed from the church that day were "very powdery and dry," with "no signs of any wetting." *Id.* at 117-18. Foster's observations are supported by the photographs, videotape, and samples taken at the facility, which show the absence of any moisture on the roofing shingles. CX 4, 7; Tr. I at 121-22, 149-57. Similarly, Amico and Stahl both testified that workers were not wetting the shingles while stripping them from the church roof on May 1, 2001, and Stahl observed "dust rising up into the atmosphere above the roof." Tr. I at 63-64, 80-81; *see* 40 C.F.R. § 61.141 which provides: "If visible emissions are observed coming from asbestos-containing material, then that material has not been adequately wetted." There was also no evidence that Chippewa obtained a waiver from the wetting requirements or used a separate emission control method. Tr. II at 67-68; *see* 40 C.F.R. § 61.145(c)(3)(i).

Although Chippewa does not assert that it wetted the roofing shingles before stripping them from the west side church roof on May 1, 2001, it argues that "EPA's inspector did not observe the actual stripping of the shingles" and that "the condition of the roofing material at least three (3) hours after it was stripped from the Church roof" does not prove that it was not adequately wet during the stripping operation. RPHRB at 13. However, "courts have routinely relied upon the observations of inspectors to determine whether asbestos was adequately wetted" in cases involving alleged violations of the asbestos NESHAP. *Echevarria*, 5 E.A.D. at 639 (*quoting U.S. v. MPM Contractors, Inc.*, 767 F.Supp. 231, 233 (D. Kan. 1990)); *In re Schoolcraft Construction, Inc.*, 8 E.A.D. 476, 486-87 (EAB 1999); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 531 (EAB 1998). As the Environmental Appeals Board ("EAB") has noted, "[i]t is difficult to imagine how the asbestos NESHAP enforcement program, or many of the other enforcement programs conducted by [EPA], could be of any effect if an inspector's credible observations were not probative evidence of a violation." *Echevarria*, 5 E.A.D. at 639. Furthermore, the EAB has held that there is no requirement that an EPA inspector observe stripping activities in order to determine whether RACM has been adequately wetted. *Allegheny*, 9 E.A.D. at 643-44, 649. Given that Chippewa has failed to present any evidence to challenge Foster's observations, which observations were supported by the testimony of Amico and Stahl, as well as the demonstrative evidence, the Court finds that Chippewa failed to adequately wet RACM during its stripping operation on May 1, 2001 in violation of 40 C.F.R. § 61.145(c)(3).

2. Count II - Failure to Keep RACM Adequately Wet until Collected for Disposal

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[40] Although Foster testified that the roofing shingles were dry when stripped from the east side church roof on May 2, 2001, EPA did not seek to hold Chippewa liable for a second day of violation for Count I. Tr. I at 211-12; CX 5 (photo 13).

Count II of the Complaint alleges that Chippewa failed to ensure that the RACM stripped or removed from the church roof on May 1, 2001 remained adequately wet until collected for disposal on May 1 and 2, 2001 in violation of 40 C.F.R. § 61.145(c)(6)(i). Complaint ¶¶ 44-46. Section 61.145(c)(6)(i) provides that for all RACM, including material that has been removed or stripped, owners and operators 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." 40 C.F.R. § 145(c)(6)(i). As noted above, wetting RACM to prevent the release of particulates is the primary method used to control asbestos emissions. CX 20, Adequately Wet Guidance at 1.

During his inspection at the facility on May 1, 2001, Foster observed "dry" and "friable" roofing shingles scattered on the ground "all around the front of the church," in the back of the dump truck, and in the west side roof gutter. Tr. I at 117-20, 149-60, 176-90. Foster collected ten samples of roofing shingles at the facility and described each one as "dry and friable and powdery to the touch." *Id.* at 120-22, 127-30. Foster's observations are supported by the testimony of Amico and Stahl, who also did not see the workers using any type of wetting agent on the roofing shingles, as well as by the photographs and videotape taken at the facility on that date. *Id.* at 63-66, 81-82; CX 4, 7.

On May 2, 2001, Foster observed that "most" of the roofing shingles in the back of the dump truck had been wetted, and that workers on the east side church roof were placing stripped shingles into plastic bags and then adding water to the bags with a hose. Tr. I at 209-12, 219-24. However, Foster testified that some of the roofing shingles in the dump truck remained dry, and he collected three samples of "dry and friable" roofing material from the west side roof gutter. *Id.* at 209-10, 213-15, 219-21. The photographs taken by Foster at the facility on May 2, 2001 support his observations. CX 5.

Although Chippewa argues that EPA has failed to prove that the roofing shingles stripped or removed from the church roof were not kept adequately wet until collected for disposal, it has submitted no evidence to challenge the testimony hand documentation presented by EPA. RPHB at 6, 11-12; RPHRB at 14-16. Chippewa admits that its employees "collected the roofing material from the grounds of the Church on May 1, 2001" but contends that "[t]hese materials were placed in the disposal trailer and they were wetted." RPHRB at 6, 16. Chippewa also notes that "Foster testified that he observed moisture on the materials and polyurethane in the disposal trailer on the morning of May 2, 2001," and argues that the roofing shingles "were adequately wet at that time." *Id.* at 16. However, Foster did not observe any moisture in the dump truck on May 1, 2001, and he testified that some of the shingles in the truck on May 2, 2001 remained dry. Tr. I at 118-19, 209-10, 219-20; CX 4, 5. Furthermore, there is no evidence that the RACM in the west side roof gutter was wetted on either May 1 or 2, 2001. Foster's testimony regarding his personal observations at the facility is uncontroverted, and it is supported by the photographs and videotape, as well as by the testimony of Amico and Stahl. *See Echevarria*, 5 E.A.D. at 639; *Ocean State*, 7 E.A.D. at 531. Accordingly, the Court finds that Chippewa failed to ensure that RACM stripped or removed from the church roof on May 1, 2001 remained wet until collected and contained or treated in preparation for disposal on May 1

and 2, 2001, in violation of 40 C.F.R. § 61.145(c)(6)(i).

3. Count III - Failure to Carefully Lower RACM to the Ground

Count III of the Complaint alleges that Chippewa failed to carefully lower RACM that was stripped or removed from the church roof on May 1, 2001 to the ground in violation of 40 C.F.R. § 61.145(c)(6)(ii). Complaint ¶¶ 48-50. Section 61.145(c)(6)(ii) provides that for all RACM, including material that has been removed or stripped, owners and operators must "[c]arefully lower the material to the ground and floor, not dropping, throwing, sliding, or otherwise damaging or disturbing the material." 40 C.F.R. § 61.145(c)(6)(ii). This requirement is designed to prevent RACM from becoming further crumbled or pulverized and releasing asbestos fibers into the air. Tr. I at 165, 200.

The observations of EPA's witnesses support a finding that Chippewa failed to carefully lower the roofing shingles that were stripped or removed from the church roof[41] to the ground on May 1, 2001. Amico testified that workers were "scraping the shingles off" the roof and into the dump truck, although some of the shingles "landed on the ground around the truck." Tr. I at 61-65. Stahl observed the workers on the roof dropping shingles to the ground and "throwing it into the truck." *Id.* at 79-80. Similarly, Foster testified that workers on the roof were "breaking up the transite and letting it fall off the roof," and he observed "[b]roken transite in pieces all around the front of the church and in the - and back behind the dump truck." *Id.* at 114-17, 199-200, 272-74, 285-86. The observations of EPA's witnesses are supported by the photographs and videotape taken by Foster at the facility on May 1, 2001. CX 4, 7; Tr. I at 171.

Chippewa has offered no evidence to counter the testimony and photographic and video evidence presented by EPA, but makes several statements in its post-hearing briefs that contradict the testimony of Inspector Foster. Chippewa first claims that "[o]n May 1, 2001, [Foster] observed unidentified workers who were using ladders to lower shingles from the adjoining roof to the ground. (Foster, Tr. 171, 10-20)." RPHB at 5. However, Foster never testified to any such observations, and the transcript page cited by Chippewa discusses the videotape of a worker on the west side church roof knocking a piece of roofing material to the ground. Tr. I at 171. While Foster may not have observed any "tossing and throwing" of roofing shingles to the ground on May 1, 2001, he testified that workers were "breaking up the transite and letting it fall off the roof," and Stahl observed workers on the roof "throwing it into the truck." RPHB at 8; Tr. I at 79, 102, 111, 114-15. Furthermore, Chippewa's assertion that "workers were scrapping shingles from the small roof and handing them down to the ground" is not supported by any evidence in the record. RPHRB at 17. Although the evidence for May 2, 2001 "does prove that Chippewa employees carefully lowered bags filled with water and shingles from the roof of the Church to the ground," EPA is not alleging any violation under this

[41] As noted above, the peak of the church roof was approximately forty feet above ground level, while the gutter around the base of the roof was approximately twenty feet above the ground. Tr. I at 58, 63, 81, 113, 199-200.

Count for Chippewa's activities on that date. RPHRB at 18. On the date at issue for this Count, May 1, 2001, the Court finds that Chippewa failed to carefully lower RACM that had been stripped or removed to the ground, dropping, throwing, sliding, or otherwise damaging or disturbing the material in violation of 40 C.F.R. § 61.145(c)(6)(ii).

IV. Penalty

Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1), authorizes the assessment of civil administrative penalties of up to $25,000[42] per day for each violation of the Act and its implementing regulations. In determining the amount of the penalty to be assessed, Section 113(e)(1) requires that:

> [T]he court, as appropriate, shall take into consideration (in addition to other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence..., payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C. § 7413(e)(1).

Pursuant to Section 22.27(b) of the Rules of Practice, an ALJ "shall determine the amount of a civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act" and must also "consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b). If the ALJ decides to assess a penalty different in amount from the penalty proposed by EPA, the ALJ must "set forth in the initial decision the specific reasons for the increase or decrease." *Id; see In re U.S. Army, Fort Wainwright Central Heating & Power Plant*, CAA Appeal No 02-04, 2003 EPA App. LEXIS 6 at *113 (EAB, June 5, 2003) ("The ALJ's decision must contain a reasoned analysis of the basis for the penalty assessment, but the ALJ is free to depart from the penalty policy so long as she adequately explains her rationale"); *Ocean State*, 7 E.A.D. at 535 ("while the presiding officer must consider the Agency's official penalty policy, in any particular instance the presiding officer may depart from the penalty policy as long as the reasons for the departure are adequately explained").

In order to facilitate a uniform application of the statutory penalty factors, EPA has developed guidelines for violations of the CAA contained in the Clean Air Act Stationary Source Civil Penalty Policy dated October 25, 1991 ("CAA Penalty Policy"). CX 22. Attached to the CAA Penalty Policy as Appendix III is the Asbestos Demolition and Renovation Civil Penalty

[42] The Debt Collection Improvement Act of 1996 authorizes a 10% adjustment for inflation for administrative penalties assessed under the CAA. 31 U.S.C. § 3107; 40 C.F.R. Part 19; Tr. II at 78.

Policy revised May 5, 1992 ("Asbestos Penalty Policy"), which provides specific guidelines for assessing penalties for asbestos NESHAP violations. CX 21. To calculate a penalty, the Asbestos Penalty Policy first requires a determination of the "preliminary deterrence amount," which consists of a gravity component and an economic benefit component. CX 21 at 1; CX 22 at 3. Several adjustment factors from the CAA Penalty Policy are then to be applied to the gravity component.[43] CX 21 at 1; CX 22 at 3, 15. Finally, EPA considers a Respondent's ability to pay the proposed penalty. CX 22 at 20.

In its proposed civil penalty, EPA calculated a $36,300 gravity component for the three counts alleged in the Complaint. Complaint at 11-12. This included $11,000 for one day of violation in Count I, $12,100 for two days of violation in Count II, $11,000 for one day of violation in Count III, and $2,200 based on the size of the violator. *Id.* EPA declined to assess any penalty amount based on the economic benefit of noncompliance, and made no further adjustments based on the factors detailed in the penalty policies. *Id.* at 12-14. After EPA entered into a consent agreement with OVCC that included a $500 civil penalty, the balance of the penalty ($35,800) was sought against Chippewa. While the record supports the use of the CAA Penalty Policy and Asbestos Penalty Policy as a basis for determining an appropriate penalty amount in this case, the Court disagrees with EPA's application of the "size of the violator" and "degree of willfulness or negligence" adjustment factors. As detailed below, the Court finds that a $45,040 penalty is appropriate for the asbestos NESHAP violations alleged in the Complaint.

A. Preliminary Deterrence Amount

1. Economic Benefit Component

The economic benefit component is a measure of the benefit accruing to an operator "as a result of noncompliance with the asbestos regulations," which includes the ability to delay making expenditures necessary to achieve compliance and avoid permanently other costs associated with compliance. CX 21 at 6; CX 22 at 4-6. Although it is "general Agency policy not to adjust or mitigate this amount," the CAA Penalty Policy recognizes that assessing the economic benefit component often requires a substantial commitment of resources and gives EPA "the discretion not to seek the economic benefit component where it is less than $5,000." CX 22 at 6-7.

In calculating the proposed penalty, Ponak testified that EPA "looked into" the economic benefit accruing to Chippewa with regard to the violations alleged in the Complaint and was "unable to determine if it was greater than $5,000 to do this properly." Tr. II at 94-95. As a

[43] While the Asbestos Penalty Policy indicates that the factors should be used to adjust the preliminary deterrence amount, the CAA Penalty Policy clearly states that "[t]hese adjustment factors apply only to the gravity component and not to the economic benefit component." CX 21 at 1; CX 22 at 15.

result, EPA declined to seek any amount for the economic benefit of noncompliance. *Id.* at 95; Complaint at 12. Although the Asbestos Penalty Policy states that EPA may use an estimated "rule of thumb"[44] to calculate the economic benefit "[i]n the absence of reliable information regarding a defendant's actual expenses," the Court finds that EPA properly exercised its discretion not to assess an economic benefit component.[45]

2. Gravity Component

According to the CAA Penalty Policy, the gravity component is designed to account for statutory criteria such as the seriousness of the violation,[46] the duration of the violation, and the size of the violator. CX 22 at 8. For violations of work practice standards, the gravity component is calculated by reference to a matrix in the Asbestos Penalty Policy which takes into account three variables: (1) the size of the project determined by reference to the total amount of asbestos involved in the operation; (2) whether the violation is a "first," "second," or "subsequent" offense; and (3) the duration of the violation. CX 21 at 3-6, 17. For the size of the project variable, the Asbestos Penalty Policy provides three categories based on the number of 160 square foot "units" of asbestos: (1) projects involving 10 or fewer units of asbestos; (2) more than 10 but not more than 50 units; and (3) more than 50 units. *Id.* at 3, 17. The penalty is then adjusted based on whether there were any prior violations and to reflect the additional days of violation. *Id.* at 4-6, 17. After a figure has been calculated from the matrix, the gravity component should be increased based on the size of the violator's business in accordance with the CAA Penalty Policy. *Id.* at 6; CX 22 at 14-15.

In determining the size of the project for the alleged violations in the Complaint, Ponak relied upon Foster's estimation that 2,050 square feet of RACM had been removed from the west

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[44] The "rule of thumb" amount is $20 per square foot of asbestos, which is the estimated economic benefit if "all stripping, removal, disposal and handling was done improperly." CX 21 at 7, 17. If EPA assumed that 2,050 square feet of asbestos was improperly handled, the economic benefit component using this figure would have been $41,000.

[45] This is particularly true since Chippewa had contracted with OVCC to strip and remove the church roof for $5,000, and there is no evidence in the record to show that this amount was improper.

[46] Violations of the asbestos NESHAP work practice requirements are generally considered to be very significant in the CAA regulatory scheme, and courts have long recognized that exposure to airborne asbestos emissions poses a serious risk to human health. CX 22 at 12; *U.S. v. Pearson*, 274 F.3d 1225, 1235 (9th Cir. 2001); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 50 (2d Cir. 1988); *Schoolcraft*, 8 E.A.D. at 492-93.

side church roof on May 1, 2001 since it was "the most conservative amount"[47] that EPA had calculated. Tr. II at 81-86; Tr. I at 198-99; CX 1. Using this figure, Ponak determined that the amount of asbestos involved in the operation was more than 10 units but not more than 50 units.[48] Tr. II at 82-83. EPA then determined that the alleged violations in Counts I-III were "first" violations for Chippewa for purposes of the gravity component matrix, and assessed an inflation-adjusted penalty of $11,000 for each count. Tr. II at 86, 88; Complaint at 11-12. For the second day of violation in Count II, EPA assessed an additional $1,100 penalty. Tr. II at 90, 94; Complaint at 11-12. Finally, Ponak testified that EPA did not have much information regarding the size of Chippewa's business at the time the penalty was calculated, and therefore assessed the minimum amount of $2,200 under the CAA Penalty Policy for size of the violator. Tr. II at 95-96; CX 21 at 6; CX 22 at 14.

Although EPA has properly determined the amount of asbestos involved in the operation, the Court finds that the civil penalty should be increased based on the "size of the violator." For this factor, the Asbestos Penalty Policy provides that an increase in the gravity component should be calculated in accordance with the CAA Penalty Policy. CX 21 at 6. That Policy provides a chart for assessing the size of the violator based on the net worth of a corporation. CX 22 at 14. Ponak testified that EPA did not have much information regarding the size of Chippewa's business at the time the Complaint was filed and therefore used the lowest amount on the chart, which is reserved for corporations that have a net worth under $100,000. Tr. II at 95-96; CX 21 at 6. Although EPA later received three years of corporate income tax returns from Chippewa and sent this information to Industrial Economics, Inc. to conduct an ability-to-pay analysis, EPA did not seek to adjust the penalty for the size of the violator factor. Tr. II at 96-97; CX 23-26. Chippewa's tax returns[49] show a gross profit well over $100,000 for each of the three years reported, and EPA's financial analyst, Joan Meyer, determined that Chippewa had total assets of $412,150 as of May 31, 2002. CX 23 at 2; CX 24-26; Tr. II at 180. Furthermore, Meyer testified that Chippewa was in "good financial condition" and had several options available to make an expenditure of $100,000 without incurring undue financial hardship. Tr. II at 176-79, 185-86, 243-47. Although Chippewa asserted that it had a net

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[47] Actually, the notification states that the quantity of asbestos to be removed from the facility is 3,500 square feet, and presumably about half of that amount (1,750 square feet) would have been from the west side church roof. CX 8. In the Complaint, EPA alleges that Chippewa stripped and removed approximately 3,500 square feet of asbestos containing roofing shingles from the facility on May 1 and 2, 2001. Complaint ¶¶ 22-25. However, the Form of Proposal and the waste manifests indicate that the project involved 5,600 square feet of ACM. CX 11, 32.

[48] At 160 square feet per unit, 2,050 square feet would amount to 12.81 units. If 1,750 square feet had been used, the size of the project would still fall within this range.

[49] EPA often relies on Dun & Bradstreet reports to determine a corporation's net worth, but no such reports were introduced at the hearing. *See* Tr. II at 53, 95; *In re CDT Landfill Corp.*, CAA Appeal No. 02-02, 2003 EPA App. LEXIS 5 at *30-31 (EAB, June 5, 2003); *Allegheny*, 9 E.A.D. at 656.

operating loss in prior years and that its taxable income was lower than the proposed penalty, it did not address the company's net worth or provide any further financial documents to support its arguments. Tr. II at 190-206, 219-20, 240-41; RPHB at 22 (PCL 6). As a result, the Court finds that the adjustment for size of the violator should be increased from $2,200 to $5,500 to reflect a net worth for Chippewa of $100,001-$1,000,000. *See* CX 22 at 14. Accordingly, the gravity component and preliminary deterrence amount for the violations alleged in Counts I-III of the Complaint is hereby increased from EPA's original assessment of $36,300 to $39,600.

B. Gravity Component Adjustment Factors

1. Degree of Willfulness or Negligence

In assessing whether to increase the penalty based on a Respondent's willfulness or negligence, the CAA Penalty Policy states that EPA should consider the degree of control that Respondent had over the events constituting the violation, the foreseeability of the events constituting the violation, the level of sophistication within the industry, and the extent to which Respondent knew of the legal requirement which was violated. CX 22 at 16. At the hearing, Ponak testified that EPA "probably could have used [this factor] because basically this first day of violation, [Chippewa] didn't comply with any of the NESHAP regulations." Tr. II at 86-87. However, EPA "went on the conservative side because on the second day of violation, they showed that they had - were improving the project" and for that reason EPA did not increase the penalty. *Id.* at 87.

While Chippewa's "improvements" on the second day of the operation may be relevant to the number of days of violation or the degree of cooperation, this should not bear on the assessment of Chippewa's willfulness or negligence for the violations alleged in the Complaint. In fact, the record shows that Chippewa willfully or, at least knowingly, violated the asbestos NESHAP work practice standards in conducting the renovation activity at the facility. Chippewa was the sole contractor hired by OVCC to strip and remove the church roof and thus had full control over the events constituting the violations. In the notification it submitted to WVDEP, Chippewa indicated that it would be treating the roofing shingles as ACM and stated in the "Description of procedures to be used to comply with NESHAP (40 CFR 61 Subpart M)" that "ACM will be removed using Wet Removal Methods along with 6 mil poly layed out aroun[d] the perimeter of [the] building." CX 8; *see Ocean State*, 7 E.A.D. at 538-39. Furthermore, Chippewa admits that it was a "qualified asbestos contractor" that "knew the work practice" requirements, and submitted the "Asbestos Contractor Supervisor" certification for its operations manager Russell Evans, who was at the facility during the renovation activities. RPHRB at 4; CX 8; Tr. I at 251-53. Accordingly, the Court finds that Chippewa acted with knowledge in violating the asbestos NESHAP work practice standards, as alleged in the Complaint, and concludes that a 15% increase[50] in the gravity component, or $5,940, is warranted.

[50] The CAA Penalty Policy allows the gravity component to be "aggravated by as much as 100%" for this factor. CX 22 at 16.

2. Degree of Cooperation

The degree of cooperation of a violator may justify an increase of the gravity component if the Respondent is not making efforts to come into compliance or is negotiating with EPA in bad faith. CX 22 at 16-17. On the other hand, mitigation of the gravity component can occur where a Respondent institutes comprehensive corrective action after discovery of a violation. *Id.* at 17. In deciding whether to mitigate a penalty based on this factor, EPA should consider if a violator "promptly reports its noncompliance to EPA," makes "extraordinary efforts to avoid violating an imminent requirement or to come into compliance after learning of a violation," or "is cooperative during EPA's pre-filing investigation of the source's compliance status or a particular incident." *Id.*

Although Ponak noted that Chippewa had made some improvements during the second day of the renovation, he testified that "there was not any extraordinary cooperation" by Chippewa and that violations remained even after Foster had identified the problems to Evans. Tr. II at 87-88, 98-100. Upon review of these considerations, EPA decided not to adjust the penalty for this factor. *Id.* at 87, 99. The Court finds that this decision is supported by the record. Inspector Foster observed that Chippewa was still not wetting the roofing material prior to stripping it from the east side church roof on May 2, 2001, and stated that some of the shingles in the back of the dump truck remained dry and unbagged. Tr. I at 209-12. There is also no evidence that Chippewa promptly reported its noncompliance to EPA or was particularly cooperative during EPA's pre-filing investigation. Furthermore, the Asbestos Penalty Policy states that:

> EPA expects that work practice violations brought to the attention of an owner or operator will be corrected promptly, thus ending the presumption of continuing violation. This correction should not be a mitigating factor[;] rather this policy recognizes that the failure to promptly correct the environmental harm and the attendant human health risk implicitly increases the gravity of the violation. In particularly egregious cases the Region should consider enhancing the penalty based on the factors set forth in the General Penalty Policy.

CX 21 at 6. Accordingly, upon the Court's review of this factor, no adjustment to the gravity component will be made for the degree of cooperation.

3. History of Noncompliance

In determining whether to increase the gravity component based on a Respondent's history of noncompliance, the CAA Penalty Policy instructs EPA to consider the similarity of any prior violation, the time elapsed since a prior violation, the violator's response to any such prior violation, and the extent to which the gravity component was already been increased due to a repeat violation. CX 22 at 17-18; CX 21 at 1 n. 1. A "prior violation" includes:

> [A]ny 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.

CX 22 at 18. The CAA Penalty Policy also states that "[e]vidence that a party has violated an environmental requirement before clearly indicates that the party was not deterred by a previous enforcement response." *Id.* at 17; *Ocean State*, 7 E.A.D. at 549 n. 27, 558 (holding that prior notification of a violation is evidence that the base gravity penalty would not be a sufficient deterrent and that an increase is appropriate).

As noted above, EPA initially searched its National Asbestos Registry and did not find any evidence of prior NESHAP violations by Chippewa at the time the Complaint was filed. Tr. II at 91-92. Although EPA later received a "notice of violation" from WVDEP, Ponak testified that the notice did not cite "an actual NESHAP violation" and EPA determined that it was not appropriate to adjust the penalty on this basis. *Id.* at 92-94. EPA did not seek to admit the prior notice of violation into the record, and therefore the gravity component will not be increased for this factor.

4. Environmental Damage

Although the gravity component is designed to reflect the amount of environmental damage caused by a violation, the CAA Penalty Policy gives EPA the discretion to increase the penalty for this factor in cases where the damage is severe and the gravity component alone is not a sufficient deterrent. CX 22 at 19. At the hearing, Ponak testified that EPA "could not document actual environmental harm" caused by the alleged violations and therefore declined to adjust the penalty on this basis. The Court agrees with EPA's assessment and finds that no further increase in the gravity component is warranted for environmental damage.[51]

C. Ability to pay

According to the CAA Penalty Policy, EPA "will generally not request penalties that are clearly beyond the means of the violator" and "should consider the ability to pay a penalty in adjusting the preliminary deterrence amount." CX 22 at 20. However, "it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially-troubled business," and "EPA reserves the option, in appropriate circumstances, of seeking a penalty that might contribute to a company going out of business." *Id.* Furthermore,

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[51] Furthermore, neither EPA nor Chippewa have argued that the penalty should be adjusted based on "other factors as justice may require," and the Court finds no reason to alter the penalty on this basis. *See In re Catalina Yachts, Inc.*, 8 E.A.D. 199, 216 (EAB 1999), *aff'd*, 112 F.Supp.2d 965, 968-70 (C.D. Cal. 2000).

EPA is directed to assess this factor "only if the source raises it as an issue and only if the source provides the necessary financial information to evaluate the source's claim." *Id.*

At the time the proposed penalty was first calculated, EPA had little information regarding Chippewa's financial condition and did not adjust the penalty for ability to pay. Tr. II at 95, 100-01. However, the Complaint noted that "EPA will consider, among other factors, Respondents' ability to pay to adjust the proposed civil penalty assessed in this Complaint," and that "[t]he burden of raising and demonstrating an inability to pay rests with Respondents." Complaint at 13. In its Answer, Chippewa claimed that it was "unable to pay the proposed civil penalty and to continue in business," and submitted to EPA corporate income tax returns for tax years 1999-2001. Answer at 4; Tr. II at 96-97; CX 24-26. The Court's Prehearing Order also stated that "[i]f the Respondent intends to take the position that it is unable to pay the proposed penalty, or that payment will have an adverse effect on Respondent's ability to continue in business, Respondent shall furnish supporting documentation such as financial statements or tax returns."[52] Although Chippewa again raised the inability to pay argument in its prehearing exchange, it did not submit any further evidence to support this claim. Tr. II at 240-41.

EPA submitted the financial information it received from Chippewa to Industrial Economics, Inc., an economic and environmental consulting firm, to conduct an ability-to-pay analysis. *Id.* at 96-97, 101-02, 159. Joan Meyer, a principal with Industrial Economics who has conducted more than two hundred ability-to-pay analyses,[53] testified that she reviewed the financial information provided by Chippewa and concluded that "Chippewa can pay the full penalty that's sought by EPA without incurring undue financial hardship." *Id.* at 159-60, 166-67, 185-86; CX 23. Meyer noted that the proposed penalty of $36,300 was less than 1% of Chippewa's total costs and expenses, total sales have been increasing, net income and cash flow have been positive, net assets were listed as $412,150 while liabilities were $851, and the company had recently made a loan to its owner for $135,000. Tr. II at 176-85; CX 23. In fact, Meyer stated that Chippewa "could afford a penalty equal to two or three times" the proposed penalty given the costs the company normally incurs, its "strong positive net income and cash flow" with "very little debt," and the number of different options it has available to make such an expenditure. Tr. II at 243-47.

Chippewa disputes Meyer's conclusions and argues that its tax returns show that the company had net operating losses in prior years and that its taxable income was less than the amount of the penalty sought by EPA. *Id.* at 190-206, 219-20; RPHB at 22 (PCL 6). Chippewa

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[52] Section 22.19(a)(3) of the Rules of Practice requires that a Respondent "explain in its prehearing exchange why the proposed penalty should be reduced or eliminated." 40 C.F.R. § 22.19(a)(3).

[53] Meyer explained that her analysis involves a "three-stage approach" that assesses the size of the penalty relative to the size of the company, the general financial performance of the company, and options the company may have to pay a penalty. Tr. II at 170, 174.

also questioned Meyer's estimation of the company's cash flow, whether the entire amount of gross receipts and sales were actually collected by the company, and if the company could recall or obtain loans to pay the penalty. Tr. II at 200-02, 206-07, 221-22, 227; RPHB at 22 (PCL 6). Finally, Chippewa repeatedly questioned why Meyer did not obtain more financial information from the company, and argues that "EPA did not present any evidence that Chippewa Hazardous Waste, Inc. had the ability to pay the civil penalty." Tr. II at 202-05, 210, 217-18, 233-35, 239-40; RPHB at 21 (PCL 6).

However, Meyer stated that she was not simply looking at Chippewa's reported taxable income to determine its ability to pay since it was not informative "to just choose one line only from a tax return and financial statement and base your entire conclusions on it." Tr. II at 219-220. She also explained that it was more appropriate to examine taxable income before deducting any net operating loss carried forward from previous years when determining a company's current financial health. *Id.* at 190-92, 205-06. More importantly, Chippewa cannot simply question Meyer's analysis based on that fact that it failed to provide any further financial information to EPA to support its inability to pay claim, other than the three years of corporate income tax returns. *Id.* at 240-41; *see In re Bil-Dry Corp.*, 9 E.A.D. 575, 613-14 (EAB 2001) (finding that a Respondent's unverified tax returns, unsupplemented by audited financial statements, did not provide the type of detailed analysis necessary to substantiate an inability to pay claim); *In re Robert Wallin*, CWA Appeal No. 00-3, 2001 EPA App. LEXIS 8 at *46-47 (EAB, May 30, 2001) ("vague statements of financial hardship do not satisfy [Respondent's] burden to show through specific facts that it was unable to pay the proposed penalty amount").

The EAB has addressed the procedure applied where ability-to-pay claims are presented. While EPA "bears the burden of proof on the appropriateness of the overall civil penalty," it does "not bear a separate burden with regard to each of the statutory [penalty] factors." *In re Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 320 (EAB 2000); *CDT Landfill*, 2003 EPA App. LEXIS 5 at *85-86. If EPA shows that it "considered each of the statutory factors and that the recommended penalty is supported by its analysis of those factors," the "burden then shifts to the Respondent to rebut [EPA's] prima facie case by showing that the proposed penalty is not appropriate either because [EPA] failed to consider a statutory factor or because the evidence shows that the recommended calculation is not supported." *Spitzer*, 9 E.A.D. at 320.

With regard to the ability-to-pay factor, the Respondent must "provide evidence to show that it is not able to pay the proposed penalty" before the start of the hearing and consistent with the prehearing exchange order since it is the party with control over the relevant records. *Id.* at 321. If the Respondent fails to meet this obligation, EPA "may properly argue and the [administrative law judge] may conclude that any objection to the penalty based upon ability to pay has been waived." *Id.* (quoting *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994)). When a Respondent does place its ability to pay at issue, EPA must demonstrate as part of its prima facie case that it did consider the appropriateness of the proposed penalty in light of its impact on Respondent's business. *CDT Landfill*, 2003 EPA App. LEXIS 5 at *89. In order to make this showing, EPA can "rely on some general financial information regarding the respondent's financial status which can support the inference that the penalty assessment need

not be reduced." *Id.* at *89-90 (quoting *New Waterbury*, 5 E.A.D. at 542-43). Thereafter, if the Respondent does not offer "sufficient, specific evidence as to its inability to continue in business to rebut the Region's prima facie showing," EPA may decide not to adjust the penalty for this factor. *Id.* at *90.

In this case, EPA has demonstrated that it sought financial information from Chippewa and considered Chippewa's ability to pay in determining the appropriateness of the proposed civil penalty. Furthermore, EPA has shown by a preponderance of the evidence that Chippewa has the ability to pay a penalty of at least twice the amount proposed by EPA without incurring undue financial hardship. Chippewa has failed to rebut this showing by providing sufficient, specific evidence regarding this issue. Accordingly, the Court finds that no adjustment in the preliminary deterrence amount is warranted based on Chippewa's ability to pay.

V. Conclusion

As described above, the Court finds that EPA has established by a preponderance of the evidence that Chippewa violated the work practice standards in 40 C.F.R. § 61.145(c) as alleged in Counts I-III of the Complaint. Having considered each of the statutory penalty factors and the applicable policies, the Court concludes that a civil penalty of $45,540 is appropriate for these violations. Since EPA has settled with one of the original Respondents and collected a civil penalty of $500, Chippewa is hereby assessed a civil penalty of $45,040.[54]

ORDER

A civil penalty in the amount of $45,040 (Forty-five thousand forty dollars) is assessed against the Respondent, Chippewa Hazardous Waste Remediation & Energy, Inc. d/b/a Chippewa Hazardous Waste, Inc. Payment of the full amount of the civil penalty assessed shall be made within 30 (thirty) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c). Payment shall be submitted by a certified check or cashier's check made payable to the Treasurer, United States of America and mailed to:

United States Environmental Protection Agency, Region III
Regional Hearing Clerk
Mellon Bank
P.O. Box 360515
Pittsburgh, PA 15251-6515

A transmittal letter identifying the subject case and the EPA docket number, plus the

[54] The Asbestos Penalty Policy provides that "[i]f a case is settled as to one defendant, a penalty not less than the balance of the settlement figure for the case as a whole should be sought from the remaining defendants." CX 21 at 8.

Respondent's name and address must accompany the check. Failure of the Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty.

Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order 45 (forty-five) days after its service upon the parties and without further proceedings unless: (1) a party moves to re-open the hearing within 20 (twenty) 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 decision within 30 (thirty) days after the Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the EAB elects, upon its own initiative, to review the Initial Decision pursuant to 40 C.F.R. § 22.30(b).

So Ordered.

William B. Moran
United States Administrative Law Judge

Dated: May 26, 2004