UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
J.A. SUTHERLAND, INC.	)	**DOCKET NO. CAA-09-2011-0007**
and WALBERG, INC.,	)	
	)	
RESPONDENTS	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION AND DENYING RESPONDENTS' MOTION FOR ACCELERATED DECISION AND REQUEST FOR ATTORNEY'S FEES AND COSTS

I. Procedural Background

On September 29, 2011, the United States Environmental Protection Agency ("EPA"), Region IX ("Complainant" or "the Region"), filed a Complaint against J.A. Sutherland, Inc., and Walberg, Inc. ("Respondents"), alleging one violation of the Clean Air Act, as amended, 42 U.S.C. §§ 7401-7671 ("the Act" or "CAA"). Respondents jointly filed an Answer on October 31, 2011. The Region subsequently filed a First Amended Complaint ("Amended Complaint" or "Amd. Complaint") on February 15, 2012, and Respondents filed an Amended Answer ("Amended Answer" or "Amd. Answer") on March 6, 2012. In the Amended Complaint, the Region alleges the violation of the Act through its implementing regulations at 40 C.F.R. part 61, subpart M, consisting of the National Emission Standard for Asbestos, and specifically a violation of 40 C.F.R. §§ 61.145(b)(1) and (3)(i). The hearing in this matter has been scheduled to commence on June 20, 2012, in Redding, California.

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.

On May 2, 2012, the Region filed a Notice of Motion and Motion for Partial Accelerated Decision with accompanying Memorandum of Points in Support (together "Complainant's Motion" or "C. Mot."). Complainant's Motion seeks a partial accelerated decision against Respondents on liability; it does not seek a determination of the appropriate penalty. A Joint Response of Respondents J.A. Sutherland, Inc. and Walberg, Inc. to Complainant's Motion for Partial Accelerated Decision ("Response

to Complainant's Motion" or "Resp. to C. Mot.") was filed on May 18, 2012. Complainant's Reply ("C. Reply") was served on May 29, 2012. Complainant also served an addendum to its Reply ("Addendum to Complainant's Reply" or "Add. C. Reply") on May 31, 2012.

On May 18, 2012, Respondents filed their own Notice of Motion and Motion for Accelerated Decision and Request for Attorney's Fees and Costs, as well as a Request for Official Notice in Support of Respondents' Motion for Accelerated Decision (together "Respondents' Motion" or "R. Mot."). Respondents' Motion raises precisely the same issues as Complainant's Motion. Accordingly, in exercise of the power to "make other orders concerning the disposition of motions" under 40 C.F.R. § 22.16(b), in light of the impending hearing on June 20, 2012, and to avoid any prejudice to Respondents, they were directed to construe Complainant's Reply and the Addendum to Complainant's Reply as a response to Respondents' Motion and to file a brief in reply no later than June 7, 2012.[1/] Respondents duly filed a Response in Support of Respondents' Motion for Accelerated Decision ("Response to Complainant's Reply" or "Resp. to C. Reply") on June 5, 2012. Also on June 5, 2012, Complainant filed a Response to Respondents' Motion for Accelerated Decision ("Complainant's Response") which raised no significant points beyond those already raised in Complainant's Reply.[2/]

The parties filed Joint Stipulations of Facts and Exhibits on June 1, 2012 ("Jt. Stip.) and a Supplement to Joint Stipulations of Fact and Exhibits on June 8, 2012.

II. Standard for Adjudicating a Motion for Accelerated Decision

Section 22.20(a) of the Rules of Practice authorizes the Administrative Law Judge to:

> render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

[1/] This abbreviated timetable is the inevitable consequence of the parties' late filing of their motions for accelerated decision. Without it, the final brief in relation to these motions could be filed less than one week before hearing.

[2/] Complainant's Response was not received by the undersigned until June 11, 2012.

40 C.F.R. § 22.20(a).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *See, e.g., BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Belmont Plating Works*, EPA Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65, at *8 (ALJ, Sept. 11, 2002). Pursuant to Rule 56(a) of the FRCP, a tribunal "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Therefore, federal court rulings on motions for summary judgment provide guidance for adjudicating motions for accelerated decision. *See, e.g., Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 780-82 (EAB 1993), *aff'd sub nom., Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995).

The United States Supreme Court has held that the burden of showing that no genuine issue of material fact exists rests upon the party moving for summary judgment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985); *Adickes*, 398 U.S. at 158-59. Summary judgment on a matter is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. Envtl. Prot. Agency*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

In support of or in opposition to a motion for summary judgment, a party must "cit[e] to particular parts of materials in the record," such as documents, affidavits or declarations, and admissions, or "show[] that the materials cited do not establish the absence or presence of a genuine dispute." Fed. R. Civ. P. 56(c)(1). The Supreme Court has found that, once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, the non-moving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson*, 477 U.S. at 256 (quoting *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)).

More specifically, the Supreme Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 322 (1986); *Adickes*, 398 U.S. at 160. Similarly, a simple denial of liability is inadequate to demonstrate that an

issue of fact indeed exists. *Strong Steel Products*, EPA Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57, at *22 (ALJ, Sept. 9, 2002). Rather, a party opposing a motion for accelerated decision must produce some evidence that places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *Id.* at *22-23; *see Bickford, Inc.*, EPA Docket No. TSCA-V-C-052-92, 1994 EPA ALJ LEXIS 16, at *8 (ALJ, Nov. 28, 1994).

Where the non-moving party has asserted an affirmative defense, the moving party must demonstrate that there is an absence of facts present in the record to support the defense in order to dispose of it. *Rogers Corp.*, 275 F.3d at 1103 (quoting *BWX Techs.*, 9 E.A.D. at 78). If the moving party properly shows an absence of facts supporting the defense, the non-moving party must identify "specific facts" from which a reasonable fact finder could find in its favor by a preponderance of the evidence in order to preserve the defense. *Id.*

Ultimately, "at the summary judgment stage[,] the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. Even where summary judgment is technically appropriate based upon a review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of summary judgment to allow the case to be developed fully at trial. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979); *Anderson*, 477 U.S. at 255.

III. Statutory and Regulatory Background

The primary purpose of the Act is to "protect and enhance the quality of the Nation's air resources." 42 U.S.C. § 7401(b)(1). To that end, the Act requires EPA to promulgate regulations establishing emission standards for certain stationary sources of listed hazardous air pollutants. 42 U.S.C. §§ 7412(d) and (a)(1) and (2). "Stationary source" is defined as "any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. §§ 7412(a)(3), 7411(a)(3). The emission standards are known as National Emission Standards for Hazardous Air Pollutants ("NESHAP"), and the regulations establishing them are found at 40 C.F.R. part 61 ("NESHAP Regulations"). The Act also authorizes EPA to require any person who it believes may have information necessary for various purposes to provide such information as it may reasonably require. 42 U.S.C. § 7414(a)(1)(G). One such purpose is the carrying out of any provision of the Act. 42 U.S.C. § 7414(a)(iii). In addition, EPA is authorized to prescribe such

regulations as are necessary to carry out its functions under the Act. 42 U.S.C. § 7601(a)(1).

Subpart A of the NESHAP Regulations contains general provisions that stipulate that part 61 "applies to the owner or operator of any stationary source for which a standard is prescribed under this part." 40 C.F.R. § 61.01(c). Mirroring the Act, "stationary source" is defined as "any building, structure, facility, or installation which emits or may emit any air pollutant which has been designated as hazardous by the [EPA]." 40 C.F.R. § 61.02. The NESHAP Regulations pertaining to asbestos are contained in 40 C.F.R. part 61, subpart M ("Asbestos NESHAP"), and govern the emission, handling, and disposal of asbestos, as well as containing associated record-keeping and notification requirements. 40 C.F.R. §§ 61.140 through 61.157. Subpart M applies "to those sources specified in §§ 61.142 through 61.151, 61.154, and 61.155." 40 C.F.R. § 61.140. Section 61.145 contains the standard for demolition and renovation and specifies when the requirements of paragraphs (b) and (c) of this section apply to "each owner or operator of a demolition or renovation activity, including the removal of RACM."[3/] Specifically, section 61.145(a)(2) states:

> In a facility being demolished, only the notification requirements of paragraphs (b)(1), (2), (3)(i) and (iv), (4)(i) through (vii), and (4)(ix) and (xvi) of this section apply, if the combined amount of RACM is
>
> (i) Less than 80 linear meters (260 linear feet) on pipes and less than 15 square meters (160 square feet) on other facility components, and
>
> (ii) Less than one cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously or there is no asbestos.

40 C.F.R. § 61.145(a)(2). The notification requirements imposed by paragraphs (b)(1) and (3)(i) are that each owner or operator of a demolition or renovation activity must

> (1) Provide the Administrator with written notice of intention to demolish or renovate. Delivery of the notice by U.S. Postal Service, commercial delivery service, or hand delivery is acceptable.
> . . .
>
> (3) Postmark or deliver the notice as follows:

[3/] RACM is regulated asbestos-containing material, which is defined at 40 C.F.R. § 61.141.

> (i) . . . If the operation is as described in paragraph (a)(2) of this section, notification is required 10 working days before demolition begins.

40 C.F.R. § 61.145(b)(1) and (3)(i).

IV. Undisputed Facts

The material facts in this proceeding are straightforward and noncontentious. Specifically, the parties agree to the following.

1. Respondent Sutherland was, at all relevant times, the owner of a structure located at 1301 West Wood Street in Willows, California ("Building"), in which it operated a Taco Bell fast-food restaurant. Amd. Complaint ¶ 2; Amd. Answer ¶ 2.

2. Respondent Sutherland hired Respondent Walberg to demolish the Building. Amd. Complaint ¶ 4; Amd. Answer ¶ 4.

3. Respondent Walberg demolished the Building on or around June 9-10, 2011. Amd. Answer ¶ 5.

4. Respondents did not submit a written notice of their intention to demolish the Building to EPA before demolition began. Amd. Complaint ¶ 11; Amd. Answer ¶ 11.

5. Respondents did submit a written notice of their intention to demolish the Building to EPA after demolition of the Building on June 13, 2011. It was accompanied by an asbestos survey commissioned by Respondents prior to demolition of the Building. Attachment 4 to C. Mot.; Resp. to C. Mot. at 3.[4/]

6. The Building was inspected on June 10, 2011 by an inspector from the California Environmental Protection Agency who found no evidence of asbestos-containing materials at the demolition site during his inspection. Jt. Stip. ¶ 12.

[4/] According to Respondents, the survey identified no asbestos containing material present at the Building. Resp. to C. Mot. at 2. The content and accuracy of the survey are neither admitted nor denied by Complainant.

V. Complainant's Motion

A. Complainant's Arguments

The Region's analysis of the regulatory background to this proceeding focuses on the Asbestos NESHAP. According to the Region, in order to establish liability in this proceeding, it must establish the following elements of the alleged violation:

> (a) Respondents are each an "owner or operator of a demolition or renovation activity" as defined by 40 C.F.R. § 61.141, which in turn requires proof that:
>
> > (1) Respondents are each a "person" as defined by Section 302(e) of the Act;
> >
> > (2) Respondent Sutherland owned the Building;
> >
> > (3) Respondent Walberg demolished the Building;
> >
> > (4) the Building was a "facility" as defined by 40 C.F.R. § 61.141; and
>
> (b) Respondents did not submit a written notice of intention to demolish the Building to EPA before demolition began.

C. Mot. at 7-8. These elements are dealt with in turn by the Region as summarized below.

In relation to element (a), the notification requirements of section 61.145(b) apply to "each owner or operator of a demolition or renovation activity." 40 C.F.R. § 61.145(a). According to the Asbestos NESHAP, "[o]wner or operator of a demolition or renovation activity means any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation operation, or both." 40 C.F.R. § 61.141.

In relation to element (a)(1), Section 302(e) of the Act defines "person" to include "an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof." 42 U.S.C. § 7602(e). Respondents are both corporations doing business in the State of California, and they admit that each of them is a person for the purposes of the Act. C. Mot. Attachment 2; Amd. Answer ¶ 1.

In relation to elements (a)(2) and (a)(3), Respondents further admit that Respondent Sutherland owned the Building and hired Respondent Walberg to demolish it, and that Respondent Walberg did demolish it. Amd. Answer ¶¶ 2, 4 and 5. Respondent Walberg's demolition was a "demolition" under the Asbestos NESHAP, which defines "demolition" as "the wrecking or taking out of any load-supporting structural member of [the Building] together with any related handling operations ...." 40 C.F.R. § 61.141; C. Mot. Attachment 3.

In relation to element (a)(4), according to the Asbestos NESHAP, a "facility" means "any institutional, commercial, public, industrial, or residential structure, installation, or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having four or fewer dwelling units); any ship; and any active or inactive waste disposal site." 40 C.F.R. § 61.141. Respondents admit that Respondent Sutherland operated the Building as a Taco Bell fast-food restaurant. Amd. Answer ¶ 2. According to the Region, the Building was thus a "commercial" building and, therefore, a "facility". C. Mot. at 10.

In relation to element (b), Respondents admit that they did not submit to EPA a written notice of intention to demolish the Building before demolition on June 9 and 10, 2011. Amd. Answer ¶ 11; C. Mot. Attachments 1, 3 and 4.

In summary, the Region argues that all elements of a violation of 40 C.F.R. §§ 61.145(b)(1) and (3)(i) have been met, that the presence of asbestos is not a prerequisite to a finding of liability, and that there is no genuine issue of material fact preventing a finding of liability against Respondents. C. Mot. at 11.

B. <u>Respondents' Arguments</u>

Respondents oppose Complainant's Motion on the basis that the NESHAP Regulations, including the Asbestos NESHAP, are inapplicable to the Building and its demolition because the Building is not a "stationary source." Resp. to C. Mot. at 1. Respondents emphasize that on Complainant's Motion for Accelerated Decision, the burden of proof lies squarely with Complainant.

By way of factual background, Respondents recount that they hired a Certified Asbestos Consultant prior to demolition of the Building, who concluded, after conducting an asbestos survey, that there was no asbestos-containing material present in the Building, and that Respondents then obtained a demolition permit from the Glenn County Building Department. Resp. to C. Mot. at 2

and Exhibits A, B and C. Respondents submitted a notice of demolition to EPA on June 13, 2011, only out of "an abundance of caution." Resp. to C. Mot. at 3.

With respect to the pleadings, Respondents note that their Amended Answer denied liability on the basis that the Asbestos NESHAP does not apply because the Building was not a "stationary source" and pleaded several affirmative defenses related to this argument, including one to the effect that Complainant's interpretation and application of the Asbestos NESHAP exceeds the scope of the authorizing legislation, namely the Act. *Id.*; Amd. Answer at 5-6 (Affirmative Defenses 1, 4, and 7).

Respondents criticize Complainant's focus on the Asbestos NESHAP as myopic and instead concentrate their analysis of the regulatory background on the general provisions of the NESHAP Regulations. Resp. to C. Mot. at 5. According to Respondents, section 61.01(c) of the NESHAP Regulations expressly states that "[t]his part applies to the owner or operator of any stationary source . . . ." Because the Asbestos NESHAP is contained in part 61, its applicability is limited by the term "stationary source." Resp. to C. Mot. at 5 and 6 (citing 40 C.F.R. § 61.01(c)). They further contend that in order to be a stationary source, a building must be one that "emits or may emit an air pollutant that has been designated as hazardous . . . ." *Id.* at 6 (citing 40 C.F.R. § 61.02). Respondents conclude that a building that cannot emit a hazardous air pollutant is not a stationary source and is not subject to regulation under the NESHAP Regulations, including the Asbestos NESHAP. Resp. to C. Mot. at 6. Because the Building did not contain asbestos, Respondents reason, it cannot be governed by the Asbestos NESHAP.

In support of this conclusion, Respondents rely on *United States v. Ben's Truck & Equipment, Inc.*, 1986 U.S. Dist. LEXIS 25595 (E.D. Cal. May 12, 1986) ("*Ben's Truck & Equipment*"). According to Respondents, "[t]he District Court explicitly stated that one of the threshold requirements for the asbestos NESHAP was that defendant was an owner or operator of a 'stationary source.'" Resp. to C. Mot. at 7 (citing *Ben's Truck & Equipment*, 1986 U.S. Dist. LEXIS at *8). Respondents also refer to EPA's penalty policy guidelines relied on in this case: Clean Air Act Stationary Source Civil Penalty Policy dated October 25, 1991, and General Clean Air Act Stationary Source Policies and Guidance dated May 11, 1992. The former states in its introduction on page 1 that "[t]his guidance governs only stationary source violations of the Clean Air Act." Resp. to C. Mot. at 7 and Exhibit D.

According to Respondents, by ignoring 40 C.F.R. § 61.02(c), the Region violates fundamental rules of statutory construction, which require that all parts of a statutory or regulatory scheme be given effect if possible. Resp. to C. Mot. at 7-8 (citing

Lyon v. Chase Bank USA, N.A., 656 F.3d 877, 890 (9th Cir. 2011)). They conclude that it is entirely possible to give effect to all provisions of the NESHAP regulations here. Resp. to C. Mot. at 8. Respondents also note that the Act limits EPA's authority by directing it to promulgate regulations establishing emission standards for certain types of "stationary sources," which is defined in the Act as "any building, structure, facility, or installation which emits or may emit any air pollutant." Resp. to C. Mot. at 8 (citing 42 U.S.C. §§ 7412(a)(1) & (2), 7412(d), and 7411(a)). According to Respondents, by ignoring the stationary source limitation in the NESHAP Regulations, the Region misapplies its own regulations and ignores the limits of the power Congress delegated to it in the Act. Resp. to C. Mot. at 9.

Finally, Respondents argue that the Region has failed to allege in the Complaint, Amended Complaint, or Complainant's Motion that the Building was a stationary source (*i.e.*, a building that emits or may emit a hazardous air pollutant) and has failed to submit evidence to support such an allegation. Resp. to C. Mot. at 9. Furthermore, they contend, the clear requirement of the NESHAP Regulations cannot be read to reflect an underlying policy that requires notification of all planned demolitions. Resp. to C. Mot. at 9-10 (citing *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995)).

C. Complainant's Counter-Arguments

The Region responds with the following arguments.

Under the canon of statutory construction (also applicable to regulations), according to which the specific terms of a statute generally override its general terms, in the present proceeding and contrary to Respondents' view, "the applicability provision at § 61.145(a) . . . controls in this matter and Complainant has already established in its Motion that Respondents are each an 'owner and operator of a demolition activity.'" C. Reply at 2 (citing *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957) ("*Fourco Glass Co.*")).

Regarding Respondents' contention that Complainant's interpretation of the NESHAP Regulations exceeds the scope of the authorizing statute, the plain language of 40 C.F.R. § 61.145(a)(2) unequivocally states that, in a facility being demolished, the relevant notification requirements apply even if there is no asbestos. C. Reply at 2.

The Asbestos NESHAP was promulgated in part pursuant to Sections 114 and 301 of the Act. C. Reply at 2 (citing 55 Fed. Reg. 48,406, 48,414 (November 20, 1990)). Section 114(a)(1)(G) authorizes EPA to require any person to "provide such information

as [EPA] may reasonably require" for the purpose, *inter alia*, "(iii) of carrying out any provisions of [the Act]." 42 U.S.C. § 7414(a)(1)(G). Section 301(a)(1) authorizes EPA to "prescribe such regulations . . . as are necessary to carry out [its] functions under [the Act]." 42 U.S.C. § 7601(a)(1). Neither authority is limited to stationary sources. C. Reply at 2-3. EPA's position is that every facility being demolished has the potential to emit asbestos until EPA or a delegated agency can verify that there is no asbestos present. C. Reply at 4. This position is based upon the fact that the Asbestos NESHAP governing renovations and demolitions is designed to prevent emissions of asbestos fibers to the outside air and, in the case of § 61.145(b), to enable EPA to send an inspector to a site before renovation or demolition begins to ensure compliance. C. Reply at 3 and Attachment A at 3. Prior notification has proved particularly necessary in the case of demolitions that are completed quickly and often in circumstances where asbestos is present despite the assertions of building owners and demolition contractors to the contrary. C. Reply at 4 and Attachment B ¶ 7.1.3. The Region cites to *Northern Improvement Company*, EPA Docket No. CAA-VIII-(113)-93-10, 1996 EPA ALJ LEXIS 110 (ALJ, Oct. 13, 1995) (Order Denying Respondent's Motion to Dismiss and Granting Complainant's Motion for Partial Accelerated Decision) ("*Northern Improvement*"), in which the Honorable Spencer T. Nissen concluded that "the Agency's determination that enforcement of the Act requires notification of all proposed demolition of buildings and structures irrespective of whether asbestos is present is reasonable and would be upheld by the courts." *Northern Improvement*, 1996 EPA ALJ LEXIS 110, at *11.

The Region asserts that, to the extent that Respondents challenge the validity of 40 C.F.R. § 61.145(a)(2) as it applies to them because of the absence of asbestos, such challenges are rarely entertained in administrative enforcement proceedings. C. Reply at 5 (citing *South Coast Chemical, Inc.*, 2 E.A.D. 139, 145 (CJO 1986); *Northern Improvement*, 1996 EPA ALJ LEXIS 110, at *11-12; 55 Fed. Reg. at 48,406).

In its Addendum to Complainant's Reply, the Region argues that Respondents' reliance on *Ben's Truck & Equipment* is misplaced because the decision in that case was based on an earlier and different version of the Asbestos NESHAP.[5/] Specifically, the earlier version did not define "owner or operator of a demolition or renovation activity"; it did not state that, for a facility being demolished, notification was required even if there was no asbestos; and the notification

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[5/] National Emission Standards for Hazardous Air Pollutants; Amendments to Asbestos Standard, 49 Fed. Reg. 13,658, 13,661-62 (Apr. 6, 1984).

requirements section was not explicitly stated to apply to an "owner or operator of a demolition or renovation activity." Add. to C. Reply at 1-2 and Attachment C.

D. Respondents' Counter-Arguments

The Response to Complainant's Reply makes three challenges to Complainant's case, each of which is summarized below.

According to Respondents, the Region's reliance on *Fourco Glass Co.* is misplaced because it involved very different facts: the court chose to apply the more specific of two entirely separate venue statutes; there was no "limiting provision" like 40 C.F.R. § 61.01(c), which limits the applicability of the NESHAP Regulations to owners and operators of stationary sources; and there was no interplay between the statutes similar to that created by 40 C.F.R. § 61.141, which incorporates the definitions in subpart A into the Asbestos NESHAP at subpart M. Further, applying the general rule in *Fourco Glass Co.* results in the Asbestos NESHAP applying to a bigger universe of persons than the NESHAP Regulations generally; the absence of a caveat in § 61.01(c) to the effect that it applied "except as otherwise noted" means that a reasonable person would read that section and conclude that only owners and operators of stationary sources were governed by the Asbestos NESHAP - a conclusion reinforced by use of the phrase "applicability of part 61" to describe § 61.01 in the table of contents for the NESHAP Regulations. Resp. to C. Reply at 3-4.

Respondents next clarify the fact that they are not contesting the validity of the regulations at issue, or EPA's authority to promulgate them. Rather, they challenge what they characterize as the Region's "selective reading and unsupported interpretation of the regulations." Resp. to C. Reply at 5. Respondents also challenge the Region's reliance on *Northern Improvement* because that decision did not address the precise meaning of the NESHAP Regulations and, in particular, the effect of § 61.01(c). Resp. to C. Reply at 5-6.

Finally, Respondents seek to rebut Complainant's suggestion that *Ben's Truck & Equipment* is no longer good law. They contend that the only notable difference between the current NESHAP Regulations and the 1984 version considered in *Ben's Truck & Equuipment* is that the 1984 version omitted the words "or there is no asbestos," and that it does not "gut the stationary source limitation from the regulatory scheme." Resp. to C. Reply at 7-9.

E. Discussion

In light of Respondents' confirmation that they challenge neither the validity of the regulations at issue nor EPA's authority to promulgate them, the parties' arguments dealing with those issues can be dispensed with. This clarification is welcome because, as pointed out by the Region, "[t]o entertain such a challenge . . . would violate the general rule that attacks on the validity of agency regulations are rarely entertained in the context of an administrative enforcement hearing absent the most compelling of reasons." *S. Coast Chem., Inc.*, 2 E.A.D. 139, 145 (CJO 1986) (citing *Am. Ecological Recycle Research Corp.*, 2 E.A.D. 62, 64-65 (CJO 1985)); *see also Woodkiln Inc.*, 7 E.A.D. 254, 270 n.16 (EAB 1997).

The kernel of Respondents' case is that the NESHAP Regulations (including the Asbestos NESHAP) apply only to "the owner or operator of any stationary source for which a standard is prescribed under [the NESHAP Regulations]." 40 C.F.R. § 61.01(c). They reason as follows: because section 61.01(c) is contained in subpart A of the NESHAP Regulations, which is entitled "General Provisions," and section 61.01 itself is entitled "Lists of pollutants and applicability of part 61," it is clearly intended to apply to the NESHAP Regulations in their entirety. "Stationary source" is defined as "any building, structure, facility, or installation which emits or may emit any [hazardous] air pollutant . . . ." 40 C.F.R. § 61.02. According to Respondents, this definition unambiguously excludes any building, structure, facility, or installation that does not contain asbestos. Respondents' argument has some appeal but ultimately, for the reasons given below, is specious.

In interpreting a regulation, "the normal tenets of statutory construction are generally applied." *Howmet Corp.*, 13 E.A.D. 272, 282 (EAB 2007) (citing *Bil-Dry Corp.*, 9 E.A.D. 575, 595 (EAB 2001) and *Black & Decker Corp. v. Comm'r*, 986 F.2d 60, 65 (4th Cir. 1993)). One such tenet is that the "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) ("*Ginsberg & Sons*"); *see also RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, ---U.S.---, 2012 U.S. LEXIS 3944, at *10 (May 29, 2012) ("*RadLAX Gateway Hotel*") ("We find the debtors' reading of § 1129(b)(2)(A), under which clause (iii) permits precisely what clause (ii) proscribes - to be hyperliteral and contrary to common sense . . . . It is a commonplace of statutory construction that the specific governs the general.") (internal quotation marks and brackets omitted); *Bloate v. United States*, 2010 U.S. LEXIS 2205, at *23 (March 8, 2010); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989) ("A general statutory

rule usually does not govern unless there is no more specific rule").

Contrary to Respondents assertions, I do not find that section 61.01(c) mandates, as a prerequisite, that the regulated party be the owner or operator of a stationary source. Here, the Asbestos NESHAP in subpart M of the NESHAP Regulations is governed by the specific applicability provision found in section 61.145(a), rather than the general applicability provision of section 61.01, subpart A. This conclusion is strengthened by the fact that the first section of subpart M, section 61.140 entitled "Applicability", states that "[t]he provisions of this subpart are applicable to those sources specified in §§ 61.142 through 61.151, 61.154, and 61.155." Section 61.145(a) is unambiguous in stating that, in a facility being demolished, the notification requirements of section 61.145(b)(1) and (3)(i) apply where there is no asbestos.[6/] None of Respondents' arguments to the contrary are compelling, but they are addressed below.

Respondents are correct that the posture of *Fourco Glass Co.* differs from that of the instant proceeding, but that fact does not undermine the validity of the general rule that a specific statutory or regulatory provision prevails over a general provision, as is clear from the Supreme Court decisions cited above. The fact that section 61.01 is a limiting provision is neither here nor there. As the Court stated in *RadLAX Gateway Hotel*, "[t]he general/specific canon is perhaps most frequently applied to statutes in which a general permission or *prohibition* is contradicted by a specific prohibition or permission." 2012 U.S. LEXIS 3944, at *11 (emphasis added). Regarding Respondents' objection that the Region's interpretation would apply the Asbestos NESHAP to a bigger universe of persons than the NESHAP Regulations generally, the Court in *RadLAX* addressed this issue too:

> [W]e know of no authority for the proposition that the canon is confined to situations in which the entirety of the specific provision is a "subset" of the general one. When the conduct at issue falls within the scope of *both* provisions, the specific presumptively governs, whether

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[6/] I acknowledge that the Asbestos NESHAP could have been drafted with greater clarity. The reference in section 61.145(a)(2)(ii) to "no asbestos" is somewhat obscured by the overall structure of section 61.145, and the applicability of section 61.145 to "the owner or operator of a demolition or renovation activity" is referred to almost in passing in section 61.145(a). Nevertheless, its clear meaning is apparent on careful reading.

> or not the specific provision also applies to some conduct that falls outside the general.

Id. at *16 (emphasis in original).

Respondents also suggested that the reasonable reader would be misled by the absence of a caveat such as "except as otherwise noted" to section 61.01, and by the title of section 61.01 in the NESHAP Regulations' table of contents. First, the rules of statutory and regulatory interpretation serve the purpose of such a caveat and render it redundant. Second, Respondents' complaint about the misleading effect of the title of section 61.01 is unconvincing. A reasonable reader might be expected to read the regulations themselves, rather than being diverted by the table of contents. In any event, no less than fifteen other subparts (not including subpart M) are listed in the table of contents as having specific applicability provisions, which should suggest to the reasonable reader that the general applicability provision of section 61.01 does not have universal application.

Respondents' concern that all parts of a statutory or regulatory scheme be given effect if possible is respected by reading section 61.01 as cabined by section 61.145 because the former section continues to apply in all situations where it is not displaced by a more specific provision. Respondents' concern did not stretch to the fate of the words "or there is no asbestos" in section 61.145, which, under their reading of the NESHAP Regulations, would be entirely written out. Although Respondents deny that they attack the validity of the Asbestos NESHAP, their arguments have the effect of inviting me to strike from them the unequivocal instruction that the notification requirements for demolitions apply even if there is no asbestos: this is a direct attack on the validity of part of the NESHAP Regulations. By reading the specific provision as prevailing over the general, all parts of the NESHAP Regulations, including the phrase "or there is no asbestos," have effect. As the Court in *RadLAX Gateway Hotel* observed, "the canon avoids . . . the superfluity of a specific provision that is swallowed by the general one, 'violat[ing] the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." 2012 U.S. LEXIS 3944, at *11-12 (citing *Ginsberg & Sons*, 285 U.S. at 208).

Turning to Respondents' reliance on *Ben's Truck & Equipment* as authority for the proposition that it is a threshold requirement for the Asbestos NESHAP that the defendant be the owner or operator of a stationary source, the relevance of this case to the instant proceeding is diminished by the fact that the current NESHAP Regulations and the 1984 version in effect at the time of alleged violations in *Ben's Truck & Equipment* differed. Specifically, the latter did not contain the words "or there is

no asbestos" and did not define "owner or operator of a demolition or renovation activity."[7/] Further, the defendant in that case conceded that it was the owner or operator of a stationary source and that the building in question did contain asbestos. The applicability of the Asbestos NESHAP was simply not in issue. Accordingly, there was no perceived conflict between the text of the general and specific applicability provisions and no detailed consideration of the relationship between them or the effect of the tenet of statutory construction according to which a general provision gives way to a specific one. Inasmuch as *Ben's Truck & Equipment* is readily distinguishable from the instant proceeding, I do not find it to be controlling. Nevertheless, as explained below, the suggestion that the Asbestos NESHAP applied to stationary sources is not necessarily inconsistent with EPA's interpretation of the NESHAP Regulations.

Where the meaning of a regulation is clear, scrutiny of the Agency's interpretation of its regulations is unnecessary. There is no scope for interpretation. However, where there is ambiguity or a conflict in agency regulations, the Agency's interpretation of those regulations is controlling unless plainly erroneous or inconsistent with the regulations. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Despite the clarity of the NESHAP Regulations, in light of Respondents' perception of ambiguity, *arguendo*, the Region's interpretation of the notification requirements of the Asbestos NESHAP as applying to demolitions where there is no asbestos is considered below. This consideration must assume that there is, potentially, a conflict between the provisions of sections 61.01 and 61.145 in order to determine whether the Agency's resolution of that potential conflict is permissible. The purposes of the Act, the regulatory history of the NESHAP Regulations, their language, and the EPA's own consistent interpretation of them are all relevant factors in this inquiry. *See Howmet Corp.*, 13 E.A.D. 272, 282 (EAB 2007).

The potential conflict here arises from the definition of "stationary source" as "any building . . . which emits or may emit any [hazardous] air pollutant," which Respondents regard as inconsistent with the absence of asbestos in a building. The phrase "may emit" assumes that there is uncertainty regarding the capacity of a building to emit a hazardous air pollutant but does not resolve that uncertainty by specifying the point at which or by whom this judgment is to be made. If Respondents' argument were correct, the judgment would be made by the owner or operator of a building. EPA believes that, in the case of asbestos

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[7/] The same is true of *United States v. Trident Seafoods Corp.*, 60 F.3d 556 (9th Cir. 1995).

demolition, it should make this judgment prior to inspection of a building, at which point it does not know if a hazardous air pollutant is present and it can legitimately say that it may be. This interpretation leads logically to the requirement that notification of a demolition must be given to EPA even where there is no asbestos.

The primary purpose of the Act is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare . . . ." 42 U.S.C. § 7401(b)(1). In addition to the requirement that EPA promulgate regulations establishing emission standards for certain stationary sources of listed air pollutants, 42 U.S.C. §§ 7412(d) and (a)(1) and (2), the Act also authorizes EPA to require any person who it believes may have information necessary for the carrying out of any provision of the Act to provide such information as it may reasonably require, 42 U.S.C. § 7414(a)(1)(G) and (a)(iii). In addition, EPA is authorized to prescribe such regulations as are necessary to carry out its functions under the Act. 42 U.S.C. § 7601(a)(1).[8/] Regardless of the extent to which EPA relied on Sections 7414 and 7601 in promulgating the notification requirements of the Asbestos NESHAP, those requirements are consistent with the apparent intent of Congress that EPA should have broad powers to enforce the NESHAP Regulations contemplated by the Act.

It appears that, even before the addition of the words "or there is no asbestos" to section 61.145(a)(2)(ii), the notification requirements of the Asbestos NESHAP were interpreted by EPA as applying where a building contained no asbestos.[9/]

[8/] The Region notes that the most recent amendments to the Asbestos NESHAP were made pursuant to Sections 7414 and 7601 of the Act, which are not limited to stationary sources, as well as pursuant to Section 7412, which is so limited. Certainly, the Final Rule for the 1990 Amendments amends the authority citation for subpart M to refer to 42 U.S.C. §§ 7401,7412, 7414, 7416, and 7601, but the first page summary states that the Final Rule is promulgated under Section 7412 of the Act. This ambivalence is perhaps reflected in EPA's Clean Air Act penalty policy guidelines, which are described as applying to stationary sources. In some instances, there appears to be an assumption on EPA's part that only stationary sources are subject to the NESHAP Regulations, but that assumption is not dictated by the meaning of the NESHAP Regulations themselves.

[9/] See letter from John S. Seltz, Director, Stationary Source Compliance Division, Office of Air Quality Planning and Standards, EPA to William L. Baker, Executive Director, National Association

(continued...)

This interpretation was possible because the notification requirements of the earlier version applied if "the amount of friable asbestos materials in a facility being demolished is less than 80 linear meters (260 linear feet) on pipes and less than 15 square meters (160 square feet) on other facility components." National Emission Standards for Hazardous Air Pollutants; Amendments to Asbestos Standard, 49 Fed. Reg. 13,658, 13,662 (Apr. 5, 1984). EPA took the somewhat literal view that no asbestos was less than the amount specified in the Asbestos NESHAP. The express reference to "no asbestos" was added in 1990 by way of clarification. Asbestos NESHAP Revision, Including Disposal of Asbestos Containing Materials Removed From Schools, 54 Fed. Reg. 912, 917 (Jan. 10, 1989). The 1990 regulations also added the requirement that notification be provided in a form similar to that shown in figure 3. 40 C.F.R. § 61.145(b)(5). Line IV of the form in figure 3 reads as follows: "IS ASBESTOS PRESENT? (Yes/No)."

EPA's position that every facility being demolished has the potential to emit asbestos until EPA or a delegated agency can verify that there is no asbestos present is based on its experience of public compliance with and enforcement of previous versions of the Asbestos NESHAP. It is expressed in the requirement that notification of demolition be given to EPA even if there is no asbestos, and this requirement (and sometimes its rationale) has been expressed in various publicly available documents. For example, the notice of proposed rule revision for the current Asbestos NESHAP states that "a proposed amendment clarifies the current requirement that notifications must be made for all demolitions, *even when no asbestos is present*, in order to promote compliance and aid enforcement." EPA's "Common Questions on the Asbestos NESHAP," dated December 1990, confirms that "the regulations require the owner of the building and/or the contractor to notify applicable State and local agencies and/or EPA Regional Offices before all demolitions"; that "all demolitions must notify the appropriate regulatory agency, even if no asbestos is present at the site"; and that all "demolitions of facilities in which no asbestos is present require notification."[10/] EPA 340/1-90-021 (1990) at 1, 4, and 7. Likewise, in EPA's "Background Information for Promulgated Asbestos NESHAP Revisions," dated October 1990, the following text appears:

[9/] (...continued)
of Demolition Contractors, dated July 19, 1988, and published on EPA's Applicability Determination Index, accessible from http://www.epa.gov/compliance/monitoring/programs/caa/adi.html.

[10/] Available at http://nepis.epa.gov.

> Demolitions are final events, and buildings are usually demolished quickly. The EPA and delegated States do not have the resources necessary to inspect every building to be demolished prior to demolition; therefore, the implementing agency prioritizes its inspections, concentrating its enforcement resources on the sites that are likely to result in significant emissions to the air if improperly demolished, as well as on those contractors who have not demonstrated a continuous compliance program.
>
> In order to ensure that the facility owner or demolition contractor has accurately evaluated and analyzed the site for the presence of asbestos, it is necessary that the implementing agency be notified prior to the onset of the demolition. The EPA has repeatedly discovered, after the demolition, that asbestos was present in spite of building owners' and contractors' claims to the contrary.
>
> There is a strong economic incentive for building owners and also for contractors to claim less than the quantity cutoff levels.
>
> . . .
>
> A similar incentive to underreport (and to not inspect) would also exist if there were no reporting requirements for facilities with no asbestos. As such, the purpose of the requirement to report even when no asbestos is found is not to identify the facilities with no asbestos; rather, it is to ensure that facilities are inspected for asbestos and that removal is performed consistent with the standard.

EPA 450/3-90-017 (1990) ¶ 7.1.3.[11/] These publications all serve to rebut Respondents' criticism that the Region has not formulated an official interpretation of its regulations and is merely advancing a litigation position.

In view of the purpose of the Act, the broad authority granted to EPA under it, the fact that EPA has determined that "asbestos presents a significant risk to human health as a result of air emissions,"[12/] the common-sense rationale for EPA's position, and the consistency with which EPA has held and publicized that position, it is entirely reasonable to interpret the requirement that a building emits or may emit asbestos from

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[11/] C. Reply, Attachment B. Available at http://nepis.epa.gov.

[12/] 55 Fed. Reg. 48,406 (November 20, 1990)

the standpoint of the Agency prior to inspection. It follows that there is no inconsistency between this requirement and the applicability of the demolition notification requirements for asbestos to buildings where there is, in fact, no asbestos. According to the plain meaning of the NESHAP Regulations, the Region is not required to demonstrate that the Building was a stationary source.[13/] Nevertheless, I believe that it is able to do so if required.

Finally, with regard to Respondents' passing reference to their first, fourth and seventh affirmative defenses (in their Response to Complainant's Motion at page 3), those defenses are untenable in light of the above conclusions, as are the third and fifth affirmative defenses to which Respondents made no reference in the context of Complainant's Motion. I treat Respondents' second and sixth affirmative defenses as abandoned based on Respondents' failure to raise them to defeat Complainant's Motion.

In light of the above, I agree with the Region's analysis of the elements of the alleged violation that it must prove in order to establish liability, as set out at pages 6 and 7 above. As there is no dispute between the parties regarding the facts pertaining to those elements, the Region's Motion for Partial Accelerated Decision in relation to liability is **GRANTED.**

VI. Respondents' Motion

Respondents' Motion is based on the assertion that Complainant does not possess, and cannot obtain, the evidence necessary to establish a required element of the alleged violation, namely that Respondents are owners or operators of a stationary source. The contents of Respondents' Motion are very similar to the contents of their Response to Complainant's Motion, but in addition, it contains information and evidence in the form of affidavits intended to demonstrate that, at the time of demolition, there was no asbestos present in the Building, and that Complainant was aware of this information prior to instituting this proceeding. As the NESHAP Regulations do not require that Respondents be owners or operators of a stationary source or, if they do, the definition of "stationary source" is reasonably interpreted by Complainant as being met regardless of the presence of asbestos, Respondents' assertion and supporting evidence are irrelevant to the question of liability.

[13/] Respondents correctly point out that the Complaint does not allege that the Building is a stationary source. Resp. to C. Mot. at 9.

Accordingly, Respondents have failed to demonstrate that they are entitled to judgment as a matter of law and Respondents' Motion is **DENIED.** As such, Respondents' request for reimbursement of attorney's fees and costs is also **DENIED.**

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Barbara A. Gunning
Administrative Law Judge

Dated: June 11, 2012
Washington, DC