UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	**)**	
	)	
GYPSUM NORTH CORPORATION, INC.	**)**	**Docket No. CAA-02-2001-1253**
	)	
Respondent	**)**	

ORDER ON MOTIONS FOR ACCELERATED DECISION

On February 28, 2002, the Complainant, United States Environmental Protection Agency (EPA), filed its Motion for Partial Accelerated Decision. EPA's motion seeks accelerated decision against Respondent on the issue of liability as to all counts and seeks to limit the hearing to penalty matters. EPA's motion alleges violations of Clean Air Act asbestos regulations at the site of the former Lawter Chemical Company plant in Kearny, New Jersey. Those regulations are the National Emissions Standards for Hazardous Air Pollutants (NESHAP) for asbestos. On March 19, 2002, Respondent Gypsum North Corporation, Inc. (Gypsum) and former Respondent Frank Kearney filed their "Cross Motion to Dismiss All Counts of the Complaint" along with their "Brief of Respondents in Opposition to Motion for Partial Accelerated Decision and in Support of Their Cross-Motion for Accelerated Decision." Upon an earlier filed Motion to Dismiss, the Court dismissed all charges against Mr. Kearney on March 19, 2002. On March, 27, 2002, the Complainant filed its Response to the Respondent's Cross-Motion for Accelerated Decision.

A threshold matter is the timeliness of Respondent's cross-motion for accelerated decision. The Court instructed the parties that no motions could be filed after February 28, 2002. Respondent does not set forth compelling reasons for missing this deadline by more than two weeks. Therefore, Respondent's cross-motion for accelerated decision is not timely. Respondent's Cross-Motion for Accelerated Decision is **DENIED.**[1]

I. Standard for Accelerated Decision

These proceedings are governed by the "Consolidated Rules of Practice," 40 C.F.R. § 22.1 et seq., instead of the Federal Rules of Civil Procedure. *Katzon Bros., Inc. v. U.S. EPA*, 839 F.2d

[1] This Ruling does not affect the Court's consideration of Respondent's responses to EPA's Motion for Partial Accelerated Decision.

1396, 1399 (10th Cir. 1988); *see also Baker v. Latham Sparrowbush Assoc.*, 72 F.3d 246, 255 (2nd Cir. 1995). The Rules of Practice authorize the Court to "[R]ender an accelerated decision in favor of a party as to any or all parts of the proceeding . . . if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a). A motion for accelerated decision is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Procedure. *In re CWM Chem. Servs.*, Inc., 6 E.A.D. 1 (E.P.A., "Order on Interlocutory Appeal," 1995); *In the Matter of Chem Lab Products, Inc.*, Docket No. FIFRA-9-2000-0007, 2001 EPA ALJ LEXIS 10 ("Order Granting Complainant's Motion for Accelerated Decision as to Liability," Jan. 26, 2001). Granting a motion for accelerated decision is appropriate only when the moving party demonstrates that there exists no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986). In deciding such motions, the Court views the evidence in a light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *In the Matter of Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (E.P.A., Nov. 28, 1994).

II. Count I of the Complaint – Failure to Submit Written Notification to EPA Before Demolition

Count I of the Complaint charges the Respondent with a violation of 40 C.F.R. § 61.145(b)(1) and (b)(3)(i), which requires owners and operators of a demolition activity to provide written notice of intent to demolish to EPA at least 10 working days in advance of the activity. The EPA has provided proof supporting its charge that the Respondent failed to submit the requisite written notification. In a sworn affidavit, Robert Fitzpatrick, an employee of the EPA, declares that he has reviewed EPA's records to determine whether a written notification of demolition as required by Section 61.145(b)(1) and (b)(3)(i) was submitted to EPA. *See* Motion of the U.S. EPA for Partial Accelerated Decision, Ex. C, ¶ 14. Mr. Fitzpatrick further declares that his review of EPA records revealed that neither Gypsum nor Mr. Kearney submitted written notification prior to October 25, 2000. Further documentation provided by the EPA indicates that the Respondent was conducting demolition activities on or about October 25, 2000 at the site of the former Lawter Chemical company.

Respondent has not set forth any evidence that would contradict Mr. Fitzpatrick's affidavit, and it does not claim that it submitted the written notification of demolition. However, Respondent challenges the applicability of the asbestos NESHAP to its alleged demolition activities at the site of the former Lawter Chemical plant. Gypsum, in its brief, maintains that it is not an owner or operator as to the demolition site.

The pre-demolition notification requirements charged in Count I apply to the owner or operator of a demolition activity. 40 C.F.R. § 61.145(a). The asbestos NESHAP defines the "owner or operator of a demolition or renovation activity" 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 operation, or both." 40 C.F.R. § 61.141.

Multiple documents establish that Gypsum is an owner and/or operator of the demolition activity. For instance, the deed to the site of the demolition activity, which was provided by the Respondent, describes Gypsum as the grantee of the property and thus shows that Gypsum is an owner within the meaning of the regulations. *See* "Motion to Dismiss all Counts of the Complaint as Against Frank Kearney," Ex. B.[2] Furthermore, as pointed out by Respondent, a New Jersey Department of Environmental Protection waste shipping document identifies Gypsum as the subject property owner. *See id*., Ex. D. Respondent Gypsum also admits that it directed Jay Brady to apply for a demolition permit on behalf of Gypsum for the site of the demolition. *See id*. at 1 and Ex. E. In a certification, Mr. Brady explains that Gypsum was the contractor of the demolition activity. This shows that Gypsum is also an operator of the demolition activity. Gypsum has not provided the Court with any evidence that would present a genuine issue of material fact to dispute EPA's proof that Gypsum is an owner and/or operator of the demolition activity.[3]

Additionally, Respondent's Answer, at ¶ 14, maintains that the asbestos NESHAP does not require "[A]n owner or operator of a demolition project to provide prior written notice before demolition begins where a demolition project is certified and/or represented by a licensed contractor not to have suspected asbestos-containing materials." Respondent provides evidence that the demolition site was inspected prior to demolition by a licensed inspector and that the inspector did not discover any asbestos. *See* RX 1 and RX 19. The asbestos NESHAP does require the inspection of a facility prior to demolition, *but* the inspection requirement is imposed to inform an owner or operator as to "which requirements" of the asbestos NESHAP apply to the owner or operator. 40 C.F.R. § 61.145(a). It is clear that the hazardous air pollutant standards for asbestos, including the pre-demolition notice requirement, impose strict liability on an owner or operator. *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 529 (E.P.A. 1998); *In re Echevarria*, 5 E.A.D. 626, 633 (E.P.A. 1994). The asbestos NESHAP requires the 10-day pre-demolition notification to the EPA without respect to whether an owner or operator has *actually* discovered asbestos. *See* 40 C.F.R. § 61.145(a)(2), (a)(2)(i)-(ii). The strict liability of the asbestos NESHAP is not thwarted by an inspector's competency or lack thereof. As such, Respondent's argument lacks merit.

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[2] The "Motion to Dismiss all Counts of the Complaint as Against Frank Kearney," although it seeks to provide relief for Mr. Kearney, was prepared by the same attorney and the same law firm as the "Cross-Motion to Dismiss All Counts of the Complaint." The Motion to Dismiss and attached brief describe the law firm and attorney as representing both Gypsum and Mr. Kearney.

[3] As previously discussed, the Rules of Practice, rather than the Federal Rules of Civil Procedure, apply to this administrative proceeding. Respondent's bare allegations that the previously mentioned documents and other documents, some of which the Respondent supplied, are hearsay or lack authentication do not present a genuine issue of material fact.

Finally, Respondent claims, in its response to EPA's motion, that the threshold requirements needed to establish a notification violation have not been satisfied. Unlike other requirements under the asbestos NESHAP, the pre-demolition notification requirements apply *even if* the threshold amount of asbestos set for failure to remove asbestos and failure to keep asbestos adequately wet is not achieved. Section 61.145(b)(1) and (b)(3)(i) applies as to a facility being demolished even "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), (a)(2)(i)-(ii) (emphasis supplied); *see also United States v. Owens Contracting Servs., Inc.*, 884 F. Supp. 1095, 1099-1100 (E.D. Mich. 1994).

Furthermore, the EPA has proven that there was at least some Regulated Asbestos-Containing Material (RACM) present at the demolition site. Under the asbestos NESHAP, the presence of friable asbestos material establishes the material as RACM. *See* 40 C.F.R. § 61.141 (definition of "RACM," which includes "Friable Asbestos Material"). Mr. Fitzpatrick's affidavit informs that he gathered samples at the demolition site and sent those samples for testing. *See* Motion of the U.S. EPA for Partial Accelerated Decision, Ex. C. Those samples were tested by a Federal Occupational Health Services (FOHS) laboratory accredited for asbestos bulk analysis. *See* CX 7. The FOHS's laboratory report concluded that these samples were "friable" and consisted of as much as 40% asbestos. *See id*. The tests were conducted using polarized-light microscopy (PLM) as called for by the asbestos NESHAP. *See id*. Respondent has not put forth any tests of its own or any other evidence to contest the validity of EPA's evidence. It is not necessary for EPA to prove that a threshold of 260 linear feet on pipes or 160 square feet on other components was achieved.

The Complainant has proven by a preponderance of the evidence that Respondent failed to submit its pre-demolition notification to the EPA as required by Section 61.145(b)(1) and (b)(3)(i). The Court concludes that the Complainant has sustained its burden of proof as to Count I and that there is no genuine dispute of material fact as to this count.

III. Counts II and III of the Complaint – Work Practice Requirements: Failure to Remove RACM Prior to Demolition and Failure to Keep RACM Adequately Wet

Count II of the Complaint charges Respondent with violation of 40 C.F.R. § 61.145(c)(1), which requires the owner or operator of a demolition project to remove all RACM from a building that is scheduled to be demolished before any activity begins that would break up, dislodge, or similarly disturb the material or preclude access to the material for subsequent removal. Count III charges Respondent with a violation of 40 C.F.R. § 61.145(c)(6), which requires that an owner or operator of a demolition activity adequately wet RACM and ensure that it remains wet until it is collected and contained or treated in preparation for appropriate disposal.

Both of the regulations charged by Counts II and III are subject to threshold amounts, which limit their applicability to certain demolition activities. In particular, these regulations are applicable if the combined amount of RACM within a facility being demolished 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, or (ii) At least 1 cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously." 40 C.F.R. § 61.145(a)(1), (a)(1)(i)-(ii). Respondent argues that EPA has not established that the threshold amount was present.[4]

On the matters of the threshold amount, there is the "Notice of Abatement" completed by the remediating company, E-CON, which describes the amount of asbestos removed from the facility. *See* Motion of the U.S. EPA for Partial Accelerated Decision, Ex. B. Both parties submitted this document in their prehearing exchanges. Respondent challenges the accuracy of this form, claiming that it is at best only an estimate of the amount of asbestos that was to be removed from the facility.[5] In contrast, the EPA claims that the abatement form clearly shows that the threshold requirements have been met. Reviewing the form, there is a check mark next to a scope of work description of ">160 sf [square feet] or >260 lf [linear feet]." However, that section does not indicate whether or not the material is RACM, as is required by the threshold requirements, or if it is merely asbestos-containing material that is not regulated. Elsewhere, the form indicates that 500 square feet of thermal insulation would be abated, but this description is under a heading describing the material as asbestos-containing material but does not specify whether the material is RACM or how much of it is RACM. Furthermore, E-CON's certificate of abatement, CX 12, indicates that 13 containers of asbestos were removed but does not clarify how much of that removed asbestos was RACM.

In the case at bar, although the notice of abatement indicates that there was some ACM present at the site of Respondent's demolition activity, it is not clear what amounts of this asbestos is RACM, which is the standard by which the threshold is satisfied. *See In re LVI Envtl. Servs.*, 2001 EPA App. LEXIS 6, at *7 (renovation case). "Summary judgment is inappropriate when contradictory inferences may be drawn from the evidence." *Rogers Corp. v. Environmental Protection Agency*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

As it is not clear that the threshold of applicability has been met, the Complainant cannot prevail on its motion as to Counts II and III. However, Complainant has fulfilled its burden of proof

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[4] Although, as noted by EPA, Respondent did not clearly dispute the amount of the asbestos in its Answer, the burden is on the Complainant to prove the applicability of the regulations and this is not an affirmative defense. *In re LVI Envtl. Servs.*, CAA Appeal No. 00-8, 2001 EPA App. LEXIS 6, at *5 (E.P.A., June 26, 2001), 10 E.A.D. ___; *In re Ocean State Asbestos Removal*, 7 E.A.D. at 529.

[5] Respondent also challenges the authenticity of this document. However, the Respondent has not set forth any evidence as of yet to contest the authenticity of this document, which Respondent also submitted to the Court.

on Count I, and there is no genuine issue of material fact on that count. Complainant's Motion for Partial Accelerated Decision is **GRANTED as to Count I** of the Complaint against Respondent Gypsum North Corporation, Inc. but **DENIED as to Counts II and III.**

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William B. Moran
United States Administrative Law Judge

Dated: April 10, 2002
Washington, DC

In the Matter of Gypsum North Corporation, Inc., Respondent
Docket No.CAA-02-2001-1253

CERTIFICATE OF SERVICE

I certify that a true copy of **Order On Motions For Accelerated Decision,** dated April 10, 2002 was sent this day in the following manner to the addressees listed below.

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: April 10, 2002

Original and One Copy by Pouch Mail to:

Karen Maples
Regional Hearing Clerk
U.S. EPA
290 Broadway, 17th Floor
New York, NY 10007-1866

Copy by Pouch Mail and facsimile to:

Michael E. Arch, Esquire
Assistant Regional Counsel
U.S. EPA
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy by Regular Mail and facsimile to:

Brian E. Fleisig, Esuire
Pearce, Vort & Fleisig, LLC
Court Plaza North
25 Main Street
Hackensack, NJ 07601-7025