UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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| IN THE MATTER OF | ) | |
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| SENECA ASBESTOS REMOVAL | ) | |
| & CONTROL, INC., and | ) | CAA-010A-1993 |
| SCHOOLCRAFT CONSTRUCTION, INC., | ) | |
| | ) | |
| Respondents | ) | |

# INITIAL DECISION

DATED: January 2, 1997

CAA: This proceeding was brought under Section 113(d)(1) of the Clean Air Act (CAA), 42 U.S.C. § 7413(d)(1), which authorizes the assessment of civil penalties for violations of Section 112 of the CAA, 42 U.S.C. § 7412, and the Regulations promulgated thereunder. In pertinent part, Counts I through V of the Complaint alleged violations by the Respondent SchoolCraft Construction , Inc. (SchoolCraft) of Subpart M of Part 61 of the EPA Regulations on asbestos , 40 C.F.R. Part 61, Subpart M. However, Complainant failed to establish a *prima facie* case against SchoolCraft on the five Counts in the Complaint since it did not establish that SchoolCraft was an operator of the asbestos removal project involved, a necessary prerequisite to find SchoolCraft liable for the violations. Accordingly, pursuant to Section 22.20(a) of the EPA Rules of Practice (Rules), 40 C.F.R. § 22.20(a), the proceeding against SchoolCraft is dismissed with prejudice. Since this dismissal disposes of all remaining outstanding issues in this case, it constitutes an Initial Decision under Section 22.20(b) of the Rules.

APPEARANCES:

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| For Complainant: | Timothy J. Chapman, Esq.<br>for U.S. Environmental<br>Protection Agency, Region 5 |
| For Respondent: | Martin Lewis, Esq.<br>for SchoolCraft Construction,<br>Inc. |

## I. Procedural History

This proceeding arises under Section 113(d)(1) of the Clean Air Act (CAA or the Act), 42 U.S.C. § 7413(d)(1). This Section authorizes the assessment of civil penalties for, among other things, a violation of any requirement in Section 112 of the CAA, and the regulations promulgated thereunder. In a Complaint filed on June 15, 1993, the U.S. Environmental Protection Agency (EPA) Region 5 (Complainant), alleges in nine Counts that Seneca Asbestos Removal & Control, Inc. (Seneca) had failed to comply with the National Emission Standards for Hazardous Air Pollutants ("NESHAP") for asbestos, which are contained in Part 61, Subpart M of the EPA Regulations, 40 C.F.R. Part 61, Subpart M, and which are promulgated under Section 112 of the CAA. The nine Counts involved four projects, including the 1992 renovation at W.O. Cline Elementary School (Cline or Cline Elementary) in Centerville, Ohio. In addition, the first five Counts of the Complaint allege that SchoolCraft Construction, Inc.(Respondent or SchoolCraft) failed to comply with the asbestos NESHAP standards during the 1992 renovation at Cline.

The first five Counts of the Complaint specifically allege that Seneca and SchoolCraft, during the Cline Elementary project, violated various provisions of the asbestos NESHAP standards for

demolition and renovation operations, which are set forth in Section 61.145 of the EPA Regulations, 40 C.F.R. § 61.145[1]. The five Counts at issue herein charge as follows: Counts I and II, failure to notify the Regional Air Pollution Control Authority (RAPCA), by telephone and in writing, of a new starting date for the asbestos removal project, as required by Section 61.145(b)(3)(iv)(A)(1) and (2) of the EPA Regulations; Counts III and IV, failure to wet adequately all regulated asbestos containing material (RACM) being stripped during renovation, and to ensure that the RACM remains wet until collected and contained or treated in preparation for disposal, as required by Section 61.145(c)(3) and (c)(6)(i) of the EPA Regulations; and Count V, failure to post evidence of an on-site representative's training in asbestos NESHAP requirements, as required by Section 61.145(c)(8) of the EPA Regulations. For these alleged violations, Complainant proposed that a $62,000 civil penalty be assessed, of which $42,000 would be entered against Seneca and $20,000 against SchoolCraft.

In their Answers, Respondent and Seneca denied all charges

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[1]For brevity, hereinafter, the reference to the volume of the Code of Federal Regulations , 40 C.F.R., will be omitted when citing the pertinent sections of the EPA Regulations.

alleged in the Complaint, asserted certain defenses, and contested the reasonableness of the proposed penalty.

Before this case went to hearing, Complainant settled the matter with Seneca. A Consent Agreement and Consent Order between Complainant and Seneca, which resolved, *inter alia*, the charges and proposed civil penalties against Seneca in connection with the Cline asbestos removal project, was executed on September 1, 1994. After the Seneca settlement, this action proceeded solely against SchoolCraft.

The parties filed joint stipulations of fact and exhibits on October 31, 1995, which were supplemented on September 9, 1996. This proceeding went to an evidentiary hearing on September 24-25, 1996, in Dayton, Ohio, during which the following decisional record was established. All joint stipulations of fact and exhibits were admitted into the record (Tr. 32). The joint stipulations of fact consisted of 36 stipulations[2], and the joint exhibits were numbered 1 through 25. Complainant presented six witnesses and introduced twelve exhibits, numbered 23 through 29, and 67 through 71. All the Complainant's exhibits were admitted into evidence, except for Complainant's exhibit 25, which was

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[2]Complainant pointed out that joint stipulation of fact number 36 was erroneously listed as number 40.

excluded. Also, Complainant's exhibits 23, 24, 26, 27, 28 and 29 were admitted for the limited purpose of putting into context part of the methodology that was used to calculate the proposed penalty (Tr. 206-219). Respondent presented one exhibit, which was admitted into evidence for the limited purpose of putting testimony in context as to how the economic impact factor was assessed in the overall proposed penalty (Tr. 253). Initial briefs and reply briefs were submitted according to the schedules established.[3]

This initial decision will consist of a brief review of the factual background of this case, a delineation of one dispositive issue, a discussion as necessary of the positions of the parties with regard to the dispositive issue, an analysis and resolution of the dispositive issue, and an order resolving this proceeding. Any argument in the parties' briefs not addressed specifically herein is rejected as either unsupported by the evidence or as not sufficiently persuasive to warrant comment. Any proposed

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[3]Citations to the record and the parties' briefs will be as follows: (1) Complainant's exhibits will be cited with the letter "C", the corresponding number and applicable page, Respondent's and Joint exhibits will adhere to the same format with the letter "R" and "J" (e.g., Ex. C-1, p. 2; Ex. R-1, p. 2; and Ex. J-1, p. 2); (2) the transcript will be cited as "Tr." with the page number (e.g., Tr. 12); (3) the stipulations will be cited by the number (e.g., Stip. No. 1); and (4) the briefs will be cited by the abbreviated party and the page number (e.g., Comp. Init. Br., p. 10).

finding or conclusion accompanying the briefs not incorporated directly or inferentially into the decision, is rejected as unsupported in law or in fact, or as unnecessary for rendering this decision.

## II. FACTUAL BACKGROUND

To place this proceeding in context, it is helpful to review briefly the events that led to this case.

Centerville City Schools (Centerville) has jurisdiction over all schools within the boundaries of the City of Centerville located in Montgomery County, Ohio (Stip. No. 2). Cline Elementary is a public school building within the jurisdiction of Centerville (Stip. Nos. 3 & 4).

In 1989, Centerville hired SchoolCraft to develop an asbestos management plan for Cline Elementary (Stip. No. 6). As part of the process for developing the plan, suspect asbestos containing materials (ACM) were tested under EPA approved methods to determine if in fact the materials contained asbestos (Stip. No. 7). The testing of the suspect materials revealed that Cline Elementary contained at least the following ACM: (1) roughly 17,500 square feet of friable spray on acoustical plaster located throughout many parts of the school, (2) about 4,730 linear feet of heat and water pipe insulation located in the Boiler Room and

Boiler Room Tunnels, (3) approximately 1,200 square feet of block insulation in the Boiler Room, and (4) roughly 23,760 square feet of ceiling tile located throughout many parts of the school (Stip. No. 8).

After preparation of the asbestos management plan, Centerville decided to abate the asbestos conditions by removing the ACM described above (Stip. No. 9). Under contract from Centerville, SchoolCraft prepared the project specifications for the asbestos abatement project at Cline Elementary (Stip. No. 10). Based upon the specifications, Centerville solicited bids for the Cline Elementary asbestos abatement project from various asbestos abatement contractors (Stip. No. 11). Centerville awarded the contract for the Cline Elementary asbestos abatement project to Seneca on June 5, 1992 (Stip. No. 12).

On Page 7 of the project specifications, SchoolCraft is defined as a "Consultant" for purposes of the project specifications (Stip. No. 13), and SchoolCraft assisted Centerville in choosing Seneca to be the asbestos abatement contractor (Tr. 41-42). The Cline Elementary asbestos abatement project occurred between June 1992 and August 1992 (Stip. No. 14). During the time of the asbestos removal in the Summer of 1992, Cline Elementary was undergoing a more extensive renovation

with numerous contractors at the site doing such tasks as painting, installing a drop ceiling and installing lighting, tile and carpet (Tr. 81, 82). SchoolCraft's's job was to coordinate all the different contractors according to the timelines Centerville had, to make sure the work was done in time for the students to return to school in the Fall (Tr. 80-83).

The Cline asbestos abatement project was subject to the notification and work practice requirements set out in Section 61.145 of the EPA Regulations (Stip. No. 16). On June 2, 1992, Seneca submitted a notification to the RAPCA[4] specifying June 15, 1992, as the starting date for asbestos removal (Stip. Nos. 20 and 22; Ex. J-7). The Cline Elementary asbestos renovation did not begin until June 17, 1992 (Stip. No. 24). Also, on June 17, Seneca sent a revised notification to RAPCA, specifying June 17, 1992, as the new starting date (Stip. Nos. 25 and 26; Ex. J-9).

On June 30, 1992, the RAPCA, through Mr. Jeffrey Adams, inspected the Cline Elementary renovation and filed an inspection report (Stip. No. 27; Ex. J-12). The renovation involved the

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[4]U.S. EPA has delegated authority to the State of Ohio to implement and enforce the asbestos NESHAP (Stip. No. 17). For activities subject to the asbestos NESHAP in Montgomery County, Ohio, regulatory authority has been delegated to RAPCA pursuant to Section 61.04(b)(KK)(vi) of the EPA Regulations (Stip. No. 18).

stripping and removal of RACM[5] in a combined amount in excess of 260 linear feet on pipes and 160 square feet on other facility components (Complaint ¶ 12; Answer ¶ 12). This amount of RACM subjected the Cline Elementary project to the requirements of the asbestos NESHAP standards in Part 61, Subpart M of the EPA Regulations (Stip. No. 15).

## III. THE DISPOSITIVE ISSUE

As a matter of primary importance, an issue that can be dispositive of all Counts in the Complainant must be addressed. That issue is whether SchoolCraft can be held liable for any NESHAP asbestos violations as an owner or operator of the renovation activities involving asbestos removal at Cline Elementary. If it is determined herein that the Respondent was not an owner or operator of the asbestos renovation at Cline Elementary, then SchoolCraft cannot be held liable for the violations charged in the Complaint. This dispositive issue will be covered next by considering the statutory and regulatory

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[5]The renovation standard defines regulated asbestos-containing material (RACM) as friable asbestos material in Section 61.141 of the EPA Regulations. And, the renovation standard defines friable asbestos material, in pertinent part, as any material containing more than 1 percent asbestos, under EPA standard testing methods, that when dry, can be crumbled, pulverized or reduced to powder by hand pressure, id.

framework in this case, by reviewing as necessary the positions of the parties on this issue, and by an analysis and resolution of this issue.

**A. The Statutory and Regulatory Framework**

Section 112 of the CAA, 42 U.S.C. § 7412, authorizes the Administrator to publish a list of hazardous air pollutants and to prescribe emission standards known as NESHAP for those pollutants. Asbestos has been listed as a hazardous air pollutant under Section 112, and a NESHAP for asbestos has been promulgated in Subpart M of Part 61 of the EPA Regulations. Section 112(i)(3)(A) of the CAA, 42 U.S.C. § 7412(i)(3)(A), prohibits any person from operating any stationary source in violation of an emission standard promulgated under this Section. Therefore, any violation of the asbestos NESHAP, in Subpart M of Part 61 of the EPA Regulations, can be subject to civil penalties under Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1).

Under Section 61.145 of the EPA Regulations, the asbestos NESHAP establish specific notice and work practice requirements to be followed during an asbestos renovation operation. Section 61.145(a)(4) of the EPA Regulations provides that these standards apply to owners and operators of a demolition operation where the amount of friable asbestos material in the facility being

renovated is at least 260 linear feet on pipes or at least 160 square feet on other facility components. In order to establish a prima facie case of liability, Complainant must establish that the following elements have been met: (1) SchoolCraft is an owner or operator of a demolition or renovation activity, (2) the amount of friable asbestos containing material exceeded the regulatory threshold under the renovation standard, and (3) the specific requirements of the renovation standard in the asbestos NESHAP have been violated, U.S. v. Tzavah Urban Renewal Corp., 696 F. Supp. 1013, 1021 (D.N.J. 1988), citing U.S. v. Ben's Truck and Equipment, Inc., 25 ERC 1295, 1298 (E.D. Cal. 1986). It is the first essential element that is contested in the instant case: whether SchoolCraft was an owner or operator of the asbestos removal renovation at Cline Elementary.

**B. The Positions of the Parties**

**1. Complainant's Position**

Complainant contends that Respondent falls within the definition of an operator under the asbestos NESHAP regulations because it supervised the renovation at Cline Elementary (Comp. Init. Br., p. 12). Complainant asserts that SchoolCraft's supervisory role and thus, operator liability for the Cline Elementary asbestos removal project, is evident from several

joint exhibits. Primary among them is the Cline asbestos project specifications, drafted by SchoolCraft (Ex. J-2, pp. 694-824). Complainant claims that these specifications are replete with examples of SchoolCraft's supervisory authority, and listed some 29 alleged examples of the Respondent's supervisory control (Comp. Init. Br., pp. 13-16). Complainant contends that SchoolCraft gave itself, *inter alia*, the power to: (1) direct Seneca's work shifts; (2) fire and discharge Seneca's employees from the renovation site; (3)deny or authorize payment to Seneca; (4) direct the removal of asbestos contaminated soil; (5) allow Seneca to initiate abatement; (6) determine which individuals were to be allowed inside the containment; (7) approve finished work areas; (8) issue stop work and corrective action orders; and (9) direct re-insulation following asbestos abatement (*id.* at 23). Complainant also argues that SchoolCraft's supervisory role is evident in Centerville's purchase order which stated that SchoolCraft's services included supervision of the work (Ex. J-4; Comp. Init. Br., pp. 17-19). Complainant also submits that Centerville considered SchoolCraft as having supervisory authority over the Cline Elementary asbestos removal renovation based on an informal job description that sets out that a consultant should supervise abatement work as agent for

Centerville (Ex. J-4, pp. 835, 837, 838).

Complainant further contends that the relevant case law interpreting the term operator supports its broad scope and application to many different persons (Comp. Init. Br, pp. 21-23). In this regard, Complainant argues that the definition of owner or operator is intended to be read broadly for the purpose of the asbestos Regulations, U.S. v. Tzavah, *supra*, 696 F. Supp. at 1021, citing U.S. v. Geppert Bros., Inc., 638 F. Supp. 996, 999 (E.D. Pa. 1986). Complainant asserts that many different persons have been held to be operators within the meaning of the asbestos NESHAP, including asbestos abatement contractors, facility owners and any third party whose involvement demonstrates that it had control or supervision over the renovation. In support of this proposition Complainant cites U.S. v. Walsh, 783 F. Supp. 546 (W.D. Wash. 1991), *aff'd* 8 F. 3d 659 (9th Cir. 1993) (on-site supervisor); U.S. v. B&W Investment Properties, Inc., Dkt. No. 91 C 5886, Memorandum Opinion (N.D. Ill. 1992), *aff'd* 38 F.3d 362 (7th Cir. 1994) (facility manager); U.S. v. Sealtite Corp., 739 F. Supp 464 (E.D. Ark. 1990) (asbestos abatement contractor); U.S. v. Hugo Key and Son, Inc. 731 F. Supp. 1135 (D. R.I. 1989) (demolition contractor); U.S. v. Tzavah., *supra* (facility owners and managers); and U.S. v.

Geppert, *supra* (facility owner).

Complainant contends that it is justified to hold a consultant like SchoolCraft liable as an operator since the Respondent was in the best position to police Seneca's actions and assure the asbestos was handled in accordance with the asbestos NESHAP standards. Complainant asserts that, if SchoolCraft is not held liable, oversight consultants like the Respondent would have no incentive to take the steps necessary to insure that asbestos abatement contractors comply with the asbestos NESHAP standards. (Comp. Init. Br, p. 26.)

Based on these arguments, Complainant argues that it has established the first essential element of its case: that SchoolCraft was an operator of the Cline Elementary asbestos removal project.

**2. The Respondent's Position**

Respondent argues that, as a consultant, it is not an owner or operator of an asbestos renovation activity as defined in Section 61.141 of the EPA Regulations. SchoolCraft contends that the record herein and the applicable case law show that the definition of owner or operator in Section 61.141 does not apply to it. (Resp. Init. Br., pp. 11, 12.)

Discussing the case law, Respondent would distinguish the

cases relied upon by Complainant since none of them address the status of a consultant. Indeed, SchoolCraft asserts that the cases support its position. Respondent avers that U.S. v. Geppert, *supra*, 638 F. Supp. at 999, involved owner liability; that U.S. v. B&W Investment Properties, Inc., *supra*, Memorandum Opinion at 10, involved both owner and operator liability where B&W leased the property at issue and hired the asbestos company to clean it up; that U.S. v. Tzavah, *supra*, 659 F. Supp. at 1021 involved parties who hired and fired contractors and actively engaged in supervision of the asbestos removal project; and that U.S. v. Walsh, *supra*, 783 F. Supp. at 549 involved an employee of the asbestos removal contractor. (Resp. Init. Br., pp.12-14.)

Regarding the factual record, Respondent claims that its activities do not fall within definition of operator of the asbestos removal activity at Cline Elementary. According to SchoolCraft, the facts establish that Centerville was the owner of Cline Elementary and Seneca was the operator of the asbestos removal project at Cline. Respondent attacks Complainant's position that it supervised the asbestos removal because it ignores the definition of demolition or renovation activity contained in Section 61.141 of the EPA Regulations. Section 61.141 sets out that renovation is altering a facility by the

stripping or removal of RACM from a facility component, and demolition is described as wrecking or taking out any load supporting structural member of a facility. SchoolCraft argues that Seneca, not it, performed these functions at Cline Elementary and that, therefore, Seneca was the supervisor of the renovation and demolition activity at Cline. (Resp. Init. Br., pp. 14-16.)

SchoolCraft also points out that Mr. Bowman, its representative, visited only very infrequently the enclosure area where the asbestos abatement was taking place, and was not in the abatement area on any consistent basis, which would have been necessary to supervise the removal activity (id. at 15). In this regard, Respondent notes that Mr. Bowman was only in the abatement enclosure area on seven of the thirty-three days when the abatement work was in progress, and avers that Mr. Bowman was never listed as a supervisor or consultant on the daily logs for the enclosure area, but was signed in as a visitor on the seven occasions he was in the enclosure area (Resp. Reply Br., pp. 3-5). Respondent also asserts that Centerville did not look to SchoolCraft to have a presence in the asbestos abatement area but looked to Seneca to control that area (Resp. Init. Br., p 15; Tr. 89, 90). In addition, SchoolCraft argues that its function was

to coordinate and schedule the various contractors working at Cline Elementary, not to baby-sit Seneca which was being paid over $338,000 to remove the asbestos from Cline properly (Resp. Reply Br., pp. 3, 4).

Respondent further contests the Complainant's strong reliance on the project specifications and purchase order for SchoolCraft's services, which Respondent claims do not demonstrate that it was an operator. According to SchoolCraft, the project specifications and the purchase order, reflecting duties and compensation, do not show actual supervision of the Cline asbestos abatement. Respondent submits that this responsibility fell to Seneca, as exemplified by its payment of over $338,000 for the asbestos removal work. (Resp. Br., pp 15-16.)

**B. Analysis and Resolution of the Dispositive Issue**

At the outset, it is warranted to look at definition of the term owner or operator of a demolition or renovation activity found in Section 61.141 of the EPA Regulations, which sets out that:

> Owner 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.

It is clear that SchoolCraft is not an owner of the facility, Cline Elementary, so for liability to attach to the Respondent, it must be found to be an operator of the asbestos removal project at Cline.

Complainant contends that SchoolCraft should be considered an operator because it allegedly supervised the Cline Elementary asbestos removal work. Complainant SchoolCraft asserts that SchoolCraft's supervisory role is evident from the record and under the relevant case law examining the scope of operator liability.

In order to bring SchoolCraft within the operator regulatory universe, Complainant cites several cases noted above in the section describing Complainant's position, for the general proposition that this term is interpreted broadly and encompasses many different persons. While this point by the Complainant is well taken, it is also compatible with the language in the regulatory definition requiring that, for liability to attach, the person involved must either own, lease, operate, control or supervise the facility or own, lease, operate, control or supervise the asbestos removal activity. The key question in the case at bar is, therefore, whether SchoolCraft exercised control

or supervision over the asbestos removal activity at Cline Elementary.

To demonstrate SchoolCraft's alleged supervisory authority over the Cline Elementary renovation, Complainant relies strongly on the asbestos project specifications drafted by SchoolCraft (Ex. J-2, pp. 694-824), as well as on the Centerville purchase order to SchoolCraft and the informal job description, both of which set out that the Respondent should supervise the asbestos abatement work as agent for Centerville (Ex. J-4, pp. 835-37). It is correct that the various provisions in the project specification relied upon by Complainant did technically provide SchoolCraft with supervisory power, and that the purchase order and job description did specify that SchoolCraft should supervise the asbestos abatement work at Cline Elementary. However, the question is whether the Respondent exercised that authority to a sufficient extent to establish its liability as an operator.

The issue of whether a consultant, who is neither the owner nor the asbestos removal contractor, can be held liable as an operator of the asbestos removal work since that consultant ostensibly had authority to supervise the asbestos removal, is a matter of first impression. None of the cases cited by the parties and discussed above is directly in point on this issue.

However, one court case, U.S. v. Walsh (Walsh), 783 F. Supp. 546 (W.D. Wash. 1991), *aff'd* 8 F.3d 659 (9th Cir. 1993), is sufficiently close that the rationale used therein can be applied to the instant cause to resolve the operator issue. In Walsh, 783 at 548, the District Court set out the test for holding a person liable as an operator of an asbestos abatement removal project if that person is not the owner:

> ". . . because the statute and the regulations in question impose strict liability, the Court would be reluctant to impose liability unless it is clear that Mr. Walsh was substantially in control or substantially supervised the various projects in question.
>
> I recognize the government contends that there is nothing that has to be substantial about the supervision, but I believe that what was intended here was a person having significant or substantial or real control and supervision over a project before he or she could be found liable under these regulations if they were not an owner. And it is my intention to apply that test in determining the liability of this defendant. [Emphasis added.]

Moreover, the substantial control test adopted by the District Court was upheld on appeal as correct as a matter of law by the U.S. Ninth Circuit Court of Appeals, U.S. v. Walsh, 8 F.3d 659, 663 (9th Cir. 1993).

It is also instructive to review the four abatement projects in Walsh, 783 F. Supp. at 549-51, to assess what type of

substantial control is needed to hold someone liable as an operator of an asbestos removal activity. During the projects, Mr. Walsh had served in various capacities with the abatement contracting company, including estimator, vice-president and president of the company, id.

On one project, where he was only the estimator, he was held liable as the employee responsible for the overall supervision and control of the project since he estimated the job, wrote the job proposal, directed the project foreman, directed certain of the asbestos removal and met with local regulator officials, id. On another project, when Mr. Walsh was vice-president, he was held liable as a superintendent with an on-site supervisory role where he was responsible for all contractual aspects of the project, signed the notice of intent to remove, directed the foremen, dealt with problems of the workers or other inspectors and dealt with a local official about scheduling, delays and increased costs of the project, id.

On the other hand, Mr. Walsh was not held liable when, as vice-president, he had signed the asbestos removal contract, a Notice of Appeal and a Notice of Violation, but where he was not the estimator, was not responsible for solving problems during the course of the work, was not present at the site and lacked

hands-on supervision and control of the project, id. Similarly, on the fourth project, when Mr. Walsh was president of the company and had signed the Notice of Removal, he was not held liable because he did not estimate the job, was not on the job site when the work was being done and had no personal involvement in the project, id. The District Court pointed out that the fact that Mr. Walsh was president in name does not make him liable where his personal involvement is not sufficient to find liability, id. at 551.

Given the substantial control rationale and the examples from Walsh, attention can now be turned to whether the facts of record in the present case warrant the conclusion that SchoolCraft can be held liable as an operator of the Cline Elementary asbestos removal project.

As noted above in the section discussing the Complainant's position, Complainant summarizes SchoolCraft's supervisorary control as the power to: (1) direct Seneca's work shifts; (2) fire and discharge Seneca's employees from the renovation site; (3) deny or authorize payment to Seneca; (4) direct the removal of asbestos contaminated soil; (5) allow Seneca to initiate abatement; (6) determine which individuals were to be allowed inside the containment; (7) approve finished work areas; (8)

issue stop work and corrective action orders; and (9) direct re-insulation following asbestos abatement (Comp. Init. Br., p. 23). However, there is no evidence of record that SchoolCraft ever during the course of the asbestos removal at Cline Elementary: directed any Seneca work shift; fired any Seneca employee; denied or authorized payment to Seneca[6]; directed the removal of asbestos contaminated soil; allowed Seneca to initiate abatement; approved finished work areas; issued stop work or corrective action orders; or directed re-insulation following asbestos abatement.

The fact that SchoolCraft had the supervisory authority over the asbestos removal at Cline is not the issue in the substantial control test. The real question is whether the Respondent exercised that power. In line with the rulings in Walsh, 783 F. Supp. 546, 548, there must be "real control" and "hands-on" supervision". In the instant case, real control and hands-on supervision by SchoolCraft of the Cline asbestos abatement has not been established.

In this case, the record indicates that SchoolCraft did not

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[6]Seneca's application for payment does show an area for SchoolCraft as architect to certify the payment to Seneca but in no instance on the payment application has SchoolCraft signed the payment certificate (Ex. J-2, pp. 598-607).

exercise any real control over the actual asbestos removal activity at Cline Elementary. The asbestos project specifications plainly laid out Seneca's responsibilities to control and perform the asbestos removal at Cline, setting out that Seneca was to, *inter alia*: be responsible for obtaining all necessary permits and arrange for all necessary inspections; be responsible for all notifications to governing bodies; perform all work in compliance with EPA and OSHA guidelines and with the project specifications; employ a competent superintendent who is certified as an asbestos hazard abatement specialist and is certified by EPA as a contractor/supervisor, and who shall remain at the job site during the progress of the work (Ex. J-2, p.698). Moreover, Mr. Aris Jende, the Centerville representative with responsibility for the Cline renovation, confirmed that the supervisor authority set out above for the asbestos removal project was the responsibility of Seneca, not SchoolCraft (Tr. 37, 85-88). Mr. Jende specifically stated that the responsibility to give notice of the start of the project to RAPCA, to post the superintendent's training certificate at the job site and to wet the asbestos material adequately, was Seneca's responsibility, not SchoolCraft's (Tr. 87-88).

In the abatement projects in Walsh, 783 F. Supp. at 550-51,

where Mr. Walsh was not held liable, an important consideration was his lack of presence at the work area. In the instant case, SchoolCraft was seldom present in the abatement area where the removal work was being performed. The daily logs for the abatement enclosure area show that Mr. Bowman, SchoolCraft's representative, was only present on 7 of the 33 days involved, and was always only present as a visitor, not as a supervisor or consultant (Ex. J-2, pp. 192-210). These logs also show that the last date Mr. Bowman was present was July 2, 1992, even though the logs cover a period running through July 31, 1992 (id. at 195, 210).

While it is true that Mr. Bowman was at the general Cline Elementary renovation site on an almost daily basis (Tr.44), he was only present in the asbestos abatement enclosure area on the 7 occasions described above. Mr. Bowman's almost daily on-site presence was for the purpose of coordinating the work of the various contractors on the general renovation, who were performing such tasks as painting and installing tile, ceilings and lighting,, in addition to the asbestos removal activity. SchoolCraft's job was to coordinate all the different contractors according to the timelines Centerville had, to make sure the work on the entire renovation was done in time for the students to

return to school in the Fall. (Tr. 80-83.) It is warranted to conclude, therefore, that SchoolCraft's presence at Cline was not to supervise the asbestos removal but to coordinate and act as a liaison between Centerville and the various contractors. Further, it should be pointed out that Centerville, not SchoolCraft, hired and paid these various contractors (Tr. 83, 84). Under these circumstances, it is reasonable to conclude that the Respondent was a coordinator of the various construction activities at Cline Elementary, and did not exercise substantial control of the asbestos abatement activities at Cline.

Moreover, the two projects where the District Court in Walsh, 783 F. Supp. at 550-51, found Mr. Walsh was individually liable as an operator stand in contrast to the instant situation involving SchoolCraft. First, the Walsh court's finding of liability is tied to the fact that Mr. Walsh was an employee of the asbestos removal company (id.). It is significant that SchoolCraft, by contrast, did not have such a role. Other crucial facts supporting operator liability in Walsh, id., were that Mr. Walsh: issued directions to the foreman at the job site, directed the actual asbestos removal, and met with state inspectors to discuss and resolve asbestos problems. However, it is clear that Seneca, not SchoolCraft, was the party which

performed these activities in connection with the Cline Elementary asbestos removal project (Tr. 86-87). Although SchoolCraft did meet with the state RAPCA inspector, Mr. Jeffrey Adams, this meeting was at the follow-up inspection, after Mr. Adams had already met with Seneca and Seneca had addressed the asbestos infractions (Tr. 132). Further, at that meeting Mr. Adams indicated that Mr. Bowman of SchoolCraft had asked Seneca to re-wet the asbestos and was glad the inspector was there to require Seneca to re-wet (Tr. 132-33). This suggests that SchoolCraft was there in a coordinating rather than a supervisor position, or Mr. Bowman would have directed, not asked, Seneca to re-wet the asbestos material.

A final consideration in the control analysis is to evaluate the fact that SchoolCraft prepared the asbestos removal specifications and assisted in the selection of Seneca as the asbestos removal contractor. However, it is uncontested that Centerville, not SchoolCraft, entered into the asbestos removal contract with Seneca (Tr. 83). And, there has been no suggestion that the contract specifications were in any way defective so as to lead to the violations charged in this proceeding. Therefore, analogous to the situation in Walsh, 783 F. Supp. at 550-51, where Mr. Walsh signed the removal contract and various official

notices relating to the projects but was held not liable, it is warranted to determine that SchoolCraft's preparation of the project specifications and assistance in selection of Seneca as the asbestos removal contractor does not constitute sufficient control or supervision of the Cline Elementary asbestos removal project to make the Respondent liable as an operator of the Cline asbestos removal project.

When the overall circumstances are taken into account regarding the relationships of the parties and their activities in connection with the asbestos removal project at Cline Elementary, it is warranted to find that SchoolCraft did not have such substantial control over the asbestos removal to make the Respondent an operator of the asbestos removal activities at Cline, within the meaning of Section 61.141 of the EPA Regulations. Accordingly, no liability can attach to SchoolCraft for the violations alleged in Counts I to V of the Complaint. Therefore, it must be concluded that the Complainant has failed to establish a *prima facie* case against the Respondent in connection with Counts I to V of the Complaint. As a result, under Section 22.20(a) of the EPA Rules of Practice (Rules), 40 C.F.R. § 22.20(a), and all charges against the Respondent in connection with those Counts must be dismissed with prejudice.

## IV. PENALTY CONSIDERATIONS

Even if an opposite result were to be reached in the previous section herein on the dispositive issue of SchoolCraft as an operator of the Cline Elementary asbestos removal project, certain comments are warranted on the appropriateness of any penalty sought in this cause against the Respondent. Section 113 (e)(1) of the CAA, 42 U.S.C. § 7413(e)(1), requires that in assessing a civil penalty for violations of the CAA, there shall be taken into account, *inter alia*, such other factors as justice may require. Moreover, under Section 22.27(b) of the EPA Rules of Practice, 40 C.F.R. § 22.27(b), the applicable penalty guidelines[7] issued under the Act must be taken into account, but these guidelines are not binding on the Presiding Judge as long as reasons are given for deviating from them, Great Lakes Div. of Nat'l Steel Corp., EPCRA Appeal No. 93-3, pp. 23, 24 (EAB, June 29, 1994).

In the present proceeding, the statutory consideration of other factors as justice may require, provides the necessary justification for not following the penalty guidelines. The

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[7]The penalty guidelines applicable herein are the CAA Stationary Source Civil Penalty Policy (October 25, 1991), including Appendix III, Asbestos Demolition and Renovation Civil Penalty Policy (May 5, 1992).

Complainant's own penalty witness indicated that, taking into account such other factors as justice may require, he did not consider it to be an equitable result to assess a $20,000 penalty against SchoolCraft, who had collected about $22,000 under its contract, when Centerville, the owner, paid no penalty and Seneca had settled for a $55,000 penalty (the major part of which related to the Cline job) but had collected over $300,000 for its asbestos removal work at Cline (Tr. 279-282). Under these circumstance there is more than ample reason for not following the penalty guidelines.

Basically, in this proceeding, the following situation is presented. Seneca was responsible on a substantive basis for the violations charged against SchoolCraft. Regarding Counts I and II, it was Seneca's responsibility to notify the state agency of the start of the abatement work at Cline (Tr. 87; Ex. J-2, p.698). Similarly, for Counts III and IV, it was Seneca's responsibility to wet adequately the asbestos material since the project specifications explicitly required Seneca to complete the asbestos removal in compliance with the EPA Regulations (Tr. 87, 88; Ex. J-2, p. 698). And, as to Count V, the failure to post the superintendent's certificate on-site, this clearly is Seneca's responsibility since the superintendent involved was

Seneca's employee. Again, under the project specifications, Seneca was required to comply with EPA Regulations, including the posting of the superintendent's certificate (Ex. J-2, p.698).

Moreover, Seneca's greater role and responsibility for these violations is further reflected in its compensation of $338,510 (Ex. J-2, p. 608), in comparison to the $21,040 received by SchoolCraft for its work in connection with the Cline Elementary renovation. This large payment was in consideration of the fact that Seneca was the party that had the actual workmen conducting the asbestos renovation activities. On this basis, the record amply illustrates that Seneca was the party mainly responsible the infractions committed. Furthermore, it was Seneca that remedied the specific notice, work practice and certification violations.

Overall, based on such other factors as justice may require, it is reasonable to conclude that, even if SchoolCraft could technically be considered an operator of the asbestos removal activities at Cline and therefore liable for the violations committed by Seneca in connection with the Cline asbestos removal, no penalty would be warranted against SchoolCraft.

**ORDER**

Base on the findings, conclusions and ruling contained in this Initial Decision, the charges against the Respondent contained in Counts I to V of the Complaint are hereby ordered dismissed with prejudice, pursuant to Section 22.20(a) of the EPA Rules of Practice (Rules), 40 C.F.R. § 22.20(a), and this proceeding is terminated. Under Section 22.20(b) of the Rules, this dismissal constitutes an Initial Decision[8] since it disposes of all remaining outstanding issues in this proceeding.

**So ordered.**

Daniel M. Head
Administrative Law Judge

Dated: January 2, 1996
Washington, D.C.

[8] Under Section 22.30 of the Rules, the parties may file with the Environment Appeals Board (EAB) a notice of appeal of this Initial Decision and an appellate brief within 20 days of service of this Initial Decision. This Initial Decision shall become the final order of the EAB within 45 days after its service, unless an appeal is taken or the EAB elects, *sua sponte*, to review this Initial Decision under Section 22.30(b) of the Rules. If there is any appeal or *sua sponte* review by the EAB, the decision of the EAB disposing of this proceeding shall be the final order in this case.