

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

**In the Matter of**

**L&C Services, Inc.,**

**Docket No. VII-93-CAA- 112**

**Respondent**

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INITIAL DECISION

By: Carl Charneski  
Administrative Law Judge

Issued: January 29, 1997  
Washington, D.C.

Appearances

For Complainant:

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U.S. Environmental Protection Agency  
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For Respondent:

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I. Introduction

This civil penalty proceeding arises under Section 113(d)(2)(A) of the Clean Air Act, 42 U.S.C. § 7413(d)(2)(A) (the "Act"). The U.S. Environmental Protection Agency ("EPA") brought this enforcement action against L&C Services, Inc. ("L&C"), alleging six violations of the National Emissions Standards for Hazardous Air Pollutants ("NESHAP") for asbestos. In each instance, EPA contends that L&C violated the asbestos NESHAP by not adequately wetting friable asbestos until it was collected for disposal. EPA claims that this failure to adequately wet the asbestos constitutes a violation of 40 C.F.R. § 61.145(c)(6)(i).

A hearing was held in this matter on February 27 and 28, 1996, in Wichita, Kansas. For the reasons that follow, it is held that EPA has failed to establish that L&C violated the asbestos NESHAP as alleged in each of the six counts. Accordingly, the administrative complaint filed by EPA against L&C is dismissed.

## II. Regulatory Background

Section 112 of the Clean Air Act, 42 U.S.C. § 7412, authorizes the Administrator of EPA to publish a list of air pollutants that EPA determines to be hazardous and to describe the emission standards, known as NESHAPS, for those pollutants. Asbestos was so listed as a hazardous air pollutant and a corresponding NESHAP was promulgated at 40 C. F. R. Part 61, Subpart M ("National Emission Standard for Asbestos"). This NESHAP sets forth the procedures to be followed in the removal and disposal of materials that contain asbestos.

In particular, 40 C. F. R. § 61.145, titled "Standard for demolition and renovation." applies where there is at least 260 linear feet of regulated asbestos-containing material ("RACM") on pipes or at least 160 square feet of RACM on other components of the facility. See § 61.145(a).<sup>1</sup> Where this threshold for RACM has been met, Section 61.145(b) sets forth specific requirements regarding notification to EPA of demolition or renovation activity by the owner or operator of the involved facility.

In addition, Section 61.145(c) lists certain procedures that must be followed in the asbestos abatement process. For example, Section 61.145(c)(6)(i), the regulatory provision at issue in this case, provides:

*(c)Procedures for asbestos emission control.* Each owner or operator of a demolition or renovation activity to whom this paragraph applies, according to

paragraph (a) of this section, shall comply with the following procedures:

\* \* \* \* \*

(6) For all RACM including material that has been removed or stripped:

(i) Adequately wet the material and ensure that it remains wet until collected or treated in preparation for disposal....

*Emphasis added.*

In this case, EPA does not allege that L&C violated the asbestos NESHAP by not wetting RACM during its removal. Rather, EPA charges that L&C violated the asbestos NESHAP by not keeping RACM wet after its removal, and before its disposal.

### III. Factual Background

The Williams Pipeline Company ("WPC") owned a largely abandoned, 440-acre oil refinery in Augusta, Kansas ("the Augusta facility"). Tr. 42. WPC contracted with L&C for the asbestos abatement and demolition of the 400-acre abandoned portion of this refinery. Tr. 484, 509-510.<sup>2</sup> The asbestos abatement work performed by L&C at the Augusta facility included the removal of all RACM, i.e., regulated asbestos-containing material. Tr. 480, 483-486.

Prior to commencing work at the Augusta facility, L&C filed an Asbestos Notification Form with the Kansas Department of Health and Environment ("KDHE"). In this Asbestos Notification Form, L&C stated that it was going to remove 128,000 lineal feet of friable asbestos from pipe surfaces, 10,000 lineal feet of friable asbestos was to be left in place on pipe removed by dismantling, 40,000 square feet of friable asbestos was to be removed from vessels, and 5,000 square feet of friable asbestos was to be left in place on dismantled heaters and towers. Compl. Ex. 1.<sup>3</sup>

Essentially, L&C was to do the asbestos abatement work, demolish the tanks and structures, and level the refinery to the ground. Tr. 47-48. From April 9, 1992, it was L&C's practice to clean the metal jacketing from the pipelines and to encapsulate the jacketing to prevent the release of asbestos fibers. Tr. 59-60, 522-523.<sup>4</sup>

EPA brings the present enforcement action alleging that on six different occasions L&C removed RACM at the Augusta facility and that it failed to keep the RACM wet until removal in violation of Section 61.145(c)(6)(i), an asbestos NESHAP work practice requirement. EPA filed an administrative complaint against

L&C based upon the results of on-site inspections conducted by the KDHE, Bureau of Air and Radiation in the Air and Asbestos Compliance Section. Tr. 124. The circumstances surrounding each alleged violation are set forth below.

#### Count I

On August 9, 1992, KDHE Inspector David Branscum inspected Zone 39 of the Augusta facility.<sup>5</sup> Inspector Branscum testified that he observed the presence of dry residue on metal jacketing that had been removed from pipe and placed on the ground. According to Inspector Branscum, this material had not been wetted or bagged for disposal by L&C. Tr. 128, 210. During this August 9 inspection, Branscum did not take a sample of the material he suspected to be regulated asbestos-containing material. Tr. 231. See Resp. Ex. 21 (Inspection Report).

#### Count II

Inspector Branscum conducted another inspection of the Augusta facility on April 14, 1992. During his inspection of Zones 31 and 39, Branscum noticed what he believed was RACM that had been removed from pipes. The inspector explained to L&C that the metal jacketing had to be cleaned or bagged for disposal at the time that it was removed, and that it could not be allowed to lay on the ground in what the inspector believed was a dry condition. Tr. 129, 213. Inspector Branscum conducted no sampling on his April 14 inspection. Tr. 230. See Resp. Ex. 22 (Inspection Report).

#### Count III

Inspector Branscum next inspected L&C's asbestos abatement and demolition activities on April 22, 1992. This inspection took place in Zone 39 of the Augusta facility. KDHE Inspector Russ Brichacek, Branscum's supervisor, was also present during this inspection. Both Branscum and Brichacek testified that they observed metal jacketing on the ground that contained dry residue. Brichacek told L&C's representative, Tom Waits, that the debris on the ground and the metal jacketing had to be handled properly at the time that it was removed from the piping. Tr. 132, 333-334. Neither Inspector Branscum, nor Inspector Brichacek, took a sample of the suspected RACM on this April 22 inspection. Tr. 230, 345. See Resp. Ex. 25 (Inspection Report).

Inspector Branscum also testified that during a subsequent inspection conducted on May 6, 1992, he observed the same metal jacketing lying on the ground that he had observed on the April 22, 1992, inspection. Branscum added that during

the May 6 inspection he was told by L&C representative Waits that the company had not as yet decided whether to salvage or to dispose of the metal jacketing. Tr. 133.

#### Count IV

The Augusta facility was next inspected by the Kansas Department of Health & Environment on June 25, 1992. Inspector Branscum stated that on June 25 he once again observed metal jacketing containing dry residue lying on the ground. During this inspection, Branscum took photographs of the metal jacketing, as well as photographs of equipment. Tr. 142-147. Inspector Branscum also took samples of suspected RACM during the June 25 inspection. See Compl. Ex. 2; see also, Resp. Ex. 27 (Inspection Report).

#### Count V

On August 28, 1992, Inspector Branscum inspected the boiler house area located in Zone 39. The inspector observed debris in this area, including metal jacketing, which he stated contained dry residue. The inspector took photographs during this inspection, and he took samples of suspected RACM. Tr. 152-157. See Compl. Ex. 2; see also, Resp. Ex. 31 (Inspection Report).

#### Count VI

The final count in EPA's complaint concerns an inspection of the Augusta facility conducted by Inspector Branscum on August 31, 1992. During this inspection, Branscum instructed L&C to cease all demolition and dismantling activities. Branscum testified that at that time he was still observing metal jacketing containing dry residue which was not being disposed of properly. Tr. 157-159. Inspector Branscum did not take any samples during the August 31 inspection. See Resp. Ex. 35 (Inspection Report).

#### IV. Discussion

Each of the six counts at issue in this case involves an alleged violation of 40 C.F.R. § 61.145 (c)(6)(i). Section 61.145(c)(6)(i) is a work practice requirement of the asbestos NESHAP which provides in part that regulated asbestos-containing material is to be kept wet until collected for disposal. L&C admits that this work practice requirement applied to its asbestos removal and demolition activities at the Augusta facility, but it denies that the six violations at issue occurred. Resp. Prop. Concl. Of Law at 2. L&C's position is

well-taken. As explained below, EPA has failed to carry its burden of proof with respect to each of the six counts at issue.

Section 61.145(c)(6)(i) is the starting point for analysis of this case. Subparagraph (6) of this section begins with the phrase, "[f]or all RACM", after which follows the requirement that the regulated asbestos-containing material be kept wet following its removal. The plain wording of this standard shows that it applies to RACM, and only to RACM. Therefore, the threshold inquiry here is whether the material observed by Inspectors Branscum and Brichacek, and which serves as the basis for the six counts at issue, was regulated asbestos-containing material,

As explained in 40 C.F.R. § 61.141, the term "regulated asbestos-containing material" includes "friable asbestos material." It is friable asbestos-containing material which EPA claims was observed by the KDHE inspectors at the Augusta facility.<sup>6</sup> Section 61.141 further explains that friable asbestos material "means any material containing more than 1 percent asbestos as determined using the method specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy. " See ns. 1 and 3, *supra*.

Despite Section 61.141's reference to Polarized Light Microscopy, or "PLM", EPA called no witnesses to explain this scientific process for determining the presence of asbestos. Only L&C's witness, Richard Potter, testified on this critical subject.

Mr. Potter was qualified as an expert in the area of asbestos. Tr. 428. See Ex. H-6 and Tr. 422-427 for Potter's qualifications. According to Potter, PLM is the recommended EPA-method for determining whether asbestos is present in a given material. Tr. 438. Potter explained that in the Polarized Light Microscopy process tweezers are used to extract a small part of the sample. This selected portion is first examined under a stereoscopic microscope, which is a low magnification microscope. A physical description is made of the color, texture, and appearance of the sample. Tr. 438-439.

Next, needle-nosed tweezers are used to extract "a very small piece" of the sample which is placed at three locations on a microscope slide. An optical liquid with a known refractive index is then added to the sample and a cover slip is placed on the sample to form a seal. The slide is then placed under a polarized light microscope. The polarized lens of the microscope allows for adjustment of the light so that it shines as an even beam of polarized light in a given direction. Tr. 439.

Potter testified that because asbestos is a crystalline structure, with its molecules formed along chains, a polarized microscope allows for the measurement of this fibrous crystalline material. According to Potter, the PLM method involves measuring the optical properties of the fibrous crystalline material, the refractive index, *i.e.*, how the light is bent, and the angle of extinction, which shows how much polarized light has been deflected. These findings are then compared with the optical properties of asbestos for a determination of the presence of that material. Tr. 440.<sup>7</sup>

Application of the PLM method obviously can be made only when samples of suspected RACM have been taken and are available for laboratory analysis. It is undisputed that in this case KDHE Inspector Branscum collected samples of suspected RACM with respect to only two of the six counts at issue, and that no samples were collected by Inspector Brichacek. Accordingly, analysis of this case can be broken down along the lines of those counts which are not supported by sampling and laboratory analysis, and those counts which are.

#### A. Counts Not Supported By Sampling And Laboratory Analysis

The KDHE did not take field samples with respect to Counts I, II, III, and VI. Accordingly, as to these counts EPA was unable to conduct PLM analysis so as to determine whether more than 1 percent asbestos was present in the suspected RACM. Given the particular facts of this case, EPA's failure to sample is a fatal omission.

As noted, 40 C.F.R. § 61.145(c)(6)(i) applies *only* to RACM, or regulated asbestos-containing material. Section 61.141 provides that the presence of asbestos is to be determined by Polarized Light Microscopy. Without application of the PLM method, there is no way of knowing whether the material suspected by the KDHE inspectors to be RACM actually was regulated asbestos-containing material. In that regard, Inspector Branscum admitted on cross-examination that he was not capable of determining whether suspected asbestos-containing material actually contained asbestos by visual observation alone. Tr. 222. Branscum further conceded that the existence of asbestos in material can be confirmed only through Polarized Light Microscopy. Tr. 223, 229. See Tr. 268, 275-276 (Inspector Branscum unable to determine whether pipe cladding contained asbestos because samples were not taken.) Similarly, Inspector Brichacek didn't know whether the material that he observed at the Augusta facility on April 22, 1992, was RACM. Tr. 346. Likewise, L&C's expert witness, Richard Potter, testified that the presence of asbestos in a given material can be determined only through laboratory analysis, and not by means of visual observation. Tr.

429, 431. See *U.S. v. Midwest Suspension And Brake*, 49 F.3d 1197, 1204 (6th Cir. 1995)(Government expert witness testifying that it is impossible to observe particulate asbestos fibers with the naked eye due to their microscopic size.)

Nonetheless, despite the fact that sampling of suspected RACM was not conducted as to Counts I, II, III, and VI, and despite the fact that the presence of asbestos cannot be determined on the basis of visual observation alone, EPA still maintains that the material observed by the KDHE inspectors in this case was RACM.

#### The Size Of The Project Argument

First, EPA argues that because the Augusta project involved the removal of more than 260 lineal feet of friable asbestos, more than 160 square feet of friable asbestos, and more than 35 cubic feet of friable asbestos off facility components, "the requirements of 40 C.F.R. § 61.145(b) and (c) applied to WPL and L&C and this demolition activity, pursuant to 40 C.F.R. § 61.145(a)(1)." Compl. Br.at 6. In other words, EPA submits that because the NESHAP workplace requirements applied to the Augusta facility project due to the amount of friable asbestos being removed, it can be concluded that the material observed by the KDHE inspectors in this case was regulated asbestos-containing material. This case is not so easily resolved.

EPA is correct in arguing that the asbestos NESHAP work practice requirements set forth in Section 61.145(c) apply in this case. In fact, L&C concedes that very point. The issue to be resolved here, however, is not whether these NESHAP work practice requirements apply, but whether L&C violated the work practice requirement set forth in Section 61.145(c)(6)(i).

Again, Section 61.145(c)(6)(i) requires that RACM be kept wet after its removal and until its disposal. As noted above, with respect to Counts I, II, III, and VI, EPA has failed to show, through Polarized Light Microscopy that the material involved in each of those counts was regulated asbestos-containing material. EPA's suspicions of suspected RACM are not enough. Moreover, the mere fact that respondent was engaged in an asbestos removal project of a size sufficient to qualify for the application of the asbestos NESHAP work practice requirements does not make the suspect material in this case RACM.

Nor is a different result dictated by the case law cited by EPA. In nearly all of the district court cases relied upon by the complainant, unlike the facts



underlying Counts 1, II, III, and VI, the government collected samples of suspected RACM as part of its inspection. The fact that EPA conducted sampling in those cases, and that analysis of the samples showed the presence of friable asbestos, was acknowledged by the courts. See *U.S. v. MPM Contractors, Inc.*, 767 F.Supp. 231, 233 (D.Kan. 1990)("[s]amples taken from all three sites contained well over the required one percent asbestos"); *United States v. Sealtite Corporation*, 739 F. Supp. 464, 467-68 (E.D.Ark. 1990)("testing and analyses of materials ... revealed the presence of at least one percent asbestos by weight"); *U.S. v. Hugo Key And Son, Inc.*, 731 F.Supp. 1135, 1139 (D.R.I. 1989)("the material was friable asbestos as defined by the asbestos NESHAP"); and *U.S. v. Tzavah Urban Renewal Corp.*, 696 F.Supp. 1013, 1015 (D.N.J. 1988)("five samples taken from the facility and ... all contained friable asbestos"). These cases actually support L&C's position that PLM analysis is a necessary prerequisite to establishing the presence of regulated asbestos-containing material.

Only in the case of *U.S. v. Ben's Truck And Equipment, Inc.*, 25 ERC 1295 (E.D.Calif. 1986), did the Court not specifically reference the fact that field samples of suspected RACM had been collected by EPA. The Court simply did not mention sampling one way or the other. As such, *Ben's Truck And Equipment, Inc.*, lends little, if any, support to EPA's argument.

Finally, Inspector Branscum's supervisor, Inspector Brichacek, testified that he could not recall the KDHE ever issuing a citation for failing to keep asbestos-containing material wet where the material wasn't sampled. Tr. 355.

Accordingly, EPA's attempt to support Counts I, II, III, and VI on the basis of the amount of friable asbestos which L&C contracted to remove from the Augusta facility must fail. EPA, and not L&C, has the burden of proof on this issue. See Compl. Br. at 13. EPA's failure to sample for the presence of asbestos ensured that it could not carry this burden given the facts of this case.

#### The DETI Survey

Next, EPA argues that enforcement samples were not necessary because sampling conducted at the Augusta facility prior to the KDHE inspection already showed the presence of asbestos throughout the facility. In making this argument, EPA is referring to the sampling performed for the Williams Pipeline Company by Diversified Environmental Technologies, Inc. ("DETI"), prior to the time that L&C began its asbestos abatement activities.

The purpose of the DETI survey was "to define the location of asbestos containing materials" at the Augusta facility and "to assess and quantify the asbestos problem within the idled refining units and areas." See Compl. Br., Attach. 1; see also, Tr. 42. As noted, the DETI survey was a preliminary step to the asbestos abatement and demolition work performed at the facility by L&C. DETI compiled its sampling results in a survey report dated May 11, 1990. Tr.44.

EPA's argument here is that inasmuch as the DETI survey detected quantities of asbestos at greater than 1 percent throughout the Augusta facility, there was no need for Inspector Branscum "to continually sample and analyze dry residue in the asbestos abatement areas where L&C was working or had worked." Compl. Br. at 10. This argument is not persuasive.

First, EPA attempts to rely on the results of asbestos sampling even though it did not even seek to introduce into evidence the laboratory results of the DETI survey. Despite the fact that several witnesses referred to the DETI survey, EPA made no attempt to move this document into evidence at the hearing. Instead, EPA sought to insert this information into the record by attaching the survey's laboratory analysis results, "Appendix D. Analysis Data Table", to its post-hearing brief. L&C moved to strike this attachment essentially arguing that if EPA wanted the DETI survey to be part of the record, it should have offered the document into evidence at the hearing. By order dated May 30, 1996, L&C's motion to strike the DETI survey laboratory results attachment was granted. Accordingly, the DETI survey results cannot be relied upon for the purpose of showing that the suspect metal jacketing in this case actually was asbestos-containing material.<sup>8</sup>

Second, even assuming that the DETI survey showed the presence of substantial quantities of asbestos as EPA represents, the testimony of DETI employee Rodney Hill establishes that the survey also showed that there was almost as much non-asbestos material in the areas involved here as there was asbestos-containing material. For example, Counts I, II, III, and VI all involve alleged violations occurring in an area of the facility marked as Zone 39. See Exh. H-3. Rodney Hill, a DETI asbestos consultant was called as a witness by EPA. Tr. 12. Hill stated that the DETI survey showed that 42 percent of the material sampled in Zone 39 did not contain asbestos. Tr. 65, 76; see Tr. 430.

More specifically, Hill testified that in the same zones where asbestos was found, there were materials that did not contain asbestos. As Hill explained: "In some zones more, in other zones less." Tr. 45. In fact, Hill conceded that

many of the pipelines in Zone 39 did not contain asbestos. *Ibid.* Moreover, like Inspectors Branscum and Brichacek, and like Richard Potter, Hill testified that he could not go on record stating what materials contained asbestos without the benefit of laboratory analysis. Tr. 45. Thus, despite the fact that the DETI survey was not introduced into evidence, to the extent that it was generally referenced by the witnesses, particularly the testimony of Hill, the survey results are insufficient to support a finding that the specific material observed with respect to Counts I, II, III, and VI was asbestos-containing material.

#### B. Counts Supported By Sampling And Laboratory Analysis

Of the six counts at issue in this case, only Counts IV and V are supported by KDHE field samples taken at the Augusta facility. Specifically, Inspector Branscum took two samples on his June 25, 1992, inspection and three samples on his August 28, 1992, inspection. All five samples were analyzed at the KDHE laboratory in Topeka, Kansas. The samples were analyzed using polarized light microscopy in conjunction with dispersion staining. See Compl. Ex. 2.<sup>9</sup>

The first sample taken on June 25, 1992, was taken from a piece of metal jacketing lying on the ground near Zone 18. The results of the laboratory analysis showed this sample to be comprised of 70 percent chrysotile asbestos, 5 percent crocidolite asbestos, 5 percent cellulose, and 20 percent non-fibrous material. The second sample taken on June 25 also was collected from a piece of metal jacketing lying on the ground also near Zone 18. Tr. 244. The laboratory results for this sample showed that it was 60 percent chrysotile asbestos, 5 percent crocidolite asbestos, 5 percent cellulose, and 30 percent non-fibrous material. Compl. Ex. 2.

Three samples were taken by Inspector Branscum on August 28, 1992, in Zone 39. Tr. 258, 262-263. One sample was collected from the floor of the boiler house. The laboratory results of this sample showed the presence of 40 percent chrysotile asbestos, 20 percent amosite asbestos, 10 percent cellulose, 10 percent mineral wool, and 20 percent non-fibrous material. Another sample was taken from a valve on the floor of the boiler house. This sample was made up of 30 percent chrysotile asbestos, 45 percent amosite asbestos and 25 percent non-fibrous material. The last of these three samples was taken from residue on the surface of metal jacketing lying on the ground to the North of the boiler. The laboratory results of this sample were the same as those from the valve on the floor of the boiler house. Compl. Ex. 2.

EPA maintains that the samples collected on June 25, 1992, and August 28, 1992, establish that the sampled metal jacketing was RACM. L&C challenges these KDHE laboratory test results on the ground that the samples collected by Inspector Branscum were contaminated and, therefore, are invalid.<sup>10</sup>

#### The Cross-Contamination Argument

L&C expert witness Richard Potter criticized the manner in which Inspector Branscum collected the samples. The inspector testified that while he collected the samples with a pocket knife, he didn't clean his knife between sample collections. The inspector stated that it was his practice not to clean the knife in between samples when the material being sampled was homogenous. Insofar as this case is concerned, Inspector Branscum conceded that he did not clean his knife in between his taking the two samples on June 25, 1992. Tr. 238-239, 241.

Regarding this sampling procedure, Potter testified that Branscum's failure to clean the knife in between taking samples was "completely inappropriate" and "probably guarantee[d]" that the second sample was cross-contaminated by material remaining on the knife from the first sample. Tr. 437, 454. Potter testified that the fear is that cross-contamination would lead to inaccurate laboratory results. Tr. 437. He explained that "the key to avoiding cross-contamination is to use clean tools, to use water, to use cleaning between every step of the process." Tr. 434. Potter further explained: "...he's got material from the first sample on the knife which he used to collect material from the second sample, so now he has material from both samples on the knife and the chances are both of those ended up in the same container." Tr. 454; see Tr. 455.

Despite Potter's challenge to the KDHE sampling procedures at the Augusta facility, Inspector Branscum was not recalled as a witness to rebut this testimony and to defend his sampling technique. Also, Inspector Brichacek, while called as a rebuttal witness, did not challenge Potter's theories of direct and cross-contamination. This is so despite the fact that it was Inspector Brichacek who trained Branscum on how to sample for asbestos. Tr. 330.<sup>11</sup>

Given the testimony of the witnesses, it is established that Inspector Branscum did not clean his knife in between taking samples on both June 25 and August 28. In addition, the testimony of Richard Potter concerning cross-contamination raises substantial doubt as to the validity of the second sample taken on June

25, and the second and third samples taken on August 28, so as to render those sample results suspect. As such, the second sample taken on June 25 and the second and third samples taken on August 28 are not sufficiently reliable to establish that L&C violated the asbestos NESHAP as alleged in Counts IV and V.

In defending its sampling process, however, EPA maintains the laboratory results are valid because the samples taken in this case were "homogenized" prior to the PLM analysis. Compl. Br. at 22. The process of homogenization generally has been described as simply mixing the sample's contents before a portion of the sample is extracted for PLM analysis. Tr. 473-474. EPA appears to argue that because of this homogenization the laboratory analysts would not by "pure chance" select the contaminated portion as Richard Potter had theorized.

The problem with EPA's argument concerning homogenization is that it lacks record support. Here, Potter testified as to improper sampling methods employed by Inspector Branscum and as to the resulting contamination of some of the samples taken. EPA's posthearing argument that homogenization of the samples makes it improbable that any contaminated portion would be selected for PLM analysis simply must fail in light of the testimony of Potter, the only asbestos expert to testify in this case.

Still, while these subsequent samples are suspect, the validity of the initial samples taken on June 25 and August 28, both of which showed the presence of greater than 1 percent asbestos, must nonetheless be addressed. Even Richard Potter concedes that cross-contamination is not an issue with respect to the first samples taken. Tr. 454.

#### The Direct Contamination Argument

L&C challenges Inspector Branscum's initial samples taken on June 25 and August 28, essentially arguing that the inspector was sloppy in his sampling procedure and also that he failed to take necessary safety precautions, such as misting the area of the suspected asbestos, before collecting the samples. In addition, L&C believes that the inspector's inability to recall whether he had visited another inspection site prior to inspecting the Augusta facility on August 28 is significant. Apparently, respondent is suggesting that the inspector's knife could have been contaminated by sampling conducted at another inspection site prior to his sampling at the Augusta facility on August 28.

On questioning from counsel for L&C, however, Inspector Branscum testified that it was his practice to clean his knife after sampling at a site had been completed. In that regard, even though the inspector didn't clean the sampling instrument in between samples believed to be homogeneous, the inspector clearly stated that he did clean his knife "[a]t the end of taking a sample." Tr. 238-239. Accordingly, to the limited extent that the record addresses this point, it establishes that it was Inspector Branscum's practice to clean his knife after all the samples had been collected. L&C has not shown otherwise. L&C's challenge to the initial samples taken on June 25 and August 28, on the ground that they may have been contaminated, therefore, is wide of the mark.

Still, even though the samples taken on June 25 and August 28 were shown to contain greater than 1 percent asbestos, EPA must show more to prove that L&C violated the asbestos NESHAP. As explained earlier, in order to establish a violation of Section 61.145(c)(6)(i), EPA must show that the RACM, or regulated asbestos-containing material, was not kept wet during its removal or disposal. As a preliminary matter, before EPA can focus its case on showing that the suspect material was not kept wet, it must first establish that the material was RACM. Section 61.141 provides that one of the ways to establish that material is RACM is to show that the material is "friable asbestos material". Indeed, this is what EPA alleges here. Section 61.141 provides a two-step approach for establishing friability.

The first step is to show by way of Polarized Light Microscopy that the material contains more than 1 percent asbestos. EPA has done this with respect to the initial samples taken on June 25, 1992, and August 28, 1992. The second step is to show that this material "when dry, can be crumbled, pulverized, or reduced to powder by hand pressure." It is this step upon which EPA stumbles.

With respect to the initial sample collected on June 25, Inspector Branscum testified that this sample "had no appearance of being wet in that there was no matting to it." Tr. 165. He added that the sample gave no indication of containing moisture, that it didn't stick together, and that he "couldn't squeeze any water out of it." Tr. 165-166. This testimony is insufficient to support a finding that the initial sample collected on June 25, 1992, was friable. While the inspector may have been convinced that the suspect material was not wet, he apparently did not investigate further to determine whether it also could "be crumbled, pulverized, or reduced to powder by hand pressure." Without this determination, EPA cannot show that the material was friable within the regulatory definition provided by Section 61.141. If EPA cannot prove that the material was friable, it also cannot prove that it was RACM. As

recited at the outset of this opinion, 40 C.F.R. § 61.145(c)(6)(i) requires that *only* RACM be kept wet until disposal. Material which is not regulated asbestos material is not covered by this regulation.

A similar results obtains with respect to the August 28 sample. Inspector Branscum admitted that he never physically touched the sample collected on that date in order to determine whether the material was even wet or dry, let alone friable. Tr. 265-266. In light of the inspector's admission, EPA is unable to point to any testimony, or other record evidence, establishing that the asbestos sampled on August 28 met the friability test of Section 61.141.

Given the fact that EPA has been unable to prove that the asbestos-containing material initially sampled on both June 25, 1992, and August 28, 1992, was friable asbestos, it cannot prove a violation of the NESHAP work practice requirements of 40 C.F.R. § 61.145(c)(6)(i). As a result, EPA cannot establish the violations alleged in Counts IV and V.

#### ORDER

For the reasons set forth in this opinion, the Environmental Protection Agency's complaint alleging that L&C Services, Inc., committed six violations of 40 C.F.R. § 61.145(c)(6)(i) is dismissed.

Carl C. Charneski  
Administrative Law Judge

<sup>1</sup> 40 C.F.R. § 61.141 provides the following definition:

*Regulated asbestos-containing material* (RACM) means (a) Friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart.

*Emphasis added.*

<sup>2</sup> WPC was named in the complaint as a respondent along with L&C. Prior to the hearing, however, WPC entered into a settlement agreement with EPA.

<sup>3</sup> The term "friable asbestos" is defined in 40 C.F.R. § 61.141 as follows:

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

<sup>4</sup> The metal jacketing, or cladding, was strapped to the pipe and it wrapped all the way around the pipe insulation. Tr. 91.

<sup>5</sup> Exhibit H-3 is a map which sets forth the various work areas, or zones, of the Augusta facility. As discussed, *infra*, Exhibit H-3 was prepared by a company hired by WPL to do a pre-demolition asbestos survey of the Augusta facility. Tr. 42-43. Throughout the course of the hearing, this map was referenced by the witnesses.

<sup>6</sup> In addition to arguing that the subject material was not friable, L&C argues that it also was not Category II asbestos-containing material likely to become friable. L&C Br. at 11. However, inasmuch as EPA alleges only that the suspect material was friable, L&C's Category II argument need not be addressed. See EPA Proposed Findings of Fact, Nos. 7 and 23; see also, EPA Reply Br. at 11 ("Here the pipe insulation and other vessel insulation was never Category II material.")

<sup>7</sup> As noted, EPA called no witnesses either to explain the PLM method, or to dispute the explanation offered by L&C's expert witness.

<sup>8</sup> EPA's failure to move the DETI survey into evidence denied L&C the opportunity to challenge the sampling procedure followed, as well as the sampling results. For example, L&C expert witness Richard Potter criticized the survey because it allegedly did not include the analysis of pipe that was insulated with glass fiber or with other materials not suspected as containing asbestos. Tr. 430.

<sup>9</sup> Polarized Light Microscopy, or PLM, was discussed earlier. The EPA witnesses, however, did not explain the KDHE laboratory's reference to dispersion staining.



<sup>10</sup> L&C raises other defenses such as a failure to establish a proper chain of custody for the samples. In light of the holding in this case, these defenses are not addressed.

<sup>11</sup> On direct examination, Inspector Brichacek did state that there was nothing that would lead him to conclude that Inspector Branscum's sampling techniques were improper. Tr. 338. Brichacek, however, provided no details to support this testimony.