UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

D & H CONTRACTORS, INC. **Docket No. CAA-III-022**

and

ST. JOHN'S EPISCOPAL CHURCH

Respondents

INITIAL DECISION

CAA - Asbestos NESHAP - Transite roofing shingles are found to be friable where a preponderance of evidence shows they were weathered prior to removal and were excessively broken. EPA inspector's visual observations and photographs taken on a morning before asbestos stripping activities began for the day do not establish violation of requirement to adequately wet RACM during the stripping operation. The fact that shingles were broken does not support an inference that visible emissions occurred when shingles were removed. However, evidence shows that Respondents failed to ensure the RACM remained wet until collected for disposal, as required by 40 C.F.R. § 61.145(c)(6)(i). Penalty assessed for that violation is $5,000.

Appearances:

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Before: Charles E. Bullock, Administrative Law Judge[1]

BACKGROUND

D & H Contractors, Inc. (D & H) is a business which conducts asbestos removal. St. Johns Episcopal Church (St. John's) owns two buildings at 820 Jefferson Street in a residential neighborhood in Roanoke, Virginia (the facility). Since the buildings had been vacant for approximately three years and were in a state of disrepair, St. John's decided to demolish the buildings. JM Turner was hired by St. John's to conduct the demolition of the facility.[2] JM Turner hired D & H to provide any asbestos abatement necessary for the demolition. Mr. James Nininger of Certified Building Inspections, Inc., was hired by St. John's to act as its representative at the site during asbestos removal in order to ensure compliance with applicable laws and regulations.

D & H submitted to EPA an "Asbestos Permit Application and Notification for Demolition/ Renovation" on July 13, 1992. In that document, D & H noted the estimated amounts of suspected asbestos-containing material (ACM), specifically non-friable floor tile and roofing material, and friable boiler-room pipe insulation. According to the notification, 600 linear feet of pipe insulation and 18,000 square feet of asbestos-containing floor tile and roofing materials were to be removed. D & H removed ACM at the facility in August and early September 1992.

On August 19, 1992, Mr. Richard Dibble, an EPA inspector, conducted an inspection of the facility.

D & H was not removing asbestos-containing materials on the day of the inspection. During the inspection, Mr. Dibble was accompanied by Mr. Nininger and Mr. Terry Doyle, site manager for D & H. Mr. Dibble observed what he suspected to be ACM on pipes in the boiler room of the facility, in asphalt material and transite shingles on the roof, in broken transite shingles on the ground, and in plastic bags on the ground near the buildings. During the removal of shingles from the roof, some shingles had become broken or torn. Some shingles appeared to have fallen down from the roof onto the porch roof at the rear of the building. Mr. Dibble collected samples and took photographs. A sample taken from the pipes and a sample taken from the transite shingles were determined to be ACM. The transite shingles contained 35 percent asbestos.[3]

Based upon the EPA inspector's observations, Complainant[4] issued a complaint on June 18, 1993 pursuant to section 113(a)(3) and (d) of the Clean Air Act, as amended (CAA or the Act), 42 U.S.C. §§ 7413(a)(3) and (d). The complaint alleged four counts of violations of the Act and regulations promulgated thereunder. The first count alleged that Respondents failed to adequately wet regulated asbestos-containing material (RACM) during stripping of that material from the facility, in violation of 40 C.F.R.§ 61.145 (c)(3). The second count alleged failure to keep stripped RACM adequately wet until it was collected for disposal. Count III charged Respondents with failure to use certain work methods specified in D & H's written notice to EPA of its plan to demolish or renovate the facility. Count IV alleged that Respondents discharged visible emissions of asbestos into the outside air. A penalty of $50,200 was proposed to be assessed for the alleged violations.

An evidentiary hearing was held in Roanoke, Virginia on August 16, 1995. Post-hearing documents, including proposed findings of fact and conclusions of law, were filed by the parties.[5]

POSITIONS OF THE PARTIES[6]

The parties strongly dispute whether the asbestos-containing material referenced in the complaint was friable.[7] Complainant's position is that the asbestos-containing transite roofing shingles were friable because they were damaged by weather and were broken into fragments.

Respondents deny that the shingles had deteriorated, and claim that no more than ten percent of the shingles were torn or broken. Respondents assert that the EPA inspector did not perform proper inspection procedures to make a determination as to the actual condition of the transite shingles. The inspector merely viewed and photographed a stack of shingles on the roof from 15 to 20 feet away. The shingles were not rubbed by the inspector to determine whether they were friable. Complainant responds that if they had been rubbed, they would have released more fibers.

Even if some shingles had become friable, Respondents argue that the transite shingles had been kept continuously wet to ensure that no visible emissions occurred. Complainant disagrees, asserting that the EPA inspector found the shingles to be dry at ten o'clock in the morning on the day of the inspection, and that he saw no way of getting water to the roof. Therefore, Complainant asserts, the shingles must not have been adequately wetted the night before, when they were being removed from the roof.

Complainant asserts that visible emissions of asbestos fibers must have been discharged at the time the shingles were removed, based on the fact that they were broken and friable. Respondents emphasize that the air at the site was sampled and monitored to detect release of any airborne asbestos fibers, and that no increase above levels taken prior to removal activities was found.

DISCUSSION

1. Whether the transite shingles were friable

The transite shingles at issue in this case contained 35 percent chrysotile asbestos. CX-10; Tr. 177, 224. Transite shingles are Category II nonfriable ACM, which is defined as "any material, excluding Category I nonfriable ACM, containing more than 1 percent asbestos . . . that, when dry, cannot be crumbled, pulverized or reduced to powder by hand pressure." 40 C.F.R. § 61.141; RX-1 p. 11. Category II nonfriable ACM becomes regulated ACM (RACM) if it "has a high probability or 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 under [40 C.F.R. Part 61 Subpart M]." 40 C.F.R. § 61.141.

EPA claims that the transite shingles had become friable because they were broken into pieces and because they were in poor condition prior to the removal

operation. D & H admits that some shingles were broken, but denies that they were in poor condition or that they were broken to the extent of being friable.

D & H submitted into evidence an EPA memorandum entitled "Asbestos NESHAP clarification on What Constitutes Crumbled, Pulverized or Reduced to Powder," dated January 8, 1992 ("1992 Guidance"), which provides the following guidance, in pertinent part:

* * * * Most nonfriable material can be broken without releasing significant quantities of airborne fibers. It is only when the material is extensively damaged that the potential for significant fiber release is greatly increased.

Transite siding, which is a Category II nonfriable ACM, becomes regulated ACM if it 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 the demolition and renovation operations. There is a difference between merely breaking a transite panel, and crumbling, pulverizing or reducing it to powder. If a Category II material, such as transite, is in good condition, it can be broken without causing the material to become regulated. Transite panels are typically bolted or nailed to buildings on which they are attached. The extent of breakage which would normally result from carefully removing a transite panel from a building and lowering it to the ground prior to demolition would not result in crumbling, pulverizing or reducing the panel to powder.

The extent of breakage which will render the ACM friable depends to some degree on the condition of the ACM prior to the abatement operation. * * * * Therefore, it is difficult to make a general statement on the level of breakage which causes ACM to be regulated. A case by case determination must be made considering the condition of the material and the forces which have or will act upon it.

* * * * Dropping Category II material, such as transite panels, from a building as a means of transporting it to the ground, will also cause the ACM to be regulated in most conditions. * * * *

RX-1. The transite at issue may be friable, according to this guidance, if it was not in good condition and was broken, if it was dropped from the building, if it was "extensively damaged," or if the extent of breakage or damage is such that it has a high probability of crumbling, being pulverized or reduced to powder.

Respondents emphasize the inspector's failure during the inspection to use hand pressure to determine whether the transite would crumble, become pulverized or reduced to powder. D & H points out a statement in an EPA guidance document entitled "Asbestos/NESHAP Regulated Asbestos Containing Materials Guidance," dated December 1990 ("1990 Guidance"), that "[t]he fractured surface should be rubbed to see if it produces powder." CX-7 p. 20.

However, the word "should" indicates that the statement is not mandatory. While the document provides guidance, it is not a regulatory requirement. If other evidence, such as photographs or testimony of visual observations, shows that the ACM has been or has a high probability of being crumbled, pulverized or reduced to powder, then a conclusion can be drawn that the ACM is friable. In cases involving alleged violations of NESHAP for asbestos, courts have routinely relied upon the observations of inspectors to determine whether asbestos was adequately wetted. *United States v. MPM Contractors, Inc.,* 767 F. Supp. 231, 233 (D. Kan. 1990); *United States v. Sealtite Corp.,* 739 F. Supp. 464, 467 (E.D. Ark. 1990). The Environmental Appeals Board has stated,

It is difficult to imagine how the asbestos NESHAP enforcement program, or many of the other enforcement programs conducted by the Agency, could be of any effect if an inspector's credible observations were not probative evidence of a violation. When an inspector trained to determine compliance with the applicable regulations reasonably determines that a violation has occurred and provides a rational basis for that determination, liability should follow, absent proof that the inspector's testimony lacks credibility.

In re Norma Echevarria and Frank Echevarria, d/b/a Echeco Environmental Services, 5 EAD 626, 639-340, CAA Appeal No. 94-1 (Final Decision, December 21, 1994). Similarly, it is reasonable to rely upon observations of the EPA inspector to determine whether asbestos is friable.[8]

It can be seen in the photographs taken by the inspector that some transite shingles were broken. CX-3A, CX-3C, CX-3D, CX-3E, CX-3F, CX-3G, CX-3U. Mr. Dibble reported that "transite shingles were piled on the roof, dry, broken, and not covered....", and that on the ground were "transite shingle in small broken pieces, in great amounts . . . ." CX-1. In his opinion, excessive force was used to remove the shingles, as evidenced by multiple fractured edges on the shingles which had been removed. CX-3C, CX-3U; Tr. 68, 93-94, 97, 144-145. In addition, Mr, Dibble observed fragments of wood to which the shingles had been attached lying on the roof, indicating to Mr. Dibble that excessive force was used to remove them. CX-3B; Tr. 27, 34-35, 143.

Mr. Doyle testified on behalf of Respondents that there was "very minimal" breakage of the shingles. Tr. 264. However, Mr. Doyle was referring to minimal breakage resulting from the removal of shingles. Tr. 264, 269. This does not rule out extensive breakage of the shingles due to the effects of weathering and/or vandalism, resulting in shingles breaking and falling off of the roof. Both Mr. Doyle and Mr. James Horsley, an owner of D & H, testified that the roof was damaged from vandalism. Tr. 240-241, 253, 268.

Mr. Nininger admitted that some of the shingles were being broken as a result of the removal operation. Tr. 361. Moreover, upon being asked during cross-examination whether he saw pieces of shingles falling off the roof, Mr. Nininger answered, "I saw some falling off the roof, yes." Tr. 361.

Thus the record suggests that transite shingles at the site were extensively broken due to several factors: damage during removal, vandalism, falling off of the roof from the effects of weather, and being dropped from the roof during the removal operation.

However, as noted in the 1992 Guidance, the likelihood that the shingles were friable is increased by evidence that the shingles were not in good condition prior to the abatement. Further, the regulations indicate that ACM which is in poor condition may have become crumbled. "In poor condition" means "the binding of the material is losing its integrity as indicated by peeling, cracking, or crumbling of the material." 40 C.F.R. §61.141.

All three of D & H's witnesses stated that the roof was in good condition. Tr. 242, 243, 259, 337. However, Mr. Horsley qualified his statement, testifying that they "were in very good condition for being on the roof probably 50 years." Tr. 243. He said that the only way to tell if the shingles were friable is by seeing airborne emissions, and that "[y]ou would have to rub those or break those to show release . . . " yet he testified that he did not rub the shingles. Tr. 243, 252. Furthermore, he acknowledged that the shingles were weathered, stating that there was debris on the ground "from the weathering of the roof." Tr. 242, 250.

Mr. Doyle testified that he did not touch the transite, "but it appeared to be in good general condition." Tr. 259. However, during cross-examination, when reference to the frayed edges of the shingles was made, and he was asked whether fibers would be released if he rubbed those shingles with his hand, he answered affirmatively, "If I did that." Tr. 305. Yet, on redirect examination, he recanted his answer, stating that it was "not a truthful answer." Tr. 325.

Similarly, Mr. Nininger did not indicate that he had ever touched the shingles. Moreover, his testimony as to friability is undermined by his very narrow view of the friability of transite shingles. He stated at the hearing that the matrix of the transite material is so tight that a fiber-release instance is almost impossible unless you put it in a grinder or run a sander over it or something of that nature." Tr. 347. This is inconsistent with the 1992 Guidance on friability of transite quoted above, and with the 1990 Guidance. RX-1; CX-7 p. 20.

The testimony of Complainant's witnesses, indicating that the shingles were not in good condition, is more convincing than testimony of Respondents' witnesses, is consistent with EPA guidance on the subject, and is consistent with the appearance of the shingles in photographs taken by Mr. Dibble.

The photographs show transite shingles with not only very rough uneven edges, but also some with frayed edges, with fibrous material exposed. CX-3B, CX-3C. These shingles are not broken, but have uneven edges that appear worn. Id.

Mr. Richard Ponak, an environmental scientist at EPA, examined the photographs taken by Mr. Dibble. His opinion was that the transite shingles were not in good condition when they were removed because they appear in the photographs to be weathered, cracked and broken. Tr. 201. He testified with reference to one of the photographs that the shingles were friable because "you can see significant weathering where it's starting to peel, and you can actually see fibers hanging off the edges on some of the surfaces where the binder has broken down and it's exposing the asbestos fibers." Tr. 171; CX-3C. He observed from the photographs that not only the edges but also the surfaces of some of the shingles were weathered and friable. id.

Mr. Dibble testified that upon examining the enlarged photographs of shingles laying loose on the roof, he noted that the shingles "looked puffy and swollen." He stated that this condition indicated that the matrix broke down from weathering, which allowed penetration of moisture. Tr. 27, 157.

Respondents make much of the fact that Mr. Dibble initially identified the transite shingles as friable only on the basis of being extensively broken, and not on the basis of being weathered or in poor condition prior to abatement. Tr. 20, 27, 68, 96-97, 155. However, this is not fatal to Complainant's case, particularly in light of the evidence as a whole. At the inspection, Mr. Dibble made his determination that the transite was RACM on the basis of it being excessively broken, that is, being fragmented into small pieces. Tr. 67-68, 71,

93-94, 97. He testified that he learned later that the matrix of the transite could break down by the effect of weathering, increasing the potential for release of asbestos fibers. Tr. 20, 27, 155. Thus, he made a determination after the inspection that the transite was friable not only on the basis of being extensively broken, but also on the basis of being weathered.

The 1990 guidance explains the subject of weathering as follows:

Category II nonfriable ACMs (cement siding, transite board shingles, etc.) subjected to intense weather conditions such as thunderstorms, high winds or prolonged exposure to high heat and humidity may become "weathered" to a point where they become friable. The photograph in Figure 1 demonstrates a split asbestos shingle that has become friable along the cracked edge.

The photograph is captioned, "Nonfriable asbestos shingle which has become friable along the broken axis." CX-7 p. 11 fig. 1. The only apparent indication in the photograph of weathering or friability is the fact that the split edge appears very rough in texture. In photographs taken by Mr. Dibble, however, the shingles have not only rough-textured broken edges, but also frayed, worn, and uneven edges.

In addition to the photographic evidence, the fact that broken pieces of transite shingles were lying on the ground before D & H began work at the site supports a finding that the shingles were friable. Mr. Horsley and Mr. Doyle testified that in their initial walk-through, they observed broken pieces of transite on the ground around the building. Tr. 242, 260-261. As suggested in Mr. Horsley's testimony, that fact indicates that the transite must have become weathered, causing pieces to fall off the roof, or that the transite was broken into pieces by vandalism. Tr. 242, 253. Whether transite pieces on the ground dropped during the removal operation or fell before D & H entered the site, the fact that broken pieces of transite were lying on the ground supports a finding that the transite was friable.

It is reasonable to conclude that transite shingles at the site were weathered and broken to the point of being friable; that is, they had "a high probability of becoming or ha[d] become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations." 40 C.F.R. § 61.141.

2. Whether the RACM was adequately wet during the stripping operation

Complainant alleges that Respondents were in violation of 40 C.F.R. § 61.145(c)(3), which provides, "When RACM is stripped from a facility component while it remains in place in the facility, adequately wet the RACM during the stripping operation."

The definition of "adequately wet" is found in 40 C.F.R. § 61.141, which means:

sufficiently mix or penetrate with liquid to prevent the release of particulates. If visible emissions are observed coming from asbestos-containing material, then that material has not been adequately wetted. However, the absence of visible emissions is not sufficient evidence of being adequately wet.

Thus, ACM may be found not to be adequately wet on the basis of evidence other than visible emissions.

Mr. Dibble was not present at the site while asbestos stripping was occurring. He arrived on a morning before the day's stripping activities commenced. Tr. 60-61, 65, 73, 80, 150. As explained below, a preponderance of the evidence does not show a violation of 40 C.F.R. § 61.145(c)(3).

The first question to address is whether Mr. Dibble was present "during the stripping operation" within the meaning of section 61.145(c)(3). The asbestos NESHAP regulations do not define or suggest the meaning of "during the stripping operation," so these words will be given their common meaning --while the ACM is actually being stripped. Therefore, an inspection on a morning before the day's stripping activities begin is not "during the stripping operation."[9] The fact that a separate requirement exists in section 61.145(c)(6)(i) for ensuring that the ACM remains wet until collected and contained in preparation for disposal is consistent with the conclusion that section 61.145(c)(3) refers to the time of active stripping.

Thus, Mr. Dibble's observations and photographs are not direct evidence of the condition of the RACM during the stripping operation. The next question is whether inferences may be drawn from Mr. Dibble's observations on the morning of August 19, 1992 which would be sufficient to establish that the RACM was not adequately wet when it was being stripped on a previous day.

Mr. Dibble testified that the transite shingles on the roof and the pieces of transite lying on the ground appeared to be dry. Tr. 27, 36, 39, 46-47, 66, 71, 104, 162. He determined that they were dry on the basis of the light color of

the transite. Tr. 104-105. He did not touch the shingles on the roof. Tr. 104-105, 108. He observed one hose coming from the church building approximately 80 feet away, which he believed would not reach the roof. CX-1; Tr. 65, 122-124, 162.

His belief with regard to the hose was contradicted by Mr. Horsley and by Mr. Doyle, who testified that approximately 300 to 400 feet of water hose existed at the site, and that a hose was kept in the roof area during the stripping process. Tr. 245, 263, 269-270. Mr. Nininger mentioned in his testimony having the men move the hose and wet the roof down. Tr. 368. Moreover, Mr. Dibble admitted on cross-examination that he did not know if the hose could reach the roof. Tr. 124. Indeed, Mr. Dibble admitted on cross-examination that he did not know whether water was used during the stripping operation. Tr. 150.

All three of the witnesses who were present at the site during the stripping operation testified that the transite shingles were wetted during the stripping operation. Tr. 245, 262-264, 274-275, 301, 323, 339, 360-361, 368. Mr. Nininger testified that he was at the site all day during the stripping process and that the material had been wet before being taken off. Tr. 339. He testified further that the shingles on the roof were wet "most of the time," but that when D & H was not wetting the ACM properly, he directed D & H employees to wet it down, and they did. Tr. 360-361, 367-368.

The photographs do not weigh heavily in favor of either Complainant's or Respondents' position. The parties do not dispute that when shingles are wet, they become darker in color. Tr. 21, 104, 284, 287-288. In Mr. Doyle's opinion, the dark areas of coloration on the shingles show that they were wet, and the lighter areas of color were the back side of the shingles, showing they were bleached from materials such as preservative or primer. CX-3C; Tr. 284-285, 287, 311-312, 327-328. Mr. Dibble testified that the dark areas were fungal growth and the effects of weathering, and the lighter areas show that they were dry. Tr. 37-38, 107.

The weight of the testimony and evidence shows that RACM at the site was wetted during the stripping activities. Any lapses noted by Mr. Nininger with regard to wetting the shingles adequately were remedied. The testimony and evidence presented in support of Complainant's position that the RACM was dry at the time of the inspection is not sufficient to support an inference that the RACM was not adequately wet during the stripping operation. Therefore it is concluded that Respondents did not violate the requirement of 40 C.F.R. § 61.145(c)(3).

3. Whether Respondent ensured that RACM remained wet until collected and contained in preparation for disposal

The asbestos NESHAP regulations provide, at 40 C.F.R. § 61.145(c)(6)(i) as follows, in pertinent part:

(6) For all RACM, including material that has been removed or stripped: I) Adequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with § 61.150
* * * *

The complaint (¶ 32) alleges that at the time of the inspection on August 19, dry RACM which had been removed or stripped from the facility was being stored on the roof, and that dry RACM was broken up and stored on the ground surrounding the building.

A preponderance of the testimony and evidence in the record show that RACM - transite which had been stripped from the roof - was dry and lying uncovered on the roof on the day of the inspection.

As to the broken pieces of transite on the ground, the evidence as a whole is not clear that they were dry on the day of the inspection. Because they were RACM, regardless of whether they were broken during the removal or previously, 40 C.F.R. § 61.145(c)(6)(i) requires that they be adequately wet and then kept wet until collected and contained for disposal.

Mr. Dibble testified that pieces of transite on the ground were dry. Tr. 36, 39, 66, 38, 39. He took photographs of these pieces. CX-3D, CX-3E, CX-3F. When asked whether a sample of transite on the ground that he picked up was wet or moist, he testified that it was dry. Tr. 119, 162; CX-3G. Mr. Nininger's testimony as to the transite pieces on the ground was that he did not know whether they were wet. Tr. 359.

Plastic sheeting appears on the ground in two of the photographs, but it is difficult to determine from the photographs whether or not the debris on the ground was wet. CX-3D, CX-3E. Mr. Horsley testified that debris on the ground was covered the night before the inspection with "poly" (polyethylene) material, or plastic sheeting, which had been rolled back on the day of the inspection. Tr. 253-254. Mr. Doyle similarly testified that the pieces of shingle on the ground had been wetted and covered the night before the inspection. Tr. 313.

Mr. Dibble observed during the inspection that transite shingles that were stripped and lying on the roof were dry. CX-1; Tr. 27, 46-47, 104. Mr. Dibble reported - and the photographs show - that they were not covered. CX-1, CX-3A, CX3-B, CX-3C, CX-3U, CX-3Y. Thus they were exposed to the air where, assuming they were wetted down previously, they could become dry.

Mr. Nininger apparently did not believe those shingles needed to be covered. His opinion was that the shingles were not friable, so he testified that "it wouldn't concern me to see a non-friable material laying on top of the roof." Tr. 360. Similarly, he saw "no problem with it if they were laying on the ground or in a bag." Tr. 359. He believed that transite roofing shingles are wetted while being removed to "knock down any airborne fibers that may be released," but "[o]nce the fibers are out of the air, the material can stay there for two weeks without releasing any fibers until it's moved again. He testified further, "Typically the way the work is done now is to throw it on back of a dump truck and hall [sic] it uncovered to the dump." Tr. 340. His testimony either presumes that the material is not friable, or does not take into consideration the requirements of 40 C.F.R. §§ 61.145(c)(6) and 61.150.[10]

Mr. Doyle testified that the shingles on the roof were wetted and covered with poly material the night before the inspection. Tr. 278-280, 308. The shingles were left on the roof, rather than being lowered to the ground, for safety reasons, he testified. Considering the lack of light in the area, and the "active criminal element basically moving in on us when we were working," he decided to tell the D & H employees to get down off of the roof at around 9:00 that night. Tr. 277-281.

He further testified that on the morning of the inspection, he broke up his men into two crews and had them begin cleanup of debris. Tr. 281. At the time Mr. Dibble arrived, Mr. Doyle testified, the shingles lying on the roof had not been touched or disturbed, but the poly material had been removed. Tr. 282. However, Mr. Doyle later testified that he "hadn't had anybody on the roof at the time" that Mr. Dibble was there. Tr. 323. The roof was approximately 20 feet from the ground. Tr. 361-362. He tried to explain later on redirect examination that he had seven men, and wasn't with them all of the time. Tr. 329. No plastic sheeting appears in the photographs of the shingles lying loose on the roof. CX-3A, CX-3B, CX-3C, CX-3U, CX-3Y. His testimony that the shingles on the roof had been covered the night before with poly material is not corroborated with any other testimony or evidence in the record, and is not persuasive.

Furthermore, when Mr. Doyle was asked at the hearing whether as a matter of practice he kept all ACM wet during the stripping operation, he answered, "[i]f we were working on that particular piece, yes." Tr. 274. His answer suggests that the ACM was not kept wet after it was removed.

A preponderance of the evidence shows that shingles that had been stripped and that were lying on the roof were RACM and did not remain wet on the day of the inspection. Therefore, Respondents violated the requirement of 40 C.F.R. § 61.145(c)(6)(i) as charged in Count II of the complaint.

4. Whether Respondent is in violation of 40 C.F.R. § 61.145(b) for failure to use work methods specified in its notification

D & H filed an Asbestos Permit Application and Notification for Demolition and Renovation on July 13, 1992. CX-4; Tr. 289-290. In the description of work practices and engineering controls to be used to prevent emissions of asbestos at the site, D & H reported, "Remove in a contained area using Wet Method." CX-4.

The complaint alleges that at the time of the inspection, dry asbestos was being stripped from facility components in an uncontained area, and that the asbestos being stripped from facility components was completely dry. Complaint ¶¶ 36, 37. Paragraph 40 of the complaint alleges that at the time of the August 19 inspection, Respondents did not use one of the emission control and waste treatment methods specified in the July 13 notification. The complaint (¶ 39) references the written notice requirement of 40 C.F.R. § 61.145(b)(4).[11] Section 61.145(b) provides, in pertinent part:

(B) *Notification requirements*. Each owner or operator of a demolition or renovation activity to which this section applies shall: (1) Provide the Administrator with written notice of intention to demolish or renovate.
* * * *
(4) Include the following in the notice:
* * * *
(xi) Description of work practices and engineering controls to be used to comply with the requirements of this subpart, including asbestos removal and wastehandling emission control procedures.

The complaint charges that "Respondents' failure to failure to (sic) use work methods specified in its July 13, 1992, notification comply (sic) with the

requirements of 40 C.F.R. §61.145(b) constitutes a separate violation of Section 112 of the Act, 42 U.S.C. § 7412."

Count III of the complaint fails to allege any enforceable violation. Section 112 of the Act sets forth EPA's general authority to regulate and promulgate standards for hazardous air pollutants. Complainant alleges that Respondents violated 40 C.F.R. § 61.145(b), which sets forth only notification requirements. It does not include any requirement to use or follow any work methods or engineering controls. Sections 61.145(c) and 61.150 set forth procedures for asbestos emission control, but they do not include any requirement to use the methods specified on the notification.

Mr. Doyle testified that a contained area method was used for removal of pipe insulation in the boiler room at the facility. Tr. 270-272, 291, 292. However, the removal of transite shingles from the roof was not done in a contained area --except to the extent that the roof and surrounding areas were not accessible to the public -- because it would be impractical, incurring a high cost, Mr. Doyle testified. Tr. 292-293. Mr. Doyle explained that the person who prepared the notification made a mistake in failing to differentiate the removal methods for the pipe insulation and for the roof. Tr. 289-293.

Nevertheless, such an inaccuracy in the notification does not support a finding that 40 C.F.R. § 61.145(b) was violated. That provision requires in essence that the notification include the required elements, that it be timely and properly delivered, that it be updated as necessary, and that an operation must begin on the date stated in the notice or amended notice. There is no issue presented in this proceeding as to Respondents' compliance with those requirements.

5. Whether Respondent caused the discharge of visible emissions to outside air in violation of 40 C.F.R. § 61.150(a)

Respondents were required to comply with 40 C.F.R. § 61.150(a), which provides in pertinent part:

Each owner or operator of any source covered under the provisions of §§ 61.145 . . . shall comply with the following provisions:
(A) Discharge no visible emissions to the outside air during the collection, processing . . . packaging, or transporting of any asbestos-containing waste material generated by the source or use one of the emission control and waste treatment methods specified in paragraphs (a)(1) through (4) of this section.

(1) Adequately wet asbestos-containing material as follows:
* * * *
(ii) Discharge no visible emissions to the outside air from collection, mixing, wetting, and handling operations . . . and (iii) After wetting, seal all asbestos-containing waste material in leak-tight containers while wet; or for materials that will not fit into containers without additional breaking, put materials into leak-tight wrapping;
* * * *

It is undisputed that a piece of transite shingle was protruding from a torn bag at the site. CX-3J, CX-3K; Tr. 66. The ACM was not sealed in leak-tight containers or wrapped in leak-tight wrapping. Because Respondents failed to use properly one of the emission control methods, Respondents had to comply with the provision to discharge no visible emissions to outside air.

The complaint alleges that stripped ACM was stored uncovered on the roof, dry RACM was broken up and stored uncovered on the ground surrounding the building, dry ACM was still affixed to pipe fittings in the boiler rooms, and two of the poly bags had RACM protruding through the bag. Complaint ¶ 44. The complaint charges that "Respondents' stripping of dry asbestos from the roof of the building, the storing of asbestos in a wheelbarrow, in torn poly bags, the pipe fittings in the boiler room, and on the ground surrounding the building, caused the discharge of visible emissions into the air."[12] Complaint ¶ 46.

The only reference to visible emissions in Mr. Dibble's inspection report is his statement that two of the approximately 50 bags containing roofing materials were torn and had RACM protruding through the bag, creating a visible emission. CX-1. At the hearing, however, he denied that he had seen any particulate matter being emitted from the transite that was protruding from the bag. Tr. 128.

There is no evidence in the record that anyone saw any visible emissions of asbestos at the site. Tr. 128, 129, 212. Mr. Doyle and Mr. Nininger testified that they did not see any visible emissions of asbestos. Tr. 295, 298, 325, 347-348. When asked what he would do if he had observed visible emissions, Mr. Nininger testified that he would have immediately put up an air pump close to the area and had the material wetted and covered, but that he never had to take such action at this site. Tr. 348.

Indeed, Mr. Nininger set up five air pumps along the perimeter of the building to determine whether asbestos fibers were released into the air. Tr. 348-350.

He took samples before, during and after the asbestos removal. Tr. 348-349, 355, 356. The air samples were sent to a laboratory for analysis. Tr. 35l. The air monitoring results showed generally that there was no significant change in air quality during the roof removal.[13] Tr. 355-356, 365.

Complainant urges that, given the condition of the shingles and the way they were broken, an inference should be drawn that visible emissions must have been discharged at the time the shingles were removed. Mr. Dibble testified that he would determine whether a visible emission of asbestos has occurred on the basis of extensive breakage of the ACM, such as breakage resulting from the ACM falling during removal. Tr. 22.

However, assuming ACM had fallen and/or was extensively broken, if it was kept adequately wet, there may not have been any visible emissions. Indeed, the purpose of keeping the ACM wet is to prevent or control emissions in the event of breakage.

As concluded above, it has not been demonstrated that Respondents failed to adequately wet RACM during the time it was stripped. Therefore a conclusion cannot be drawn that visible emissions were discharged based merely upon the condition and breakage of the transite. It is concluded that Respondents have not violated the requirements of 40 C.F.R. § 61.150 as alleged in the complaint.

PENALTY

A penalty of $15,000 is proposed by Complainant for the violation charged In Count II. Complainant asserts that it calculated the penalty according to the Clean Air Act Stationary Source Civil Penalty Policy and Appendices ("Penalty Policy"). CX-6; Tr. 180. In making the calculation, Complainant considered the amount of asbestos Respondents reported in the July 13, 1992 notification (CX-4), namely 18,000 square feet, which is considered in the Penalty Policy to be over 50 units of asbestos (one unit is 160 square feet). Tr. 181. The Penalty Policy includes charts for various types of asbestos demolition and renovation violations. These charts assign penalty amounts in accordance with various factors. The chart for "work-practice, emission and other violations," upon which Complainant based the proposed penalty, includes the factors of: (1) the total amount of asbestos involved in the operation, (2) whether it is a first, second, or subsequent violation, (3) multiple days of violation, and (4) an economic benefit component. CX-4, Penalty Policy Appendix 3 p. 17; Tr. 182-183.

The chart indicates that a penalty of $15,000 represents a one-day first-time violation, involving more than 50 units of asbestos. Id.

Complainant added $5,000 onto the total penalties proposed in the complaint to reflect the size of the violator. Tr. 184-185. A Dunn & Bradstreet report on Respondent D & H indicates it had sales of approximately $1,300,000, and that its net worth is approximately $256,000. CX-5; Tr. 18S. The Penalty Policy provides that a figure reflecting the size of the violator should be assessed once for the case as a whole. CX-4, Penalty Policy at p. 14. For corporations with a net worth between $100,001 and $1,000,000, the Penalty Policy directs that $5,000 be added to the penalty. Id. Thus, Complainant would assess a penalty of $20,000 for Respondents' liability on Count II.

That penalty is close to the maximum penalty allowable under the statute. Section 113(d) of the Clean Air Act, 42 U.S.C. §7413(d), provides for the administrative assessment of civil penalties as follows, in pertinent part:

(1) The Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to $25,000, per day of violation, whenever, on the basis of any available information, the Administrator finds that such person --
* * * *
(B) has violated or is violating any other requirement or prohibition of subchapter I of this chapter . . . .
* * * *

Section 113(e)(1) of the Act specifies penalty assessment criteria, as follows, in relevant part:

In determining the amount of any penalty to be assessed under this section . . . , the Administrator . . . shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence. . . , payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

The penalty proposed by Complainant is excessively high and does not accurately reflect the facts revealed by the evidence in this case. First, the amount of ACM at the site is less than the amount that Respondents estimated in the

notification of July 13, 1992 (18,000 square feet), because Respondents included in their estimate asphalt roofing material, which was found not to be ACM, and floor tile. Tr. 299-300; CX-4. Only the transite shingles are at issue in Count II. It is undisputed that there were approximately 5,000 square feet of transite shingles. Tr. 300; Complainant's Proposed Findings of Fact, Conclusions of Law and Order at 30.

Second, as described above, the evidence was conflicting as to whether or not the transite pieces on the ground were wet on the day of the inspection. The record does not show that Respondent completely disregarded the requirement to wet RACM adequately and to keep it wet until contained for disposal. A hose was used to wet down the shingles while being removed, and plastic sheeting apparently was used to cover some of the transite material. Tr. 245, 254, 262, 263-264, 269, 274, 301, 339, 368; CX-3D, CX-3E. After removal, the shingles were contained in bags. Tr. 262, 295, 297, 301.

As to the size of the business, D & H is not a very large sized corporation. The economic impact of a penalty on Respondents is much greater than on a very large corporation. Aside from the directive noted above in the Penalty Policy, which is a tool for enforcement personnel but which is not binding on the Judge, I find no compelling reason to increase the penalty amount on the basis of the size of Respondents' business.[14]

There is no evidence in the record of any history of noncompliance with the NESHAP requirements on the part of Respondents. Complainant does not claim that there was any economic benefit of Respondents' noncompliance with the NESHAP requirements.

Balancing these factors, and considering all of the testimony and evidence in the record, it is concluded that a penalty of twenty percent of the statutory maximum is an appropriate amount to assess for Respondents' failure to comply with 40 C.F.R. § 61.145(c)(6)(i).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At the time of Mr. Dibble's inspection, several transite shingles which had been loosened from the roof and were lying on the roof of the facility and lying on the ground were broken. CX-3A, CX-3B, CX-3C, CX-3D, CX-3E, CX-3F, CX-3G. The evidence shows that some transite shingles at the site showed signs of weathering. CX-3B, CX-3C. A preponderance of the evidence shows that transite shingles at the site had a high probability of becoming or had become crumbled,

pulverized or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations and were therefore regulated asbestos-containing material.

2. The inspection on the morning of August 19, 1992 did not take place during stripping operations. Tr. 80, 94-95, 149-150. The allegation that RACM was not adequately wet during the stripping operation is not supported by a preponderance of the evidence. Therefore, Complainant has not established a violation of 40 C.F.R. § 61.145(c)(3).

3. At the time of the inspection, shingles which had been stripped from the roof were lying uncovered on the roof. CX-3B, CX-3C, CX-3U, CX-3Y. A preponderance of the evidence shows that they were not wet on the date of the inspection. CX-3A, CX-3B, CX-3C, CX-3U, CX-3Y. The failure of D & H to ensure that RACM remains wet until collected and contained for disposal constitutes a violation of 40 C.F.R. § 61.145(c)(6)(i).

4. In a notification to EPA, D & H stated that it intended to remove ACM a contained area using a wet method. CX-4. Roofing shingles were not removed within a contained area. Tr. 291. However, the failure to use the particular work practices and engineering controls stated in the notification does not constitute a violation of 40 C.F.R. § 61.145(b).

5. No visible emissions of asbestos were observed during the inspection of the facility. Tr. 128-129. The allegations that transite shingles were not adequately wet during removal and handling is not supported by a preponderance of the evidence. The friable condition and breakage of transite shingles do not provide a basis upon which to infer that visible emissions were discharged to outside air. Complainant has not established that Respondents violated the requirements of 40 C.F.R. § 61.150(a).

6. An appropriate penalty for Respondents' violation of 40 C.F.R. § 61.145(c)(6)(i) is $5000.

ORDER

Respondents are liable for failing to ensure that RACM remains wet, as required by 40 C.F.R. § 61.145(c)(6)(i). A penalty of $5,000 is hereby assessed jointly and severally against Respondents D & H Contractors, Inc. and St. John's Episcopal Church, for that violation. Accordingly, Respondents shall pay a civil penalty of $5,000 pursuant to section 113(d) of the Clean Air Act, 42

U.S.C. 7413(d). Payment of the penalty shall be made within 60 days from the service date of this Order by submitting a cashier's or certified check payable to the Treasurer of the United States, and mailed to EPA Region III, Regional Hearing Clerk, P.O. Box 360515, Pittsburgh, Pennsylvania 15251-6515.[15]

Charles E. Bullock
Administrative Law Judge

Dated: 2/4/97
Washington, D.C.

[1] Prior to his retirement from Federal service in January of 1996, Judge Frank W. Vanderheyden held a hearing in this proceeding on August 16, 1995. This case was reassigned by order of Chief Judge Jon G. Lotis dated June 27, 1996.

[2] Demolition is defined in regulations under the Act as "the wrecking or taking out of any load-supporting structural member of a facility together with any related handling operation." 40 C.F.R. § 6l.141. Renovation is defined as "altering a facility or one or more facility components in any way, including the stripping or removal of RACM from a facility component." Id.

[3] The asphalt roofing material and materials from the front building were determined not to contain asbestos. Tr. 83.

[4] Complainant is the United States Environmental Protection Agency, Region III.

[5] By letter dated December 6, 1995, St. John's informed the Presiding Judge that it would not be making independent submissions but that it intended to rely upon the evidence, briefs, proposed findings of fact and conclusions of law submitted by D & H. The arguments and positions of D & H or "Respondents" are the same as St. John's.

[6] Arguments of the parties which are not specifically addressed herein are deemed insufficient to affect the outcome of this case.

[7] Friable asbestos material means any material containing more than one percent asbestos that when dry can be crumbled, pulverized, or reduced to powder by hand pressure. 40 C.F.R. § 61.141.

[8] Mr. Dibble, a compliance inspector for NESHAP, testified that he had undergone training for asbestos inspectors, and had performed over 300 inspections, including "numerous" sites involving transite material. Tr. 18-19, 22, 141-142.

[9] This is not inconsistent with the finding of respondents' failure to adequately wet RACM during the stripping operation *In re: Norma J. Echevarria and Frank J. Echevarria, d/b/a Echeco Environmental Services,* 5 EAD 626, CAA Appeal No. 94-1 (EAB, December 21, 1994), where the inspector made his observations during respondents' lunch break. If ACM is found not to be adequately wet during a lunch break, it is safe to assume that it also was not adequately wet before the break. Such an assumption cannot be made after the long overnight break from ACM removal activities. Thus, a short break from work does not significantly halt stripping operations, but an overnight does, in this context.

[10] 40 C.F.R. § 61.150 requires owners and operators to "[d]ischarge no visible emissions to the outside air during the collection..... or transporting of any asbestos-containing waste material. . . or . . . use one of the emission control methods . . .[a]fter wetting, seal all asbestos-containing waste material in leak-tight containers . . . or leak-tight wrapping . . ." However, those requirements do not apply to nonfriable Category II ACM waste that did not become crumbled, pulverized or reduced to powder. 40 C.F.R. § 61.150(a)(5).

[11] The complaint contains a typographical error, as it cites to 40 C.F.R. § 61.145(b)(4)(ix), but refers to the requirement to include in the notice a description of work practices and engineering controls, which requirement appears at 40 C.F.R. § 61.145 (b) (4) (xi) .

[12] At the hearing, Mr. Dibble conceded that the material in the wheelbarrow was roofing material from the other building, and was not ACM. Tr. 83.

[13] On one day, excess fibers were recorded, and on another day the air was too dirty to count for monitoring of airborne emissions. Tr. 364-365; CX 13, entries for August 4 and 10.

[14] Complainant has not provided any supporting arguments or evidence in the record for following the directive in the Penalty Policy of adding $5000 to the penalty to reflect the size of Respondent's business.

[15] Unless this decision is appealed to the Environmental Appeals Board in accordance with 40 C.F.R. § 22.30, or unless the Board elects to review this

decision sua sponte, it will become a final order of the Agency 45 days after its service upon the Parties.