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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Indspec Chemical Corporation	)	
	)	
and	)	Docket No. CAA-III-086
	)	
Associated Thermal Services, Inc.	)	
	)	
Respondents	)	

INITIAL DECISION

This case was initiated by the filing of a Complaint and Notice of Opportunity for Hearing on May 13, 1997, to Respondents Indspec Chemical Corporation ("Indspec") and Associated Thermal Services, Inc. ("ATS".) The Complaint was issued under the authority of Section 113 (a) (3) and (d) of the Clean Air Act, as amended, 42 U.S.C. § 7413 (a)(3) and (d) ("CAA" or "Act"), alleging violations of Section 112 of the Act, 42 U.S.C. § 7412 and the requirements of the National Emission Standards for Hazardous Air Pollutants for Asbestos found at 40 C.F.R. Part 61, Subpart M ("Asbestos NESHAP".)

The four count Complaint alleges, in Counts I and II, violations solely against Indspec and, in Counts III and IV, violations against both Indspec and ATS. Counts I and II of the Complaint are no longer at issue, the case against Indspec having reached an out of court settlement.

Count III alleges that Indspec as the owner of the facility, and ATS as the operator of a demolition or renovation activity, failed to adequately wet regulated asbestos containing material ("RACM") during an asbestos renovation operation performed by ATS personnel at the Hill Plant of the Indspec Chemical Corporation facility ("Facility"), in violation of Section 112 of the Act and 40 C.F.R. § 61.145 (c)(3). More specifically, Count III of the Complaint alleges that from at least September 16, 1996 through September 19, 1996, the Respondents failed to

adequately wet RACM during the removal operation conducted at the Hill Plant area of the Facility, thereby violating Section 112 of the Act and 40 C.F.R. § 61.145 (c)(3).

Count IV of the Complaint alleges that Indspec and ATS also failed to ensure that such RACM remained wet until collected and contained or treated in preparation for disposal in violation of Section 112 of the Act and 40 C.F.R. § 61.145 (c)(6)(i). Under that provision each owner or operator of a renovation operation is required to adequately wet all RACM, including material that has been removed and stripped and ensure that it remains wet until such time as it is collected and contained or treated in preparation for disposal in accordance with 40 C.F.R. § 61.150. The Complaint alleges a period of non-compliance with the Act and the implementing regulations from at least September 16, 1996 through September 19, 1996. The EPA proposed a total civil penalty for Counts III and IV of the Complaint of $67,000.00 jointly against the Respondents.

ATS filed its Answer to the Complaint on or about June 5, 1997, and thereafter filed an Amended Answer to the Complaint ("Amended Answer") on or about October 31, 1997, in which ATS denied all material allegations contained in the Complaint, set forth affirmative defenses and requested a hearing pursuant to EPA rules of practice. The case was assigned to the undersigned Administrative Law Judge through an Order of Designation dated June 23, 1997.

On December 5, 1997, the undersigned issued an Order on Motions which granted EPA's Motion to Strike Affirmative Defenses and granted EPA's Motion *In Limine*. Thereafter, on February 18, 1998, the EPA entered into a formal settlement agreement with Respondent Indspec with the filing of a Consent Agreement and Consent Order ("CACO") with the Regional Hearing Clerk. The CACO resolved and settled all allegations set forth in the Complaint against Indspec and requires Indspec to pay a civil penalty in the amount of $18,500.00.

On January 21, 1998, the undersigned issued an Order on Motion and Response to Status Report. The Order required ATS to provide the documents and information requested by EPA in their Motion to Compel the filing of a supplemental prehearing exchange by ATS. The Response to the Status Report also directed EPA to advise the Court and ATS of the revised proposed penalty in light of the settlement of Respondent Indspec. By letter dated February 18, 1998, EPA advised the undersigned of the settlement of Respondent Indspec and that EPA would seek a penalty of $61,000.00 against Respondent ATS at the scheduled hearing.

A hearing was held in this matter on February 23 - 24, 1998, in Pittsburgh, Pennsylvania. Subsequent to the hearing, on April 8, 1998, the EPA filed a Post-Hearing Motion seeking the reopening of the hearing record, the insertion of relevant records into the hearing record and the admission of those relevant exhibits into evidence. Specifically, Complainant seeks to add to the hearing record the documents contained in their initial Prehearing Submission and identified as Complainant's Prehearing Exhibit 22A through 22E. Complainant further states in their Post- Hearing Motion that they wish to have the hearing in this case reopened for the limited purpose of admitting into evidence these documents. EPA maintains, as they did at the Hearing, that they relied upon the documents in question including a state inspector's report and a state-issued Notice of Violation alleging Asbestos NESHAP violations against ATS, in calculating the appropriate penalty to be issued pursuant to the penalty assessment factors of the Act as set forth in Section 113(e), 42 U.S.C. § 7413(e), the Clean Air Act Stationary Source Civil Penalty Policy dated October 25, 1991, as clarified January 17, 1992, and its Appendix III, the Asbestos Demolition and Renovation Civil Penalty Policy as revised, May 11, 1992. A Post-Hearing Brief was also filed by Complainant on April 8, 1998.

On April 7, 1998, ATS filed its Post-Hearing Brief. This was followed by the submission of a Reply Brief and Opposition to Complainant's Post-Hearing Motion on May 7, 1998. In their Opposition to Complainant's Post-Hearing Motion, ATS asserts that the documents in question (Complainant's Prehearing Exchange Exhibit 22A - 22E) were properly excluded as not being part of ATS' compliance history.

I. The Determination of Liability

As reflected by the Joint Stipulations, most of the potential issues in this case are not in dispute.(1) Therefore this initial decision will address only those issues which remain to be resolved. Broadly speaking these consist of resolving three issues. Two of these involve challenges to the fact of violations: 1. whether ATS adequately wet the asbestos-containing pipe insulation during the removal process and; 2. whether ATS failed to ensure that the insulation remained wet until its collection. Central to the resolution of the first two issues is ATS's contention that it complied with these regulations by encapsulating the asbestos with a spray solution referred to in the proceeding as "Encap."(2)

If liability is established, on either or both of the alleged violations, the third issue will be addressed, which involves determining the appropriate civil penalty to be assessed.

A. The Factual Setting.

It is uncontested that, on September 19, 1996, EPA Inspectors Douglas Foster and Richard Eaton conducted an inspection of a resorcinol manufacturing plant at 133 Main Street in Petrolia , Pennsylvania, which Facility is owned and operated by Indspec Chemical Corporation. ATS, an Asbestos Abatement contractor, removed asbestos containing pipe insulation at the Facility's Hill Plant from September 16, 1996, through at least September 19, 1996. As pertinent here, during the course of their inspection, the EPA inspectors eventually viewed the ATS dumpster which contained the asbestos material ATS had collected during the renovation project. EPA inspector Douglas Foster lifted the bags in the dumpster and took three of them to a storage shed to examine their contents. While in the shed, he took photographs of the material and took samples from the bags for the purpose of subsequent laboratory analysis.

B. ATS's Position on the Issue of Liability.

ATS asserts that, by encapsulating the asbestos, it did comply with the subject regulations, keeping the RACM "adequately wet" during the removal process and that it remained "adequately wet" pending its collection. ATS does not claim that it complied with the regulations by using water. Rather the sole basis for its contention that it was in compliance is that it used encapsulant. In support of its position, ATS maintains that before the specific factual determination can be made as to whether it violated the regulations, the term "adequately wet" must be defined and that the standard an inspector employs to make such a determination needs to be identified. While conceding that courts have routinely relied upon the observations of inspectors to determine if asbestos has been "adequately wetted," ATS argues that an inspector must have a "thorough understanding" of the term "adequately wet" in order for a court to rely on such observations. ATS Brief at 5. In this regard it believes that neither Inspector Eaton nor Inspector Foster had such an understanding, describing the former's testimony concerning his understanding of the term as ranging "from saturated, to essentially dry when sprayed with an encapsulant" and the latter's testimony as evidencing "uncertain[ty] of the meaning of the word 'liquid'". Id. 6-7. Further, ATS asserts that the understanding of the term by EPA's third witness, Mr. Richard Ponak, was based on the old EPA definition of the term, as reflected by the witness's insistence that the asbestos containing material ("ACM") had to be "entirely wet." Id. at 8. Thus, ATS concludes that each EPA witness had a different understanding of the term and that, given the conflicts within EPA itself, ATS personnel can hardly be expected to have a clear understanding of the meaning of the term on its own.

Apart from this legal argument, ATS maintains, addressing whether EPA established a violation of the two cited regulations, that the Complainant also failed to meet its burden of proof. In support of this contention, ATS notes that EPA's Inspector Eaton did not observe the asbestos removal process nor did he ask to view it while at the site, did not know whether there were water sources available, and saw no airborne particulates when Inspector Foster opened the ACM bags at the Facility.

Further, ATS characterizes Inspector Eaton's testimony as effectively acknowledging that "adequately wet" can mean dry because of his concession that encapsulating asbestos could give it a dry appearance. Id. at 11.

Referring to Inspector Foster's testimony, ATS states that this inspector never inquired whether an encapsulant was used during the removal process. As with Inspector Eaton, he did not observe any visible emissions from the ACM bags and he also failed to inquire of ATS as to whether there were water or wetting agent supplies present. Concerning the testimony of EPA's third witness, Mr. Richard Ponak[(3)], and his conclusion that the insulation was dry, ATS maintains that this witness's determination cannot stand, as its foundation rests on the deficient inspection and testimony made by Inspectors Eaton and Foster. Id. at 14.

In apparent contradiction, although ATS concedes that ". . . the courts have universally held that an inspector's observations that asbestos-containing materials had not been adequately wetted was enough to hold the Defendant liable as a matter of law . . ." it goes on to report that it could find no cases where the inspectors did not make "direct observations" supporting the violations charged and consequently ATS winds up asserting that it is necessary for EPA to have observed the removal process or, lacking that, to rely upon the work practices of the Respondent to determine what actually happened. Id. ATS suggests that the more reliable witness as to these work practices was the ATS foreman, Mr. David Fisher, and that, as he was no longer employed by ATS at the time of the hearing, his testimony is particularly trustworthy. In contrast, ATS notes that Complainant's witnesses are all presently employed by EPA. On this basis, ATS submits that the court should rely upon the "direct and uncontroverted testimony" of Mr. Fisher who states that he sprayed the material with the encapsulant. ATS concludes that "there were no airborne emissions, no harm to the environment and a substantial compliance to the best of ATS's ability with a vague and confusing regulation." Id. at 20.

In its Reply Brief ATS reiterates that the various understandings of EPA's witnesses as to the term "adequately wet" points to their collective unreliability and lack of credibility. As it did in its Post-Hearing Brief, ATS continues to assail various aspects of the EPA inspection itself. In the case of Inspector Foster's testimony, it maintains that he was not looking for Encap and knew little about the product. ATS suggests that Foster's failure to observe signs of static electricity inside the bags he opened is explained by its use of Encap . It also claims that Inspector Foster did not follow EPA's own inspection procedures when he opened the bags in a storage area instead of in a containment area or by using a glove bag. Taking all of these factors together, it submits that Foster should be considered a "totally unreliable witness." Reply Brief at 4. As for Inspector Eaton, ATS believes his testimony supports its interpretation of the term "adequately wet, " and its view that water need not penetrate the asbestos, but must only mix or combine with it. Id.

Addressing EPA's testimony that the material in the bags examined by Inspector Foster appeared dry three days after it was bagged, ATS responds that the bags were only "leak tight" not "air tight," and that since Encap is "essentially glue" it was likely already dry at the time it was bagged. Further, ATS protests that it was inherently unfair for EPA to wait until eight months after the inspection to file the Notice of Violation, thereby depriving ATS of the chance to test the material to show it in fact adequately wet. Id. at 5.

C. Resolution of the Issue of Liability.

As mentioned earlier, the core of the ATS defense is that it complied with the subject regulations by using an encapsulant [(4)] and that such use can satisfy the requirements of 40 C.F.R. § 61.145(c)(3) and § 61.145 (c)(6)(i) which provide, respectively, that regulated asbestos containing material ("RACM") be adequately wet during the stripping operation and that it remain wet until collected and contained or treated in preparation for disposal in accordance with § 61.150. Indeed, ATS has never maintained that it adequately wetted the RACM through any other method other than through encapsulation. EPA's Inspector Foster and ATS's asbestos removal Project Supervisor, Mr. Fisher were in agreement that Mr. Fisher

did not use water on the RACM.[(5)] Both affirm that it was Mr. Fisher's position that water could not be used because of the hot steam pipes. Tr. 303, 672. In fact, Mr. Fisher believed that spraying water on the pipes would have caused them to "blow up right in your face." Tr. 665.

The problem with ATS's defense that it complied by encapsulating the asbestos, wrangling as it does over the asserted differences between the EPA witnesses' understanding of the meaning of the regulatory term "adequately wet" and whether, when encapsulated, adequately wet can mean dry, is that it misses the point that if the material in issue is still dry, soft, and easily crushable, it cannot be adequately wet. When Inspector Foster examined each of the sample bags, he found the material inside to be in just such a state: very dry, real soft, easily crushed and thus friable. He noted, as evidenced in the photographic log he took during his examination of the sample bags,[(6)] the dry, friable edges on the insulation. His direct observations as to the condition of the material in the sample bags refute the ATS claim that there had been adequate wetting through encapsulation.[(7)] Inspector Foster also testified that he could see visible dust inside the bags on top of the material. Tr. 356. Thus, questions about whether Inspector Foster knew enough about the characteristics of Encap, its properties as sticky or shiny or the colors it comes in, are all transcended by his direct observations.

Apart from the laboratory analysis results of the samples he took, which confirmed the presence of asbestos, Inspector Foster, who I find to be credible, was the only witness to directly examine the suspect material. As mentioned, the photographs he took at the time of his examination lend support to his observations concerning the condition of the material he examined. Viewed in this context, it becomes irrelevant whether the opinions of Inspectors Foster or Eaton as well as Mr. Ponak's understanding of the term "adequately wet" squared with each other or with the Respondent's interpretation of the term. Although a case may someday present an issue as to the degree of encapsulation that might satisfy the regulations involved here, this case does not, as I accept the testimony of Inspector Foster as to the dry, soft, easily crushable, friable state of the asbestos containing pipe insulation. His testimony makes it clear that there was not sufficient mixing or penetrating with liquid to prevent the release of particulates and accordingly that it was not adequately wet during the stripping operation.[(8)] Thus, inquiries into the degree of encapsulation and the point at which asbestos becomes adequately wetted by employing Encap are not reached when the asbestos is not wetted or encapsulated sufficiently to eliminate it from being in a dry, soft, easily crushable state.

In fact, Mr. Fisher's own description of the process of encapsulation that was ostensibly employed by ATS reveals that, if it was used, it was inadequate. Mr. Fisher was asked how much Encap was used. His response revealed, on its face, that it was insufficient: "We would spray until, you know, you could visibly see that, you know, it was onto the insulation." Tr. 629. Patently, this approach would, at most, only coat the outside of the RACM. Mr. Fisher also clearly testified that this was the only time that spraying occurred. Thus, if it occurred, it was only at the outset *before* any slicing to actually remove it was done and then, again without any further application of Encap, the RACM was bagged. Tr. 629-630. Further, Mr. Fisher conceded that Mr. Foster told him that the bags were dry and needed to be wetted. Tr. 648. Nor was Mr. Foster's assertion met with any protest by Mr. Fisher. Had Mr. Fisher believed that the encapsulation procedure allegedly employed was effective, it would have been natural for him to challenge EPA's position. In Mr. Fisher's own words, it was only *after* Mr. Foster explained to him about "the moisture content and all" that Mr. Fisher changed ATS's wetting procedure. Tr. 661-662.

I also reject ATS's flirtation with the notion that inspectors must observe the asbestos removal process. As has been aptly observed by the Environmental Appeals Board ("EAB" or "Board"), few enforcement cases could ever be brought if such a requirement existed. See, In re: Norma J. Echevarria, 5 E.A.D. 626 (EAB 1994). After reporting that it could find no cases where inspectors did not make "direct observations," ATS asserts that where the removal process is not observed, the

determination of what actually happened must be made by relying upon the work practices of the Respondent. This is a facile suggestion. If adopted, it would leave the trier of fact hostage to the Respondent's witnesses. Respondent fails to recognize that "direct observations" were in fact made here by Inspector Foster both in connection with his physical examination of the sample bags he opened, as well as by his hefting the remaining bags in the dumpster and by feeling them for signs of moisture content. Further, there is no merit to the suggestion that EPA's witnesses should be viewed as less trustworthy merely on the basis that they are currently employed by EPA, nor to ATS's companion suggestion that its sole witness, Mr. Fisher, should be considered "particularly trustworthy" simply because he was no longer in their employ.

In addition, ATS's suggestion that EPA acted unfairly by not filing the Notice of Violation until eight months after the inspection is without merit. Nothing prevented ATS from protesting at the time of the inspection that the material in issue was fully encapsulated so as to comply with the adequate wetting provisions and there was no impediment to ATS's saving some samples from the bags to potentially enable it to show at a later time that it was, in fact, adequately wet. Despite Mr. Fisher's claim that he had no idea there would be a citation issued, certainly ATS knew from the direction given by the inspectors to add water to the bags that adequate wetting was in issue at that time and that a civil penalty action would be likely to follow.

Other aspects of ATS's position present conflicts which tend to support EPA's description of the condition of the subject material. ATS suggests, for example, that it could not use water in the removal process because the pipes were so hot, but it offers no legitimate response to the observation that Encap is composed predominantly of water. When presented with the fact that water is the primary ingredient in Encap, Mr. Fisher conspicuously had no response to the point that, as such, the Encap would also be expected to generate steam. See Complainant's Exhibit 52, and Tr. 674. Nor does it give any reason for its failure to avail itself of the waiver provision at 40 C.F.R. 61.145(c)(3). That provision, excusing wetting and substituting other precautions, is available where an owner or operator, upon showing that wetting would damage equipment or present a safety hazard, obtains prior written approval from the Administrator. EPA Brief at 24, Joint Stipulations Nos. 16-17.

Thus, I conclude and find that ATS failed to adequately wet the RACM and failed to ensure that it remained wet until collected during the September 16 through September 19, 1996, Hill Plant renovation and pipe stripping operation in violation of the asbestos NESHAP work practice requirements of 40 C.F.R. §§ 61.145(c)(3) and 61.145(c)(6)(i).

II. The Determination of an Appropriate Civil Penalty

EPA maintains that it calculated the proposed penalty for the violations on the basis of the statutory factors in Section 113(e) of the Clean Air Act, the penalty guidelines for the Asbestos Penalty Policy, and the General Penalty Policy. After reminding the Court that 40 C.F.R. § 22.14(c) directs that the Presiding Judge *must* consider any civil penalty guidelines issued under the Act, EPA submits that its assessment of the appropriate penalty in this matter should be adopted here.

As with the determination of violations in this case, the issues involving the appropriate penalty in this instance are also discrete. In its Post-Hearing Brief and Reply Brief, the Respondent does not take issue with EPA's calculation of the appropriate penalty except for its consideration of Exhibit 25 and Proposed Exhibit 22 as part of Respondent's compliance history. If these Exhibits were not properly considered by EPA in this regard, ATS otherwise accepts the Agency's calculation of the penalty and drops any issue of its ability to pay such a recalculated penalty.[(9)]

A. Background

In addressing the Respondent's "Full Compliance History," four exhibits, (Nos. 22

through 25), were discussed by Mr. Ponak, EPA's witness regarding the reasoning behind its penalty calculation.[(10)] Keeping in mind that the violations involved in this case occurred in *September 1996,* proposed Exhibit 22A through 22E involves alleged violations by ATS during the removal of asbestos containing material occurring during *January 1997.* Exhibit 23A and 23B involved non-NESHAP violations of a Pennsylvania County Asbestos Code which occurred during June 1995. ATS arrived at settlement of this matter, paying $1,000.00 for the alleged violations. Exhibit 24A through 24B also involved non-NESHAP violations which occurred during August 1996. Last, Exhibit 25A through 25G involves a criminal complaint which was issued in December 1996, and involved alleged violations in connection with an ATS asbestos removal project during August 1996. As to this last Exhibit, ATS paid a $2,000.00 fine, admitting guilt to the charge of removing asbestos without a permit, another non-NESHAP violation. However, in the present proceeding, although there was judicial finality to the matter involved with Exhibit 25, EPA counsel attempted to create a NESHAP violation by asserting that ATS's admission of guilt in the matter addressed in Exhibit 25 proved that it had also violated the NESHAP requirement to notify EPA when more than 160 feet of asbestos is being removed. The fact that EPA never notified ATS of any such alleged violation and never brought any charge that it constituted a NESHAP violation did not deter EPA counsel from asserting that nevertheless it *could have been* a NESHAP violation.

Thus, it was the reliance upon the alleged state NESHAP violation of January 1997, as reflected in Exhibit 22, and the asserted NESHAP violation that *could have been*, as reflected in Exhibit 25, that caused Mr. Ponak to determine that the penalty should be increased two times, resulting in his proposed penalty calculation of $65,000.00 for Counts III and IV. By considering these violations, Mr. Ponak determined that Counts III and IV involved "subsequent violations," which, under the EPA penalty matrix, had the effect of raising the penalty to $25,000.00 for each Count and increasing the additional days of violation component to $2,500.00 per day for three days. After factoring in $2,000.00 for the "size of business" component, EPA arrived at a total proposed penalty of $67,000.00. Tr. 438. In deriving this total, the witness agreed that the component of "Full Compliance History" played a significant role in the amount of the proposed penalty.

B. EPA's Arguments

EPA does not contest the underlying facts pertaining to the two Exhibits it believes should be considered as part of ATS's full compliance history. As alluded to above, the Exhibits in issue involve three county asbestos violations, one of which EPA maintains was also an asbestos NESHAP violation, and an alleged single Pennsylvania Department of Environmental Protection violation which, it is contended, is also a NESHAP violation. These will be referred to hereafter as the "county violation" and the "state" or DEP violation. As mentioned, the county violation, reflected in Exhibit 25, involved ATS's admission of guilt and settlement as to a single *non-NESHAP* violation: removing asbestos without a permit. The state violation, reflected in proposed Exhibit 22A-E, involves claimed violations which are alleged to have occurred on or about January 21, 1997. Unlike the county violation, there has been no final determination in the state matter.

As to the state violation, EPA counsel argued that, although it was issued *after* the date of the violations in this litigation, they were relevant because they occurred "very shortly" after the violations in issue and that while the statute requires consideration of the full compliance history, it doesn't limit such history to those violations occurring immediately before or after those being litigated, but rather, according to EPA, they must be "relevant." Tr. 442, EPA PH Brief at 83.

This Court ruled that Exhibit 22 was not admissible, in part on the basis that, while a violation had been charged, there had been no determination yet of the truth or falsity of the allegations. Tr. 444. EPA now argues that the decision of the EAB in Ocean State Asbestos Removal, Inc., CAA Appeal Nos. 97-2 and 97-5, 1998 EPA App. LEXIS 82, (March13,1998) ("Ocean State"), decided after the hearing in this matter, mandates reversal of this ruling and formally moves for reopening of the record to admit Exhibit 22. In Ocean State the presiding officer was determined

to have erred when he ruled that, because there had been no adjudication of the matter, a prior Asbestos NESHAP violation would not be considered in determining the appropriate civil penalty. The Board, reversing the judge, ruled that compliance history was not limited to violations previously determined after full adjudication.

Noting that the Court also questioned in the present matter whether it was appropriate to consider, as part of a respondent's full compliance history, a violation occurring *after* the date of the alleged violations being litigated, EPA maintains that such events are properly considered as part of the "broad inquiry" into the respondent's "full compliance history and good faith efforts to comply." EPA Brief at 91. In support of this argument, EPA distinguishes references by other environmental statutes to "*prior history of violations*," from the Clean Air Act's direction that the violator's "*full compliance history*" be considered. EPA reasons that since the only modifiers to history are "full" and "compliance," there is no limitation to "prior history." Rather, EPA takes the position that the Respondent's "full history" must be considered and submits that this interpretation is consistent with the Board's recognition of the CAA's penalty policy that the gravity component should be calculated using the most aggressive assumptions supportable. EPA Brief at 92-93. Placing emphasis upon the Asbestos Penalty Policy, EPA points to the provision that ". . . prior notification of a violation is sufficient to trigger treatment of ***any future violation*** as second or subsequent violations . . ." EPA Brief at 93-94 (emphasis in original).

From this interpretation, and the argument that one's violation history can look ahead to alleged violations occurring *after* those being litigated, EPA then reasons that, with respect to the non-NESHAP county violations, "ATS certainly knew [this] also constituted an Asbestos NESHAP violation," and therefore the NESHAP violation that never was alleged by EPA but that it could have brought, should also be deemed to be part of ATS's compliance history. EPA brief at 95. Although EPA goes to great lengths to discuss the alleged violations stemming from the December 1996, criminal complaint against ATS, it ultimately notes, as it must, that the matter was concluded with ATS' plea of guilty to one count which involved the removal of more than 160 square feet of asbestos-containing material without a permit and the dismissal of all other counts. The one count, EPA concedes, was not a NESHAP violation, yet it argues that because 40 C.F.R. § 61.145 requires notification for an asbestos removal project involving more than 160 square feet, this was a NESHAP violation too.

C. Discussion

EPA would not only dispense with the need for finality in determining one's compliance history, but also with the need to have ever brought an action at all. Under EPA's reasoning, unconcerned about even the niceties of providing notice to the Respondent that it is alleging a violation, figments of violations that could have been, can be part of one's full compliance history as well.[(11)] Defending EPA's consideration of Proposed Exhibit 22 and Exhibit 25, Mr. Ponak maintained, in response to questions from the Court, that NESHAP policy provides that EPA may consider asbestos violations that were charged by a state or county. EPA Counsel also pointed to Exhibit 33, page 4, Section C of Appendix III to the Asbestos Demolition and Renovation Civil Penalty Policy in support of the Agency's stance. However, this very policy provides that a "'second' or 'subsequent' violation should be determined to have occurred if, ***after being notified*** *of a violation by the local agency, State or EPA at a prior demolition or renovation project*, the owner or operator violates the asbestos NESHAP regulations during another project, even if different provisions of the NESHAP are violated." Exhibit 33, Appendix III, I, C 1. (emphasis added). The plain, unavoidable fact is that the alleged county violations were settled, with ATS admitting to a single non-NESHAP violation and without EPA filing its own notice of violation in connection with those events.

Although Mr. Ponak testified that his computation, upwardly adjusting the penalty because of EPA's view of ATS's compliance history, was based solely upon the state and county violations, as reflected in proposed Exhibit 22 and admitted Exhibit 25, EPA also points to Exhibits 23 and 24. While neither of these figured into Mr.

Ponak's calculations, EPA proceeds to go to great lengths to describe the violations involved there, but admits that neither Exhibit 23 nor Exhibit 24 involve NESHAP violations. EPA also concedes that the Asbestos Penalty Policy only applies to Asbestos NESHAP violations and that the "General Penalty Policy takes into account prior violations of all environmental statutes *enforced by the Agency* under its 'history of noncompliance' guidance . . ." EPA Brief at 108 (emphasis added). Accordingly, EPA concedes that although it described these other violations in detail, they should play no part in the consideration of ATS's compliance history. Though Exhibits 23 and 24 were introduced by EPA, ultimately it is difficult to ascertain the design behind this strategy for their admission. EPA concedes that, as non-NESHAP violations, they have no bearing in the penalty determination process. Even Mr. Ponak recognized these violations were irrelevant to the consideration of the ATS compliance history. It would seem then, that the purpose was simply to show that ATS was, environmentally, generally a "bad actor." This apparent attempt to influence the Court through consideration of irrelevant matters is of no effect.

D. The Environmental Appeals Board's decision in Ocean State Asbestos Removal, Inc.

In support of its argument that the Court should consider the state and county violations reflected in proposed Exhibit 22 and Exhibit 25, as evidence of ATS's violation history, EPA makes frequent reference to the decision of the Environmental Appeals Board in Ocean State.

In that case the Board held that ". . . the penalty assessment criteria of CAA § 113(e), which includes a requirement to consider the respondent's 'full compliance history,' authorizes consideration of previously unadjudicated notices of alleged violations." Ocean State, 1998 EPA App. LEXIS 82, *5. It determined that the phrase "full compliance history" authorizes a broad inquiry into "the violator's *history* with respect to compliance . . ." Id. at *50 (emphasis added).

The Board reasoned that the Asbestos Penalty Policy was reasonable because it recognizes that a *notice* of violation "when followed by a *subsequent* violation shows that the respondent was not deterred by the prior notice." Id. at *5 (emphasis added). In its view, two "key facts" are relevant to increasing the gravity component of the penalty: "(1) *actual notice* given to the respondent regarding an alleged violation, and (2) a violation occurring at a *subsequent* jobsite [sic] or time." Id. at *56. (emphasis added).

While I disagree[(12)] with the EAB's interpretation of the meaning of the phrase "full compliance history" under the penalty assessment criteria of Section113(e) of the Clean Air Act, I am obligated to apply its holding and do so. However, by its own terms, the decision is inapplicable to the case at hand. Implicitly, the Board recognized that the term "history" refers to the common understanding of that term, defined in Webster's as "[a] narrative of *past* events." Webster's II New College Dictionary, 1995 edition. Thus, while it accepted that notices of alleged violations may be considered, it required that they be *previously issued.* The notices under consideration in Ocean State involved immediate compliance orders which were *issued* in 1988 and 1990 for application to the alleged violations arising out of an August 27, 1992 inspection. Accordingly, the Board held that the "penalty assessment inquiry . . . may look to whether the present violation occurred *after* the respondent was given *notice* of a *prior* alleged violation . . ." Id. at *15,16 (emphasis added).

E. Conclusion

Exhibit 22 A-E was not admitted during the hearing and the propriety of this ruling is being reaffirmed today. By its very terms, the Notice of Violation involved there was issued on January 22, 1997, a time some four months *after* the date of the violations at issue here. Therefore, the violations at hand could not have been subsequent violations since they occurred *before* the notification reflected in Exhibit 22. One's compliance history does not contemplate future events.

Similarly, it was improper for EPA to consider the violation which might have been,

stemming from Exhibit 25, on the basis that ATS's admission in a non-NESHAP matter constituted an implicit violation of a NESHAP reporting requirement. EPA ignores the fact that it has never notified ATS, through the initiation of an action, of any such violation arising out of that event. Thus, EPA failed to perform a step, recognized as critical by the Board in Ocean State. EPA can not point to any state NESHAP violation. Further, its attempt to rewrite the terms of the settlement, which did not admit of any NESHAP violation, is rejected, as is the notion that EPA itself can create NESHAP violations without ever formally notifying a Respondent of such an allegation. Yet, ignoring the plain meaning of the term "history" and the basic due process requirement that EPA notify a Respondent of an alleged NESHAP violation, Mr. Ponak acknowledged that both of these matters were considered by him in arriving at his proposed penalty figure, leading him to increase the penalty by $40,000.00 for the two counts and $12,000.00 for the three subsequent days of violations alleged in this action.

For the reasons stated, I conclude that it was improper for EPA to have included in its proposed penalty calculation an alleged NESHAP violation that it has never brought against ATS and which has never been determined to have occurred by any other court. It was also improper to have included as part of ATS's compliance *history*, an alleged violation which, even if eventually proven, occurred at a point in time *after* the violation in issue in this case. Simply put, one's compliance *history* can not include *future* events.

Thus, with the improper considerations removed, EPA's proposed penalty would have been calculated as $15,000.00, less the $6,000.00 credit from this amount accountable to the amount paid by Indspec and a final proposed penalty for ATS of $9,000.00. I concur with this corrected assessment of the appropriate penalty.

ORDER

For the reasons discussed above, Respondent Associated Thermal Services, Inc., is held to have violated 40 C.F.R. 61.145(c)(3) and 40 C.F.R. 61.145(c)(6)(i). Having considered the civil penalty guidelines, a civil penalty totaling $9,000.00 is assessed against Respondent.

As specified in Rule 22.27 (40 C.F.R. Part 22), this decision constitutes an Initial Decision, which unless appealed in accordance with its provisions or unless the Administrator elects to review the same, *sua sponte*, will become the final order of the Administrator in accordance with Rule 22.27(c).

Respondent shall pay the civil penalty within 60 days from the date of this Order. Payment shall be made by mailing, or presenting, a cashier's or certified check made payable to the Treasurer of the United States of America, U.S. Environmental Protection Agency, Mellon Bank, P.O. Box 360515, Pittsburgh, Pennsylvania, 15251.

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William B. Moran
United States Administrative Law Judge

Date: January 26, 1999
Washington, D.C.

1. Among these, the parties agree that the amount of asbestos removed was sufficient to bring it within the regulations' purview, that ATS sought no waiver from the cited provisions' requirements for wetting, that the 60 bags examined by the EPA inspectors contained RACM, and that the laboratory analyses of the samples from the bags and reflected in Prehearing Exhibit I are accurate. Joint Stipulations 15- 22, EPA Post-Hearing Brief at 14-15.

2. As used during the course of the hearing, in the briefs, and this decision, "Encap" is the shorthand expression for "encapsulant."

3. As acknowledged by EPA's Counsel in response to the observation by the Court concerning Mr. Ponak's role, he was not an eyewitness to the scene of ATS's activity at the Facility. Rather, he was the individual who took the information supplied from the inspection, delivered the samples to the lab and later concluded, based on all the information received, that there were violations. Mr. Ponak also testified as to how the penalty was calculated. Tr. 396, 502.

4. It is noted that EPA does not actually challenge the proposition that an encapsulant may be used to comply with the regulations.

5. To be particularly accurate, this is to say that Mr. Fisher did not use water on the RACM, except, of course, to the extent that water, as the primary ingredient, was part of the Encap that may have been used, a fact that Mr. Fisher obviously did not apprehend. Tr. 672-674, Respondent's Post-Hearing Brief at 17.

6. See, for example, Complainant's Exhibit 6B, photograph No. 28.

7. Because I have determined that the RACM was not adequately wet, it is not necessary for me to determine whether any Encap was actually ever applied. Although some Encap may have been applied, and without making an express determination to the contrary, I nevertheless note that some aspects of Mr. Fisher's testimony cast doubt on the matter of whether it was actually used. I note, for example, that while Mr. Fisher at one point referred to the Encap as the "clear liquid form," he later described it as a "milky white solution." Tr. 613, 628. I also note that EPA inspector Foster did not observe any five gallon bucket(s)of Encap during the inspection, nor did any ATS employee or any other individual call EPA's attention to the presence of such container(s) and perhaps most importantly, no one from ATS brought up that Encap was being used, something which would have been natural and expected to have been raised under the circumstances.

8. As ATS's Mr. Fisher conceded, spraying occurred *only* at the outset of the removal process *before* any slicing occurred. Thus, finding whatever original treatment may have been applied to have been inadequate, and that no further wetting was done, the second violation is, perforce, established.

9. However, ATS did voice its objection to Exhibits 23 and 24, even though those exhibits did not impact the calculation of the proposed penalty. Respondent's Reply Brief at 7, 13.

10. It is noted that EPA did provide a fourth witness, Mr. Mark Ewen, who testified, as an expert on the subject of ATS's ability to pay the proposed penalty, which was originally set at

$67,000.00. Given the conclusions reached by the Court as to the appropriate penalty, the ability to pay issue, although challenged at the hearing by ATS, has become moot, as ATS concedes that it has the ability to pay a $9,000.00 civil penalty.

11. EPA protests that it never brought its own NESHAP violation in this matter because it never knew ATS had violated the NESHAP notification until Mr. Ponak became involved in the present litigation and because EPA knowingly elected to not pursue its own civil enforcement action as the same facts were involved in the county criminal action. EPA also maintains that it notified ATS of its intention to "upwardly adjust[] the gravity-based Count III and IV proposed penalties on the basis of the Brashear House Asbestos NESHAP violation at page 10 of the Complaint. Arguing circularly, EPA asserts that by failing to notify EPA with notice of the Brasheer House renovation, it kept EPA from learning about the violation. Of course it was the failure to notify EPA that constituted the putative violation, so if ATS had notified EPA there would have been no NESHAP violation at all. To complain that ATS was unfair in not notifying EPA about its failure to notify EPA displays the inanity of the government's argument. Having elected to let the matter rest with

the county criminal proceeding, EPA cannot now try to retrieve a NESHAP action that has never been brought out of a ATS's settlement to a single non-NESHAP violation, merely because it is now displeased with the terms of that settlement.

12. In my view, the Board's analysis in Ocean State fails to sufficiently take into account certain considerations. First, the term is not "notification history" but rather "compliance history." This term implicitly carries with it a requirement that a respondent has failed to comply. It would seem that where a respondent contests the issue of compliance, the matter cannot be categorized as part of one's compliance history, until the issue of whether there has or has not been compliance has been resolved.

Second, in determining that it is appropriate to consider, as part of one's "full compliance history," previously issued notices of alleged violations that have not been adjudicated, the Board reasoned that, apart from the final adjudicated outcome of such notices, receiving such a notice should, by itself, create "heightened awareness" of NESHAP requirements. It followed, under this reasoning, that if one then had a subsequent violation, there had been no deterrent effect from the prior notice. The problem with the Board's interpretation is that it implicitly assumes that a respondent will ultimately be found liable on the prior alleged violation. This is apparent in the Board's view that the prior notice will create "heightened awareness" of compliance obligations. However, this assumption fails to consider the possibility that, when adjudicated, it may be determined that there was no violation on the prior matter after all. One who is ultimately found to be in full compliance cannot have "heightened awareness," as that state of awareness was already achieved. Yet the Board discusses the "subsequent" violation as reflective of a respondent's failure to take steps to prevent violations and to comply with the regulations. Id. at *59. Again, if it is ultimately determined that there was no violation regarding the prior notice, a respondent cannot be expected "to take steps" to not err again when it did not err in the first place. That the Board assumes the outcome of the unadjudicated notice will be a formality appears to be revealed in its discussion which treats the matter in issue as the *subsequent violation*: ". . . a prior notification, even without a determination that a violation occurred, is relevant to the penalty . . . [in that it] can serve as evidence of the respondent's knowledge of the asbestos NESHAP requirements and the degree of fault associated with the ***subsequent violation***." Id. at *58. (emphasis added). The Board also reveals its implicit premise that the prior notification will in fact ultimately be shown to be a violation by its adoption of the Region's reasoning that a respondent, at the point after notification and therefore presumed to know the regulations, has committed something more serious as they "***continue*** *to violate*." Id. at *59. (emphasis added).

Third, taking the Board's approach also effectively requires to a degree that a trial within a trial be conducted, by delving into whether the prior notification was properly issued, whether a reasonable inference can be drawn about the prior matter's creation of a heightened awareness and by consideration of the specific facts surrounding the prior notification. Id. at *75.

Last, I would note that the postponement of the consideration of prior matters is only that. Eventually recalcitrant regulated parties' histories will catch up with them and by delaying such consideration until the matter has become final, no cloud over the fairness of particular past events will exist.