UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
MORTON FREIDMAN	)	**Docket No. CAA-09-99-0004**
and	)	
SCHMITT CONSTRUCTION COMPANY	)	
	)	
RESPONDENTS	)	

INITIAL DECISION

Introduction

This proceeding arose from the filing of a complaint by the United States Environmental Protection Agency ("EPA"), on September 30, 1999, against Morton L. Friedman and the Schmitt Construction Company ("Respondents"). In three Counts, the Complaint charges violations of Sections 112 and 114 of the Clean Air Act, 42 U.S.C. §§ 7412, 7414 and its implementing National Emissions Standard for Hazardous Air Pollutants (NESHAP) for asbestos, found at 40 C.F.R. Part 61, Subpart M. Count I alleges that Respondents violated 40 C.F.R. § 61.145(b), which requires an owner or operator of a facility to provide at least 10 working days of notice before commencement of renovation or demolition activities. Count II alleges that Respondents violated 40 C.F.R. § 61.150(d)(1), a regulation requiring an owner or operator of a facility to maintain waste shipment records. Count III alleges that Respondents violated 40 C.F.R. § 61.145(c)(6)(i) and its requirement that an owner or operator of a facility keep Regulated Asbestos-Containing Material (RACM) adequately wet prior to disposal. EPA seeks a $134,300 penalty against Respondents for the three Counts.

In brief, Respondents hired an asbestos consultant company to perform a survey of certain properties. The survey detected some asbestos. Respondents then proceeded to commence renovation/demolition activities, including stripping and removing the asbestos. They did so without giving prior notification of that activity to the local authorities because they believed they were excused from that requirement on the ground that the quantity of asbestos did not exceed the exempted amount, as expressed in the local rule. On the same premise, Respondents believed that they were exempted from the requirement to maintain a waste shipment record for the transfer of asbestos off of the properties, as well as from the requirement to keep asbestos wet.

The core of the controversy in this matter stems from the conflict between the wording employed by the local rule, regarding notification, and the wording used in the Asbestos NESHAP version of the same provision. EPA delegated authority to the Sacramento Metropolitan Air Quality Management District ("SMAQMD") to enforce the asbestos NESHAP, permitting it to adopt local rules. Tr. at 248. Under this delegation, SMAQMD is to adopt rules and regulations which are consistent with the NESHAP. At the time of the alleged violations, in the summer of 1997, SMAQMD's exemption to its asbestos regulations provided, in pertinent part:

> 110.10 This rule shall not apply to:
>
> ... b. *renovations* where the combined amount of RACM is less than 260 lineal feet *or* less than 160 square feet, *or* less than 35 cubic feet.
>
> 110.2 Section 300 of this rule shall not apply to *demolitions* where the combined amount of RACM is less than 260 lineal feet, *or* less than 160 square feet, *or* less than 35 cubic feet.

Sacramento Metropolitan AQMD Rules and Regulations, Resp. Exhibit #1, (italics added)

Thus, in two separate subsections, the SMAQMD rule explicitly referred to three ways of quantifying the amount of RACM and classified them as *alternative* exemptions measures.

By comparison, for *renovations* of a *facility*, the EPA regulation, 40 C.F.R. § 61.145, provides that the requirements for notification and emission control apply if the combined amount of RACM is:

> (4)(i) At least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components, or
>
> (4)(ii) At least 1 cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously

For a *facility* being *demolished,* the requirements apply if the combined amount of RACM is:

> (a)(1)(i) At least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components, or
>
> (a)(1)(ii) At least 1 cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously.

The relevant portion of the definition of a "facility" explains that the term:

> means any institutional, commercial, public, industrial, or residential structure, installation, or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having four or fewer dwelling units);

40 C.F.R. § 61.141

Last, the term "installation" is defined as meaning:

> ... any building or structure or any group of buildings or structures *at a single demolition or renovation site* that are under the control of the same owner or operator (or owner or operator under common control).

40 C.F.R. § 61.141 (emphasis added).

For the reasons which follow, the Court finds that EPA did not establish the violations. Although the Court makes this determination unwaiveringly, for the sake of judicial efficiency it also determines that, should the decision be appealed and reversed on the issue of liability, the appropriate total penalty for all three violations would be $3,500.00, with $2,000 allotted for Count I and $500 for Count II and $1,000 for Count III.

I. Factual Background

The Complaint describes the properties in this case as commercial units forming part of the Town & Country shopping complex, located at 2640, 2642 and 2650 Marconi Avenue ("Marconi") and demolished apartments located at 2901 Calderwood, building number 7; 2911 Calderwood, building number 22; and 2931 Calderwood, Building Number 37 on Calderwood Lane ("Calderwood"), all of which are located in Sacramento, California. The streets of Marconi Avenue and Calderwood Lane intersect each other at a point where those buildings are located and are all in close proximity to each other. RX 5.

Respondent Morton Friedman is an owner of the properties alleged in the Complaint. Tr. at 224; CX 2, 3, and 4. In addition, he belongs to a partnership. Tr. at 225, 295. He also runs a real estate development and management company, which he has run for approximately ten years. Friedman hired Richard Schmitt, owner of Respondent Schmitt Construction Company, a general contractor outfit, to work on the Calderwood and Town and Country renovation and demolition projects. Consequently, Schmitt Construction was an "operator" as to these sites.

Respondent Schmitt hired Action Environmental Management Services, Inc. ("Action Environmental"), an asbestos surveying and consulting firm. Mac Hussey is a certified asbestos consultant and partner in Action Environmental.[1] Tr. at 340. He is required to keep apprised of the laws affecting his line of work, which would include the asbestos NESHAP. Tr. at 342. Hussey works in various parts of California, and he noted that many locales have their own asbestos rules. Tr. at 343. He has also taken courses and trained other people in the area of asbestos surveying and surveillance. Tr. at 342.

In Sacramento, as a prerequisite to receive a demolition permit from the city, an owner or operator must submit the Asbestos Survey and Demolition Notification Form. Tr. at 58, 70. That form is to be sent to SMAQMD prior to the abatement of asbestos. Tr. at 70. Usually it is the abatement removal company which submits the form prior to demolition of a building. Tr. at 70, 73. The local rules require a person planning to renovate or demolish an apartment house to obtain individual permits for each apartment. Tr. at 126, 301. Respondents contend that this permit process implied that a "facility" refers to individual buildings, as opposed to groups of buildings. It was on this basis that Hussey believed that the Respondents did not have to group individual buildings together for the purposes of the definition of "facility." Tr. at 349. Hussey testified that homeowners and contractors were confused about the local rules regarding the asbestos notification requirements. Tr. 345-346, 375-377. He also noted there was confusion regarding whether separate addresses constituted separate facilities or whether buildings were to be grouped. Tr.347- 350.

Hussey stated that he measured the amount of material in Respondents' buildings by square feet, based on his training as an asbestos consultant and that he only uses cubic feet measurements when he cannot use the square feet or linear feet measurements, such as when a building has been demolished prior to measurement. Tr. at 379, 387. Because he understood that the local rules must be as stringent as NESHAP, Hussey stated that, personally, *he* had a clear understanding of the SMAQMD exemption rule. Accordingly, he understood that data showing asbestos in amounts greater that *any* of the three measurements would trigger the applicability of those regulations. Tr. at 373, 381. While his particular expertise guided his interpretation of the local rule, Hussey stated that his own clients, including Respondents, were confused as to the measure which triggers the requirements of the SMAQMD rules. Tr. at 373.

On June 19, 1996, through a report, Hussey informed his client, Schmitt, of the presence of Regulated Asbestos-Containing Material (RACM) at the Calderwood Apartments complex. CX 5. Specifically, he informed Schmitt that material consisting of more than 1% of asbestos was present in several buildings, including 2805, 2901, 2911, 2921, and 2931 Calderwood Lane. Hussey's report to Schmitt informed, "All of the asbestos-containing linoleum in the designated apartments of each structure are classified as friable, regulated asbestos-containing material (RACM)," but it did not indicate the amount of asbestos material present at the site. He advised

[1] As an asbestos consultant, Hussey's job entails conducting asbestos surveys, monitoring asbestos abatement project, taking air samples, air monitoring, and bulk sampling.

Schmitt to retain a certified asbestos abatement contractor to remove the material prior to beginning demolition activities and to submit an asbestos notification to state and local authorities prior to abatement activities. Hussey issued another report to Schmitt on June 11, 1997 concerning the Calderwood apartments. That report disclosed that he found all three units to be 'clean,' free of asbestos debris. He expressed the view that no 10 day notice to SMAQMD was required because each unit had less than 160 square feet of RACM. He noted that the linoleum had been completely removed as a "1 piece" unit from each apartment. Rs' Ex. 6.

On June 13, 1997 Hussey issued his inspection report for the Marconi Building to Schmitt. He disclosed that he took 45 samples of suspect ACM in the course of his inspection. After noting the presence of some ceiling texture materials in the suites, the report noted that a 10 day asbestos notification to SMAQMD was required "*if* the amount of RACM scheduled to be removed is equal to or greater than 160 square feet, 260 linear feet, or 35 cubic feet." Rs' Ex. 10. (emphasis added). As to 2650 Marconi Avenue, Hussey classified some ceiling material as friable RACM and other material as Category I non-friable asbestos-containing materials. Hussey testified that he had no conversations with Schmitt before Schmitt did any work, only after the work was done. Tr. 351. While the report also made reference to the need to hire a certified asbestos abatement contractor, Hussey explained that this was standard language in his reports but he implicitly meant by this advice to retain such an individual *if* the exempted amount was exceeded. Tr. 360. Hussey also testified that he made no specific recommendation to Schmitt that he hire a certified asbestos contractor, nor did he intend to make one. *Id.* Nor did he make such a recommendation to Friedman.[2] Tr. 361.

Although the report relates that the asbestos was removed by a certified asbestos abatement contractor, at the hearing, Hussey explained that this statement was based on an incorrect assumption, as it was removed by Schmitt. Tr. at 385-86. He also reported that all hazardous waste was properly removed from the site by a certified hauler to a certified landfill. CX 7; RX 11. Nevertheless, at the hearing he acknowledged that this, too, was based on an assumption and that he had no personal knowledge on that matter either. Tr. at 386.

Respondents' Exhibit 11 is the August 6, 1997 report from Hussey to Schmitt. It concerns Hussey's post-asbestos removal report reflecting his inspection of the Marconi building. Hussey found the building to be clean. Unlike the SMAQMD inspector, Darrell Singleton, Hussey did not see any asbestos chunks on the floor. Air sampling he conducted also showed the building to be clean. Hussey explained that his remark in the letter that proper notifications to SMAQMD had been made prior to commencement of the work, was an assumption on his part, based on his experiences with the larger activities that had taken place at the site. Tr. 364. While EPA Exhibit 3, the Asbestos Survey and Demolition Notification Form from Hussey, dated August 6, 1997, describes the amount of RACM as 3200 square feet, Hussey stated that amount of RACM had already been removed by Schmitt at the time he expressed that

[2]Prior to Respondents being issued the notices of violations, Hussey had never met Friedman. Tr. 356.

figure to him. Tr. 391. Although Hussey actually completed the survey for this report on May 29, 1997, he maintained that he did not express this to Schmitt before he sent the form, and Schmitt, in his own testimony affirmed that Hussey had never told him that the amounts he was removing from either Calderwood or Marconi were in excess of the amounts exempted under the local rules. Tr. 391.

Stan Bowers, a contractor, submitted Asbestos Survey and Demolition Notification Forms relating to Calderwood and signed them on June 25, 1997 on behalf of Friedman. CX 2. Each apartment was within a freestanding building with a different address. Tr. at 125-26. In those forms, Bowers states that the demolition would begin July 8, 1997 and that RACM reported by the consultant had been removed. CX 2. Bowers submitted a separate form for each separate building. However, Bowers indicates on one form that the amount of RACM was "Less than 160 SF in 3 separate units." Bowers' forms were also signed by consultant Philip Bradley of Action Environmental and the forms indicated that the survey was conducted on June 17, 1996. Where the form requests the amount of RACM present, 80 square feet was listed for 2901 Calderwood, 94 square feet for 2911 Calderwood, and 90 square feet is listed for 2931 Calderwood.

Morton Friedman stated that he did not know when he first became aware of RACM at Calderwood apartments. Tr. at 306. He did not deal directly with the asbestos consultants until after receiving the Notice of Violation ("NOV"). Tr. at 303. This was also the first time he has received an NOV. Tr. at 306. He also stated that he did not deal directly with Schmitt, who is a comparatively smaller contractor than other contractors. Tr. at 304. Friedman stated that at the time that he obtained demolition permits for the Calderwood apartments, he was aware of the exemption for small quantities of asbestos. Tr. at 301.

On August 7, 1997, Bowers signed one Asbestos Survey and Demolition Notification Form for Town and Country, including 2640A Marconi Avenue, 2642 Marconi Avenue, 2650 Marconi Avenue, the Creative Hair Styling shop, and the vacant suite between 2642 and the Tuxedo Rental store. CX 3. It was submitted for the Town and Country complex as a whole, instead of submitting separate forms for individual units. *See* CX 3. Under the form's section to be completed by an asbestos consultant, Laurence Hussey indicates that 3,200 square feet of RACM was present, and the form indicates that the survey was conducted on May 29, 1997. Singleton

As for SMAQMD's inspection of the Marconi site, Darrell is an Associate Air Quality Specialist with that local authority. Singleton's job entails enforcement of SMAQMD rules and regulations and enforcement of the federal Clean Air Act, responsibilities which translate into inspection of sources of air pollution and investigation of complaints. On August 21, 1997, Singleton inspected the Marconi Building. Subsequently he made an inspection at Schmitt Construction, where he viewed the bags of material from the Marconi location.

In conducting the inspection, Singleton and Najjar entered the unlocked building at 2640A Marconi Avenue and saw two rooms with scraped ceilings. Tr. at 73; CX 1 (Field

Inspection Report; Photos 5 and 6). In the adjacent "Creative Hair Styling" building, they observed that the ceiling had been scraped and took samples in that building. CX 1 (Field Inspection Report; Photos 7 and 9). At that location, they estimated that 300 square feet of material had been removed.

At 2642 Marconi Avenue, Singleton and Najjar estimated approximately 700 square feet of material had been removed from the building. Tr. at 75; CX 1 (Field Inspection Report). In this building much of the material appeared to be wet, including on the door, the door window, and the door frame, as Singleton observed some water dripping from various materials. Tr. at 131-32. However, they saw small pieces of *dry*, brittle, flaky, ceiling material on the floor and on raised beams. CX 1 (Field Inspection Report; Photos 10, 11, and 12). They noted two pieces of material that were approximately 2 1/2 inches in length. Tr. at 137-39; CX 1 (Photo 11). That material had originally been scraped from the roof and fallen onto a beam. Tr. at 142-43, 155. Regarding the Count for failure to keep asbestos wet, Singleton determined the duration of the wetting violation to be 17 days, a calculation starting from the violation's occurrence and continuing until it has been cleaned up. Tr. at 145. Singleton first saw an asbestos removal company remediating the debris on September 10, 1997. Tr. at 147.

On August 21, 1997, in response to Singleton's inquiry regarding the asbestos removal at Town and Country Building Number Two, Schmitt informed that he did the asbestos removal himself. CX 1 (Inspector's Narrative).[3] Schmitt stated that he used water during the asbestos removal and that he put the ceiling material into bags, which were at his place of business on Heinz Street. *Id.* On August 22, 1997, Schmitt submitted to SMAQMD a form entitled "Asbestos Demolition/Renovation Plan" for the vacant building at 2640-2650 Marconi Avenue. Tr. at 78; CX 4. Such plans are normally provided by the abatement contractor. Their purpose is to help SMAQMD to determine if asbestos is present in a building before it's demolished. On the form, Schmitt listed Schmitt Construction as the operator and Mort Friedman as the owner.

Schmitt estimated that five to six cubic feet of material was removed and placed in bags. Tr. at 415.[4] Schmitt told Singleton that the asbestos material removed from Town and Country was present at Schmitt's place of business on Heinz Street.

On August 25, 1997, Singleton inspected Schmitt's place of business. In visting him on that date, Singleton asked to see the material taken from the Town and Country properties. Schmitt agreed but at first could not locate the bags of material, as one of his employees had moved the bags from a yard to an unlocked dumpster. Tr. at 81, 414; CX 1 (Inspection Report at

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[3] Also on August 21, 1997, Mr. Hussey told Singleton that he did not participate in the removal of the asbestos. CX 1 (Inspector's Narrative at 1).

[4] Schmitt explained that he used cubic feet to initially measure the amount of material because that was the measurement method he used when he was in the drywall business. Tr. at 404, 424.

2). The next day, Singleton inspected the bags, which consisted of seven green garbage bags containing material. Schmitt climbed into the container, trying to remove them, and the inspector saw debris in the air, disturbed by Schmitt's attempts to remove the bags from the dumpster. CX 1 (Inspection Report at 2). One bag had a tear on it and carpet and ceiling material could be seen. The material within the bags was wet. Tr. at 101, 415. Singleton estimated that the bags contained 13 to 14 cubic feet of material. Tr. at 105.

With Schmitt's permission, Singleton took samples from the bags. Singleton then sent the samples to Precision Analysis for testing. The test results described the material as blue or blue and gray ceiling material and debris. Several of these tests revealed the presence of greater than 1% of chrysotile asbestos. Samples taken by Singleton at 2642 Marconi Avenue revealed the following: one sample consisted of 7.6% chrysotile asbestos while another sample consisted of 5-10% chrysotile asbestos. Samples taken by Singleton at 2640A Marconi Avenue consisted of 2.3% chrysotile asbestos, while two other samples showed 1-5% chrysotile asbestos. At the Creative Hair Styling building on Marconi Avenue, a sample from the outer door of that building consisted of 2.2 % chrysotile asbestos while a separate sample from the same location showed 1-5% chrysotile asbestos. CX 1 (Precision Micro Analysis Report).

On August 27, 1997, Singleton served NOVs on Respondents Friedman and Schmitt regarding the properties at Calderwood and at Town and Country. Tr. at 112-13; CX 1. On serving the NOVs on Friedman, Singleton informed him that he needed to block access to and decontaminate building number two at Marconi Avenue. CX 1 (Inspection Report at 3). In that encounter, Friedman told Singleton that he did not believe the regulations applied to him because Respondents had removed less than what he believed to be the threshold amount to be under the regulations. Tr. at 113-14. Friedman notified Singleton that Respondents had relied on SMAQMD's 1997 exemption to SMAQMD's asbestos rules specifying three different methods of measuring whether the exemption threshold of RACM. Tr. at 96-97. Singleton admitted that Mark Friedman asserted this contention within days or weeks after Respondents received the NOVs. Singleton also admitted that it would be unusual for a violator trying to hide the removal of asbestos to proceed to provide documents showing that a violation had occurred. Tr. at 123.

According to SMAQMD's inspection report, on November 18, 1997 Singleton left a telephone message for Schmitt, requesting a copy of the waste manifest for the bags of material that were present at Schmitt's office. The same report reflects that Schmitt did not respond to that telephone message. CX 1 (Inspection Report at 6).

An April 9, 1998 letter from Hussey to Friedman reflects Hussey's disagreement with SMAQMD's interpretation of "facility" as including a group of buildings. RX 9. In that letter, Hussey asserted that Friedman was being "singled-out" and made to comply with a standard he believed was not clearly defined either by SMAQMD or by EPA's asbestos NESHAP. RX 9. The same letter refers to the applicability of both the NESHAP and SMAQMD's local rules as being triggered by "160 square feet, 260 linear feet, or 35 cubic feet." RX 9.

Singleton agreed that some amounts of asbestos can be removed from buildings without giving notice to his agency. He also agreed that when people, such as contractors and building owners, visit his agency, the local (i.e. the SMAQMD) rules are there for them to review. Tr. 85-87. Further, Singleton agreed that in the summer of 1997 the local exemption expressed the removal of RACM in cubic feet, lineal feet, or square feet, with no description as to which of those measures should be used. When SMAQMD issued a notice of violation, the Respondents pointed out that the local rule did not prioritize the measure to be used. Singleton's agency then looked, without success, to see if the local rules spoke to the problem. Tr. 89-92.

About a year later, SMAQMD changed the rule to make it consistent with the Asbestos NESHAP provision. Tr. 93, Rs' Ex. 2. Singleton, who recommended the change and viewed the local rule as ambiguous, agreed that the rule is clearer now and that the change came about because of the "many problems we've seen in the rule." Tr. 94, 96. When asked whether, under the rule as it existed when the Respondents were cited, one could disregard square feet and use cubic feet, Singleton observed that the rule says "or." Tr. 160. Importantly, Singleton conceded that if one used cubic feet as the measure in the summer of 1997, before the rule was changed, there was no need to notify the local agency before removal if the RACM was within the exempted amount. Tr. 98. In this instance, Singleton admitted that the amount of asbestos in the bags from the Marconi site amounted to only a third of the 35 cubic foot exempted amount. Further, if within the exemption, he conceded that neither of the other requirements (i.e. the waste shipment record and the adequate wetting) apply. Tr. 100.

Thus, the Court notes that the problem with the local rule was not unique to Respondents and when considered with the fact that Respondents raised the matter immediately[5] upon being served with the SMAQMD notice of violation and the plain wording of the local regulation, it completely refutes the suggestion by EPA that the Respondents had invented a clever defense to the notice of violation. It is also clear that the Respondents did not act in a manner that would suggest that they knew the local rule was being violated. Singleton conceded that the Respondents had informed his agency through the submission of a form that certain amounts of linoleum had been removed from the apartments. Thus, he agreed that the Respondents were not trying to hide their activities. Tr. 124.

Singleton, it must also be said, was less than forthcoming[6] about the original notice of violation issued by SMAQMD. He maintained that he could not recall what happened to those notices, other than to remark that the matter was "resolved" and that no penalty was paid.

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[5]Singleton agreed the Respondents raised the issue of the language of the local rule right away. Tr. 96.

[6]As compared with his testimony on direct, Mr. Singleton's testimony on cross-examination was filled with many assertions that he did not know the answer to the questions posed. *See, for e.g.,* Tr. 110-113. Nor did his report include Friedman's position that the rule did not apply because the quantity was within the exemption. Tr.113.

Tr.107. Despite his role as the chief investigator for SMAQMD in this matter, Singleton still asserted that he did not know why EPA took over the case. Tr. 108. Although EPA emphasized[7] that the Asbestos Demolition/Renovation Plan, dated August 22, 1997 and hand-carried to SMAQMD, listed the amount of RACM at Marconi facility in square, not cubic feet, Singleton admitted that *he told* Schmitt to list it in square feet, not cubic feet. Tr. 426

Regarding Singleton's visit to the Marconi Building, he conceded that the photos he took there were intended to depict the best evidence of asbestos contamination.[8] Yet, the photos depict very little material and he acknowledged that all of the asbestos that he saw could fit on half the surface area of an 8 x 11" file folder. Tr. 143. Later, he confirmed that the "file folder" estimation applied to "everywhere in the whole Marconi building." Tr. 157. Tr. at 52; CX 1.

In October 1998, SMAQMD amended its exemption. Singleton had recommended changes because he thought it was ambiguous as to which unit of measurement to use in determining whether the exemption applied. Tr. at 98. The new exemption provides that SMAQMD's asbestos rules do not apply if the amount of RACM removed or disturbed "is less than . . . 260 lineal feet on pipes, or . . . 160 square feet on other facility components, or . . . 35 cubic feet off facility components where the length or area could not be measured previously." RX 2; Tr. at 93. This new exemption is more consistent with EPA's exemption defining the applicability of its asbestos NESHAP. Singleton agreed that the new SMAQMD exemption is clearer to the contractors and property owners to which SMAQMD's regulations might apply and he admitted that those regulations were changed, at least in part, because of the "many problems" with its rules. Tr. at 93-94.

II. Legal Issues: Applicability of the Asbestos NESHAP, Fair Warning, and Equitable Estoppel

A. Introduction

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[7]See Transcript at page 77.

[8]While on direct examination Singleton suggested that he saw acoustic ceiling material on the floor, but this was staged as he revealed on cross-examination that the material had been knocked from the beam to the floor. These pieces were about 2 ½ " x 2 ½ " and these were the largest pieces he observed. Tr. 136, 143.

It is important to appreciate the specific allegations against the Respondents. Count 1 charges a failure to provide notification of asbestos removal prior to demolition and renovation, in violation of 40 C.F.R. § 61.145(b) in that Respondents failed "to submit written notice of their intention to remove asbestos-containing material from the Facility at least ten (10) working days prior to the commencement of the demolition or renovation activities, which disturbed 1600 square feet of RACM..." Complaint at ¶21. The 1600 square feet refers to the units located at 2640 - 2650 Marconi Avenue. Specifically, the Complaint details that local air pollution control specialist Singleton, with the aid of his assistant, determined that 1600 square feet of asbestos material had been removed from the Marconi units. ¶13. Counts 2 and 3, alleging the failure to maintain waste shipment records and to keep the RACM wet, contends that Respondents failed to maintain a waste shipment record for the asbestos containing material transported from the facility to 2900 Heinz Street[9] and that this material was not kept adequately wet.[10] Accordingly, each of the Counts in the Complaint deal only with the material from the Marconi site,[11] a point not lost on Counsel for the Respondents. Tr. at 18-19.

Counsel for EPA has not only acknowledged that the Complaint is limited to events arising from the Marconi site but also that this matter is about "renovation." In its Post Hearing Brief EPA notes that "Complainant alleges that Respondents failed to submit written notification of their intention *to renovate* a facility at least ten (10) working days before the *renovation* activities began." EPA Br. at 2. (emphasis added). EPA further notes that "[i]n a facility being *renovated*, all of the notification requirements of §61.145(b) and the work practice requirements of §61.145(c) apply *if* the combined amount of RACM ... is at least 260 linear feet on pipes or at least 160 square feet on other facility components or at least 35 cubic feet off facility components where the length or area could not be measured previously." Complainant goes on to note " ... if the applicable jurisdictional amount of RACM is met, § 61.145(b) provides that each owner or operator of a *renovation* activity shall provide the Administrator ... [with] at least 10 working days [notice]." EPA Br. at 5 (emphasis added)

In the "Argument" section of its Brief, under "Elements and Proof of Violation," EPA asserts that the Respondents are the Owner or Operator of a Renovation Activity," and that

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[9]As set forth in its Brief, EPA's charge regarding the waste shipment record violation relates to "the asbestos-containing waste material that Respondent Schmitt transported from the *Marconi Avenue Building* to Respondent's place of business at 2900 Heinz Street..." EPA Brief at 16 (emphasis added).

[10]Local inspector Singleton testified that the material in the bags looked like acoustic material. Tr. 101.

[11]Although, at the hearing, Respondents' objection to receiving evidence concerning Calderwood, on the ground that it was not part of the Complaint, was overruled, the Court advised that if EPA based its penalty only on Marconi, it would only consider that site. Tr. 21, 193. Upon review of the record, the Court now agrees that EPA's penalty was derived from Marconi alone.

Respondents' answer as well as the report from its asbestos consultant establish this. *Id*. at 7. In fact, throughout its brief, EPA consistently describes the activity as a renovation: "As established above, the facility being *renovated* in this case consists of the Calderwood Apartments and the Marconi Avenue Building." *Id*. at 12. Consistent with this contention, its brief talks in terms of whether "[t]he jurisdictional amount amount of 160 square feet" was exceeded. *Id*. *See also,* EPA Brief at 13, 14, 17.

The point of highlighting the foregoing is to emphasize that this case, as charged by EPA throughout the proceeding, concerns whether Respondents' *renovation* activities at Calderwood and Marconi exceeded the exempted amounts.

While the Complaint alleges that the units at Marconi and the apartments at Calderwood constituted a "facility" under 40 C.F.R. §61.141 and that in or before August 1977 Respondents removed more than 160 square feet of RACM, consisting of floor linoleum and ceiling texturing, the determination of liability for Count I requires a separate analysis for each location.

For the Marconi/acoustic ceiling material location, liability has not been established because the Respondents did not receive fair notice that it was impermissible to use cubic feet as the measure. For the Calderwood/apartments location, liability has not been established for three independent[12] reasons. First, as already explained, EPA did not effectively charge nor pursue its Calderwood claims. Second, EPA did not establish that the material removed was regulated asbestos. Third, while a "facility" includes a structure, building or "installation," and the term "installation" includes a group of buildings, such group is limited to a single demolition or renovation site. Neither a single demolition site nor a single renovation site is defined in the regulations or in policy statements. As such it was reasonable for the Respondents to conclude that such demolition or renovation sites were limited by the scope of the demolition permits they applied for, which were specific to each separately addressed structure.[13] Thus it was inappropriate for EPA to combine the separate Calderwood apartment buildings in its attempt to reach an amount of asbestos in excess of the exempted amount. This conclusion is supported by common sense as well. Obviously, by virtue of the fact that EPA established a threshold in the first place, there was a recognition that small amounts of asbestos removal did not warrant regulatory protections such as prenotification, recordkeeping of the wastes removed when the amounts were below the threshold and even the requirement for adequate wetting. Thus, EPA determined that it was the quantity at a particular location that would trigger the regulatory

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[12]When the Court uses the term "independent" reasons, it does so to emphasize that the reasons it sets forth , in support of the finding that there is no liability, are not linked but rather stand alone as separate grounds for the denial.

[13]Singleton agreed that the Respondents were required to pay for individual demolition permits for each distinct apartment address. He also conceded that there is an inconsistency with requiring individual permits on the one hand while simultaneously accumulating for exemption calculation purposes all the asbestos from the different buildings. Tr. 125-127.

protection. Where asbestos removal is taking place at separate buildings, each of which is below the threshold, there is no combined risk created. By comparison, such activities when conducted within the same building would create such a combined hazardous effect.

B. Applicability of the Asbestos NESHAP

One aspect of the Respondents' defense addresses the applicability of the regulations involved in this case. While the Complaint alleges that Respondents violated Asbestos NESHAP, which constitutes regulations enforcing the federal Clean Air Act (CAA), Respondents maintain they looked to the local regulations of SMAQMD. As noted earlier, in this case the distinction between the asbestos NESHAP and the SMAQMD regulations is in their distinctly differently worded "applicability" provisions. Respondents state that, knowing that Sacramento has a history of enacting stringent air quality standards, they, and local contractors rely on the local rules, and that only the local rules are available in the Sacramento offices.

As noted earlier, at the time of the violations charged by the Complaint, SMAQMD had promulgated an exemption to its asbestos regulations by providing that those regulations would not apply to a demolition or renovation activity in which the combined amount of RACM at a facility is "less than 260 lineal feet, *or* less than 160 square feet, *or* less than 35 cubic feet." (emphasis supplied.) Thus there was no expressed priority among the three measure of RACM. Accordingly, under the plain wording of the rule, one meeting *any* of the three measures would be exempt. Nor did the SMAQMD rule in effect at the time of those charged violations provide any interpretative explanation of the rule's operation.[14] In contrast, the asbestos NESHAP in effect at the time of the charged violations provided that the asbestos NESHAP would be applicable to a facility in which the amount of RACM is "At least . . . (260 linear feet) *on pipes* or . . . at least . . . (160 square feet) *on other facility components*, or . . . At least . . . (35 cubic feet) off facility components *where the length or area could not be measured previously*." 40 C.F.R. §§ 61.145(a)(1), (4). (Emphasis supplied.) In 1998, not long after the violations charged in the Complaint, SMAQMD then revised its rule to be consistent with the asbestos NESHAP.

Respondents further contend that they were misled as to the definition of "facility," asserting that they were led to believe that a facility only refers to individual buildings or structures instead of groups of buildings and structures. In support they point out that they were required to submit separate asbestos survey/demolition notification forms for each building with a separate address. Neither party submitted the SMAQMD definition of "facility" and neither party claimed that SMAQMD had promulgated a definition of "facility" different from the asbestos NESHAP or that SMAQMD had promulgated *any* definition of "facility."

Respondents' arguments become important because they assert that EPA's delegation of its regulatory authority to SMAQMD means that SMAQMD's regulations govern instead of the

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[14] Tr. at 92-93 (statements of Singleton).

asbestos NESHAP. Respondents claim that EPA cannot penalize them for violating a local rule because EPA has the responsibility to ensure that the local rule is consistent with the federal rule. Thus, Respondents argue that EPA has an obligation to disapprove any inconsistent or ambiguous local rule. EPA counters that Respondents are charged with violating the asbestos NESHAP, not the local SMAQMD rules, and that the asbestos NESHAP provides for strict liability.

Respondents also point to federal regulations and Environmental Appeals Board ("EAB") cases upholding EPA's ability to enforce local regulations that impose equivalent or more stringent standards than the federal rules. Since EPA may enforce equivalent or more stringent local regulations, Respondents suggest that EPA should also be bound where less stringent local regulations have been promulgated.

At the hearing, EPA's Mr. Trotter admitted that EPA had delegated some of its asbestos air enforcement power to SMAQMD. In response to Respondents' applicability arguments, EPA maintains that the Clean Air Act reserves EPA enforcement power regardless of state or local action. EPA also contends that the Clean Air Act sets the NESHAP as the minimum standard, and consequently, state or local regulations cannot set a less stringent standard. EPA further argues that the delegation of primary enforcement power to a state or local entity cannot affect either EPA's ability to enforce the asbestos NESHAP nor the use of the asbestos NESHAP as the minimum standard of public health precautions.

In support of their contention, Respondents point to a subsection in the regulation found at 40 C.F.R. § 63.91 for the proposition that EPA is bound by regulations promulgated by local authorities. That subsection provides that EPA ". . .*will approve* the State rule or program and thereby delegate authority to implement and enforce the approved rule or program in lieu of the otherwise applicable Federal rules, emission standards or requirements." 40 C.F.R. § 63.91(a)(6).

Respondents also cite to cases in which EAB appeared to treat some local permits as the equivalent of federal CAA Prevention of Significant Deterioration (PSD) permits. *See In re Milford Pwr. Plant*, 8 E.A.D. 670 (E.P.A. 1999); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244 (E.P.A. 1999). In one case, EAB held that it had jurisdiction over a state-issued CAA permit in which the issuing agency was a delegatee of EPA, stating, "[T]he Permit is considered an EPA-issued permit for purposes of federal law, and is subject to review by the Board . . . ." *Encogen*, 8 E.A.D. at 245 n.1. In another case, EAB stated, "EPA can delegate its authority to operate the PSD program to a state, in which case the state issues PSD permits as federal permits on behalf of EPA." *Milford*, 8 E.A.D. at 673.

In the Court's view, based on Trotter's admissions, the Court finds that EPA did delegate some enforcement power to SMAQMD. However, delegation is not unlimited under Section 112 of the Clean Air Act. Delegation is not intended to result in standards that are less stringent that EPA' work practice standards. CAA § 112(*l*)(1). Apart from this, the CAA expressly reserves EPA's enforcement power: "Nothing in this subsection shall prohibit the [EPA]

Administrator from enforcing any applicable emission standard or requirement under this section." CAA § 112(*l*)(7). Also, under Section 114, after granting EPA authority to delegate recordkeeping, inspection, monitoring, and entry authority to the states, the CAA provides that "Nothing in this subsection shall prohibit the [EPA] Administrator from carrying out this section in a State." CAA § 114(b)(2). Several courts have also held that EPA's delegation of primacy does not inhibit EPA's enforcement power. *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1091 (W.D. Wis. 2001); *United States v. LTV Steel Co., Inc.,* 118 F. Supp. 2d 827, 832-835 (N.D. Ohio 2000); *United States v. SCM Corp.*, 615 F. Supp. 411, 418-20 (D. Md. 1985); *United States v. Harford Sands, Inc.*, 575 F. Supp. 733, 735 (D. Md. 1983). *See also cf. United States v. Elias*, 269 F.3d 1003, 1009-12 (9th Cir. 2001) (Resource Conservation and Recovery Act case, holding that delegation of enforcement authority "in lieu of" federal enforcement power did not restrict EPA from enforcing that Act). Furthermore, the cases cited by Respondent do not conclude that EPA can ignore the limitations of Section 112(*l*) by deferring to local regulations which are less stringent than the NESHAP.

Thus, absent the imposition of other defenses, EPA is not bound by less stringent state or local standards and may proceed to enforce the NESHAP regulations. However, such other defenses include whether a regulated party has been given "fair warning."

C. Fair Warning

As a corollary to its local regulation applicability argument, Respondents also maintain that they were not given "fair warning" that their conduct constituted violations and consequently that imposing a penalty would deny them due process of law. They contend that the definition of "facility" is not sufficiently clear and that SMAQMD's practice of requiring a separate asbestos demolition and renovation permit for each individual building with a separate address led Respondents to believe that a "facility" did not constitute a group of buildings but only individual buildings. If Respondents' interpretation of "facility" were to be accepted, the threshold for applicability of the asbestos NESHAP would not allow the aggregation of RACM from multiple buildings, unless they were part of a single demolition site. Respondents also have contended that they lacked "fair warning" as to *the method by which to measure RACM*. This argument is directed at the buildings at Marconi Avenue. The SMAQMD investigator, Mr. Singleton, estimated that the amount of RACM collected in trash bags from the Marconi Avenue buildings equaled approximately 13 to 14 cubic feet. Thus, applying the local rule, Respondents were well within the SMAQMD expressed exemption.

In response, EPA argues that fair warning claims should be evaluated based on the clarity of the asbestos NESHAP with which Respondents are charged with violating instead of the SMAQMD rules. EPA notes that the asbestos NESHAP regulations define "facility" as including an "installation," which in turn may consist of a group of buildings. As such, EPA concludes that there was "fair warning" to Respondents that the amount of RACM throughout the buildings at the demolition and renovation site was to be combined in order to determine the applicability of the asbestos NESHAP. EPA's response to the language Respondents dealt with under the SMAQMD provision is simply that the asbestos NESHAP rather than the SMAQMD

rules govern and that the NESHAP unambiguously specified which measurement methods to use and when such methods are allowed to be used.

Although the Respondents acknowledge that, under 42 U.S.C. § 7412(*l)*, a state which has been delegated the authority to enforce the standards, cannot set less stringent standards, they contend that the Administrator is required to disapprove any program a state submits that does not comply with the CAA. 40 CFR 63.91(a)(6) and 63.92(a)(2) also provide that EPA can approve and delegate to the state to implement and enforce the approved rule in lieu of the otherwise applicable federal rules. However, Respondents observe that 40 C.F.R.63.91(a)(5) places the burden on EPA to approve or disapprove a plan and if the Administrator finds that any of the criteria are not met, then it is to be disapproved, and the administrator then has a duty to notify the state of the revisions or additions necessary to obtain approval. Where a state rule does not conform to the federal rule, then the Administrator must disapprove it if it is in any way ambiguous with respect to the *stringency of applicability, ...level of control, or the stringency of compliance and enforcement measures*.[15] See 63.92(a)(2).

Thus Respondents assert the Administrator should never have approved SMAQMD Rule 110.2. Under 40 C.F.R. § 63.91(a)(6), once EPA approved the local rules, it delegated authority to implement or enforce the approved rule or program in lieu of the otherwise applicable federal rules, emission standards or requirements." RIB at 9 R believes *Milford Power* (EAB October 199) *and Encogen Cogeneration* (EAB March 1999) provide support for its arguments. Although those cases dealt with the federal PSD program, Respondents see no conceptual difference. The EAB stated that as Hawaii was delegated authority the permit was considered *an* EPA permit for purposes of federal law. As Respondents put it:

> When the EPA delegated its authority to promulgate and enforce rules and regulations, those rules were thereby promulgated and enforced on behalf of the EPA. This, combined with the fact that EPA had a duty to ensure that the local rules complied with the Clean Air Act, demonstrates that the local rule had the force and effect of a federal rule.

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[15]Subpart E - Approval of State Programs and Delegation of Federal Authorities, sets forth criteria for approval of a rule or program that differs from the federal rule. 40 C.F.R. § 63.91 (a)(5) and (a)(6) address the Administrator's duty to determine if all the criteria for approval have been met. Where a State rule or program is disapproved, the State is to notified of any revisions necessary to obtain approval. 40 C.F.R. § 63.92, entitled "Approval of a State rule that adjusts a section 112 rule," permits a state to seek approval of a State rule with specific adjustments to a Federal section 112 rule. It provides at section (a)(2): "If the Administrator finds that any one of the State adjustments to the Federal rule is in any way ambiguous with respect to the stringency of applicability, the stringency of the level of control, or the stringency of the compliance and enforcement measures for any affected source or emission point, the Administrator will disapprove the State rule."

RIB at 10

Trotter acknowledged that EPA has a Rule Development Section that is supposed to review local rules and make sure they are consistent with asbestos NESHAP. Tr. 250. Yet, he stated that he never inquired whether EPA had carried out such a review. *Id.*

In the Court's view, in order to be subject to liability, a regulation must provide the regulated community with adequate notice as to what is required. *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997), *cert. denied*, 524 U.S. 952 (1998); *General Electric Co. v. U.S. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995)("*General Electric*"); *In re CWM Chem. Servs., Inc.*, 6 E.A.D. 1, 17 (E.P.A. 1995).[16] Without adequate notice, no penalty may be imposed, as that would violate constitutional prohibitions against depriving persons of property without due process of law. *Hoechst Celanese*, 128 F.3d at 224; *General Electric*, 53 F.3d at 1328; *CWM*, 6 E.A.D. at 17.

Although the Complaint alleges violations of the asbestos NESHAP, and not the local regulations of SMAQMD, a question arises whether fair warning may be evaluated by looking only to whether the asbestos NESHAP provided notice of the proscribed conduct.[17] While *General Electric* dealt with EPA's interpretation of its own regulations, the D.C. Circuit, noting that the requirement of "fair notice" has been long recognized, observed that "'*elementary fairness compels clarity*' in the statements and regulations setting forth the actions with which the agency expects the public to comply." *General Electric* at 1329, quoting *Radio Athens, Inc.*, 401 F.2d 398, 404 (D.C. Cir. 1987)(emphasis added). The question then becomes whether, in view of EPA's delegation to SMAQMD and the plain wording of the local regulation, providing three unranked measures for determining the exemption threshold, EPA provided fair notice of its interpretation. In a comment analogous to the facts here, the D.C. Circuit noted that "it is unlikely that regulations provide adequate notice when different divisions of the enforcing agency disagree about their meaning." Presciently, the Court went on to say: "While we accept EPA's argument that the regional office interpretation was wrong, *confusion at the regional level*

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[16] *CWM Chemical* involved an applicability threshold to be triggered by the presence of at least 500 parts-per-million ("ppm") of PCBs. 6 E.A.D. at 17-20. In contrast to the applicability provisions of asbestos NESHAP, the regulation at issue in *CWM* did not specify how to measure the threshold amount. The prospective violator found less than 500 ppm of PCBs based on the dry weight of PCBs. EPA claimed that the regulation applied because dry weight was not an appropriate way to measure PCBs. The EAB held that because the regulation was silent as to how to measure the amount of PCBs, it did not provide "fair warning" that the dry weight measurement was prohibited. Accordingly, no penalty could be imposed.

[17] Respondents' formulation of fair notice based on the lack of clarity of local regulations instead of the minimum standards set by the asbestos NESHAP appears to be an issue of first impression.

is yet more evidence that the agency's interpretation of its own regulation could not possibly have provided fair notice." *Id*. at 1332 (emphasis added).

The practical implication of EPA's position should not be overlooked either because it stands for the position that a local rule, even though delegated by EPA to the local authority, is meaningless if it is at odds with asbestos NESHAP. Further, EPA, by pointing to its NESHAP rule and looking away from its own responsibilities to monitor itsdelagee's actions, places the burden for errors entirely on the regulated community. Thus, as EPA would have it, in practice the language of the local rule is meaningless. To avoid a federal citation, the regulated community must ultimately consult the federal rule, and assess whether the local rule measures up to asbestos NESHAP, before adhering to the local rule. Such an arrangement in which the federal government is able to duck any responsibility for local regulations is fundamentally unfair. There is also a certain arrogance in the government's attitude in blithely turning to NESHAP when the problem with the local regulation became apparent. It represents a 'gotcha'[18] attitude, when the government should have instead employed its available discretion to forego pursuing the Respondents, who were individuals with no record of previous Clean Air Act violations. Accordingly, the Court finds that the Respondents, having no actual notice that the local regulations were in error, were not given fair warning.

D. Respondents' Equitable Estoppel Claim, Based on EPA Approval of the SMAQMD Regulation

Respondents also raise the defense of equitable estoppel based on EPA's asserted duty to disapprove inadequate regulations proposed by a delegatee of EPA asbestos NESHAP enforcement authority. Respondents seek to bar EPA from enforcing the asbestos NESHAP against them as to charged violations occurring while the 1997 SMAQMD rule was in effect. Estopping the government from seeking civil penalties threatens to interfere with the rule of law and the protection of public health and the environment. *In re B.J. Carney Industries, Inc.,* 7 E.A.D. 171, 196, 202 n.39 (E.P.A. 1997). To protect against that risk, "A party seeking equitable estoppel against the government carries a heavy burden." *See Yerger v. Robertson*, 981 F.2d 460, 466 (9th Cir. 1992); *B.J. Carney*, 7 E.A.D. at 196. In addition to proving the additional elements of equitable estoppel, a party seeking to prove such a defense against the government must establish affirmative misconduct which goes beyond mere negligence. *Yerger*, 981 F.2d at 466; *B.J. Carney*, 7 E.A.D. at 199.[19] The EAB has held "affirmative misconduct" to mean "an affirmative misrepresentation or affirmative concealment of a material fact by the

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[18]Merriam-Webster's 10th Collegiate Dictionary. *See also,* William Safire, *On Language*, The New York Times Magazine, January 28, 2001

[19] Additionally, the Ninth Circuit requires the party asserting estoppel to "[P]rove that not applying estoppel would result in a serious injustice, and that the public will not be unduly burdened by the imposition of estoppel." *Yerger,* 981 F.2d at 466.

government." *In re Newell Recycling Co., Inc.*, 8 E.A.D. 598, 631 n.24 (E.P.A. 1999), *aff'd*, 231 F.3d 204 (5th Cir. 2000), *cert. denied*, 122 S. Ct. 37 (2001).

Respondents suggest that EPA's approval of the 1997 SMAQMD rule, which provided a less stringent trigger for applicability, constitutes affirmative misconduct sufficient to call for equitable estoppel of EPA's enforcement of the asbestos NESHAP against Respondents.

EPA's response to the equitable estoppel defense asserts, *inter alia*, that the SMAQMD program was not less stringent than the asbestos NESHAP. Compl. Resp. Br. at 5. However, this contention is rejected, as the plain wording of the 1997 SMAQMD rule does not specify which measurement may be used, thus allowing for greater opportunities for an owner or operator to report an exemption under it.

Respondents also claim EPA misconduct through its supposed approval of the local rules in violation of Section 112 of the Clean Air Act.[20] EPA's own compliance officer, Mr. Trotter, admitted that EPA had delegated enforcement power to the local authority, SMAQMD, and does not mention the state's role in these matters. In light of this admission, it is clear that SMAQMD was acting in the place of the state and that SMAQMD was a delegatee of EPA enforcement power in this case. Nevertheless, Respondents' equitable estoppel defense must fail.[21]

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[20] EPA mischaracterizes Respondents' equitable estoppel defense as a claim that EPA engaged in misconduct by *approving a SIP* ("state implementation plan") less stringent than federal law, and EPA then states that the SMAQMD rule governing asbestos was not part of a SIP. *Id*. at 2, 5. Instead, Respondent's equity-based estoppel defense is based on its contention that the *local rules* were approved although they were inconsistent with federal standards.

[21] In their Answer, Respondents also briefly stated their intention to assert several affirmative defenses based on EPA's delay in enforcing the violations charged in the Complaint, those defenses being the statute of limitations, laches, and (time-based) estoppel. Answer at 12. Nevertheless, Respondents abandoned these defenses, as they did not again raise these or assert any argument to prove such defenses in either at the hearing or in their post-hearing briefs. As Respondents have not pursued these defenses, they are deemed abandoned. *See In the Matter of U.S. Army, Fort Wainwright Central & Heating Power Plant*, Docket No. CAA-10-99-0121, 2001 EPA ALJ LEXIS 30, at *56 ("Order on Complainant's Motion for Accelerated Decision and Other Motions," July 3, 2001) (denying several affirmative defenses, including laches and estoppel, after finding that the respondent either abandoned them or reserved arguments on those matters only as to the penalty). *See also In re Tennessee Valley Authority*, CAA Docket No. 00-6, 2000 EPA App. LEXIS 25, at *34 n.10 (E.P.A., Sept. 15, 2000), 9 E.A.D. ___ (noting the respondent's abandonment of the affirmative defense of the statute of limitations in its denial of that defense). Alternatively, under the Rules of Practice, Respondents have the burden to prove their affirmative defenses. 40 C.F.R. § 22.24(a). As Respondents did not make arguments or present evidence directed towards supporting these defenses, Respondents did not meet their

(continued...)

Reviewing the record, EPA mistakenly approved or at worst negligently approved the 1997 SMAQMD exemption. However, Respondents have not put forward evidence, nor is there any present in the record to show that EPA acted beyond mere negligence in erroneously approving the 1997 SMAQMD exemption rule. Thus, no affirmative misconduct has been demonstrated. Accordingly, Respondents have not sustained their "heavy burden."[22]

III. Remaining Liability Issues: the impact of determination that Count I liability was defeated.

A. Count II: Failure to Maintain Waste Shipment Records

Count II of the Complaint charges Respondents with failure to maintain waste shipment records in violation of the asbestos NESHAP, 40 C.F.R. § 61.150(d)(1).[23] It alleges that Respondents failed to maintain waste shipment records for the asbestos transferred from the "facility" (which would include the renovated Town and Country buildings) to 2900 Heinz Street, the latter of which is the address of Schmitt Construction Company.

Respondent Rich Schmitt, the general contractor who removed the material from the Calderwood and Marconi sites, testified that he believed he was complying with the asbestos rules when he removed the materials from Calderwood. Further, in his view, the flooring was

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[21](...continued)
burden of proof.

[22] The Court notes that Respondents would not sustain their burden even under the traditional test for equitable estoppel. Under the traditional test, the party seeking estoppel must show all the following: (1) the party to be estopped knew the true facts at the time the relevant conduct occurred; (2) the party to be estopped intended that the other party rely on its conduct or representation; (3) the party seeking estoppel was ignorant of the true facts; and (4) the party seeking estoppel relied to its detriment on the other party's conduct. *Yerger*, 981 F.2d at 466. *See also Newell Recycling*, 8 E.A.D. at 631 n.24. As to the second prong of the test, Respondents have not set forth any support nor is there any evidence in the record showing that EPA *intended* Respondents (or the rest of the regulated community) to escape the applicability of EPA's own asbestos NESHAP by their erroneous approval of the 1997 SMAQMD exemption.

[23] A waste shipment record must contain information including the following: (1) name, address, and telephone number of the waste generator, (2) name and address of government authorities responsible for administering the asbestos NESHAP program, (3) approximate quantity in cubic measurements, (4) name and telephone number of the disposal site operator, (5) name and physical site location of the disposal site, (6) date transported, (7) name, address, and telephone number of the transporter, and (8) a certification of accuracy and that the material is in proper condition for transport. *Id*. An owner or operator must maintain copies of such records for at least two years. 40 C.F.R. § 61.150(d)(5).

completely exempt, as it is not considered RACM, as long as one does not crush or saw the vinyl flooring.[24]

Schmitt removed asbestos from the Marconi Avenue buildings and had the material transferred to his place of business at 2900 Heinz Street. On August 21, 1997, SMAQMD inspectors discovered that the asbestos material had been removed from those buildings. On November 18, 1997, Singleton requested that Schmitt provide the waste shipment records for this asbestos material. Respondents have never provided these waste shipment records to SMAQMD, to EPA, or to the Court.[25] While the Court finds that Respondents did not maintain waste shipment records for the transfer of the asbestos from the buildings at Marconi Avenue to the Schmitt Construction Company's place of business at 2900 Heinz Street, it finds that because Count I was defeated, Count II fails as well. .

B. Count III : Failure to Keep RACM Adequately Wet Until Collected for Disposal

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[24]Given that the Court has determined that the Complaint in fact only alleges violations arising from the actions at the Marconi Building, and that issues related to the Calderwood linoleum were not part of the three Counts, the character of the linoleum has become moot. However, it is worth mentioning that Schmitt in fact was correct in his assertion that the linoleum would not be considered RACM unless one crushes or saws the material. RACM means ... "Category I nonfriable ACM that has become friable. Under the definition section for Subpart M -National Emission Standard for Asbestos, RACM means "... (b) Category I nonfriable ACM *that has become friable*, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting or abrading." 40 C.F.R. § 61.141 Category I *nonfriable asbestos-containing material (ACM)* includes ... resilient floor covering. *Id*. Finally, *Resilient floor covering* means "asbestos-containing floor tile, including ... vinyl floor tile. 40 C.F.R. § 61.142. "To impose liability under the asbestos NESHAP requires a 'two-fold showing: first, the Agency must show that the NESHAP requirements apply, and second, that the work practice standards of the NESHAP have not been satisfied.'" *In re: Lyon County* Landfill, CAA Appeal No. 00-5, April 1, 2002, 2002 WL 519727 (E.P.A.). EPA offered no evidence on the method of removal for the Calderwood linoleum and the record is otherwise devoid of information on this subject.

[25] In their Answer, Respondents claimed that they prepared a Uniform Hazardous Waste Manifest on November 21, 1997 documenting the transportation of the asbestos from Schmitt Construction company to B & J Landfill. Answer at 9. Respondents have never provided that document to SMAQMD, EPA, or to the Court. Even if such a document had been maintained, the Complaint charges failure to maintain a document as to the transfer of waste from the Marconi complex to Schmitt's place of business, *not* from Schmitt's place of business to the landfill. Respondents do not claim to have maintained (or even to have prepared) a waste shipment record for the transportation of the waste from Marconi Avenue to Heinz Street.

In Count III of the Complaint, EPA alleges that Respondents violated the asbestos NESHAP which requires an owner or operator to keep asbestos material adequately wet until collected and contained in preparation for disposal.[26]

In their Answer, Respondents cite to an August 6, 1997 report by their asbestos consultant, Mr. Hussey, who reported that he did not see any asbestos debris and that all waste was properly removed and contained from the site. Answer at 10, referring to RX 11. EPA counters with the reports of SMAQMD inspector Singleton, who observed asbestos left at the site in a Marconi Avenue building, and with the subsequent tests of that material. Respondents have also contended that Schmitt *did* wet the material, in order to scrape the material more easily from the buildings. Answer at 11. EPA responds by referring to the reports of SMAQMD inspector Singleton, who observed dry asbestos at the site after the scraping and removal of asbestos material and refers to tests of that material showing it to be asbestos.

Schmitt, who admitted to removing the asbestos himself by scraping it from the ceiling of the building,[27] in the process of scraping the material, caused some small pieces that material to fall onto a beam situated near the ceiling of the building.[28] The largest of the material on the beam consisted of two pieces approximately 2 1/2 inches long. Because of the small size of the material and its location on a beam near the ceiling of the building, the presence of this material went undetected and consequently was left behind by Schmitt and not notice by Respondents' asbestos consultant, Mr. Hussey.[29] Later, the two SMAQMD inspectors, saw the material on the beam and knocked it to the floor for the purposes of making a closer inspection. They observed that the material was dry and took samples for testing. They also took pictures of the material. Thus, some of the remaining dry pieces of asbestos material were errantly left behind by Schmitt. Tests performed by polarized light microscopy by a certified lab revealed that material to be

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[26] In particular, Count III charges Respondents with a violation of 40 C.F.R. § 61.145(c)(6)(i).

[27] Schmitt also admitted to not being certified or otherwise trained in the removal of asbestos.

[28] Respondents assert that the asbestos fell onto the beam *after* Schmitt had performed his removal activities. The Court finds, however, that the asbestos fell onto the beam, which is situated near the ceiling, during the process of scraping the ceiling. Respondents do not suggest any plausible explanation for why that material was on the beam at the time of SMAQMD's inspection.

[29] Although Hussey stated that he did not see any asbestos material after removal, that is outweighed by Singleton's photographs showing that it was RACM. Further, Hussey's claim may be discounted. He admitted that his August 6, 1997 report was inaccurate; he incorrectly assumed in his report that the asbestos was removed by a certified asbestos abatement contractor and incorrectly assumed and reported that the asbestos was properly removed from the site by a certified hauler to a certified landfill.

RACM. Respondents did not remove this material until seventeen days after the SMAQMD inspection.

Respondents argue that the amount RACM in the Marconi building involved in the wetting violation was "*de minimus,*" and consequently was too insignificant to establish a violation. It is accurate that the amount of RACM material left behind was small, being two pieces of RACM no more than 2 1/2 inches long with the total amount of RACM left covering no more than 50% of the area of an 8 1/2 by 11 inch file folder. Respondents further contend that the small size of the material would have made it impossible to wet the material EPA reported was remaining after the scraping. In response, EPA contends that there should not have been any asbestos remaining at the facility after the removal of the RACM, as asbestos is a hazardous material. They also contend that asbestos NESHAP does not provide a *de minimus* exception to wetting violations. Consequently, as long as the threshold amount is present, there is no *de minimus* defense to liability for violations of the asbestos NESHAP regulation requirement that asbestos be kept adequately wet.[30] The Court agrees that once one is beyond the exempted amount of RACM, there is no "*de minimus*" defense. Accordingly, while the Respondents could be technically liable for failure to keep asbestos material adequately wet, because Count I was defeated, Count III also cannot be sustained. This is so, because the regulation cited in Count III, 40 C.F.R. §61.145(c)(6)(I), is confined to the demolition or renovation activity described in Section 61.145(a). The Count I claim that Respondents violated 40 C.F.R. §61.145(b) must be read in concert with §61.145(a).

IV. Penalty Determination in the Alternative in the event the Court's finding of no liability is reversed.

A. Prefatory Remark

For the sake of judicial efficiency, the Court proceeds to provide its analysis of an appropriate penalty. This analysis is offered in the alternative, should the Court's determination of no liability for Respondents be reversed.[31]

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[30] In any event the lack of a *de minimus* defense to *liability*, would not preclude the Court from taking account of the amount of material in assessing the seriousness of the situation for the purposes of determining an appropriate penalty.

[31]No one should interpret the decision's alternative analysis of an appropriate penalty as suggestive that the Court entertains doubts about the correctness of its determination that the Respondents were not liable in this case. Rather, it reflects a sober recognition that initial decisions are often appealed and that novel issues were involved here. Accordingly it is far more efficient for the Court to provide an alternative analysis of an appropriate penalty. At times the EAB has proceeded to impose its own penalty *de novo.* The Court would not want that to occur

(continued...)

B. EPA's Penalty Argument

EPA seeks a penalty of $134,300 against Respondents. In support of that penalty, it emphasizes that asbestos is a hazardous air pollutant and that inhalation of miniscule asbestos fibers can result in deadly diseases. In promulgating the asbestos NESHAP, which includes work practice and notice requirements, to control asbestos air emissions, EPA could not conclude there was any safe level of asbestos exposure. EPA also cites to EAB case-law characterizing violations of the asbestos NESHAP as serious violations of the Clean Air Act and calling for substantial penalties for such violations. Compl. Post-Hrg. Br. at 24-25, *citing, In re Schoolcraft Constr., Inc.,* 8 E.A.D. 476, 492-93 (E.P.A. 1999).

The proposed penalty was derived from EPA's penalty policy, that being the general Clean Air Act penalty policy, the "Clean Air Act Stationary Source Civil Penalty Policy" (hereinafter, "Penalty Policy") and Appendix III to that policy, which is the "Asbestos Demolition and Renovation Civil Penalty Policy." The Penalty Policy was last issued on October 25, 1991, but Appendix III to that policy was revised on May 5, 1992. EPA notes that the Penalty Policy instructs that any penalty should, at a minimum, remove any significant economic benefit resulting from noncompliance and should include an amount beyond recovery of economic benefit to reflect the seriousness of the violation. Because of this, EPA explains, the Penalty Policy has two components, those being (1) gravity and (2) economic benefit.

Witness Robert Trotter is an enforcement officer and the Asbestos NESHAP coordinator at EPA's Region IX office. Tr. at 170-71. As he did in this case, Trotter also acts as a case developer for suspected violations of Asbestos NESHAP. In this role, he calculated the proposed penalty for this case. To do this, Trotter applied the Penalty Policy and initially found the following amounts for each violation: $15,000 for Count I, the failure to notify violation; $2,000 for Count II, the waste shipment record violation, and $13,500 for Count III, the failure to keep adequately wet violation. Tr. at 188-89. These initial amounts reflect the Agency's assessment of the gravity of the violations.

For Count I, involving a first-time failure to notify violation, the Penalty Policy states that notice submitted after asbestos removal is completed is tantamount to no notice. In those situations the policy sets a $15,000 gravity assessment. App. III, at 15. Trotter explained that the notification regulation is intended to provide an inspector with the opportunity to observe the removal of asbestos so as to determine whether it is being properly removed. Tr. at 192. In this instance, the inspector did not arrive until after the demolition of Calderwood was already in progress and thus he could not witness whether the asbestos was being properly removed in those buildings. Consequently, the lack of notification made it very difficult to determine whether there had been any harm. Tr. at 203-04. Trotter suggested that significant penalties are

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[31](...continued)
without its voice on the issue in the record.

imposed for first-time notice violations because such violations risk thwarting effective enforcement and oversight of compliance with the asbestos NESHAP. Tr. at 192.

For Count II, addressing a "[f]ailure to maintain records which precludes discovery of waste disposal activity," the Penalty Policy sets a $2,000 penalty. In its post-hearing brief, EPA explains this requirement as intended to ensure that generators of asbestos containing waste material keep track of their hazardous waste. Compl. Post-Hrg. Br. at 25.

For Count III, the failure to keep RACM adequately wet, EPA emphasized at the hearing that when Singleton arrived at Schmitt Construction Company's place of business to inspect the removed asbestos, Schmitt could not at first locate the waste. Tr. at 81. Subsequently, Schmitt did locate the bags of removed asbestos in a dumpster at his place of business. In Schmitt's attempts to remove the bags from the dumpster, Singleton stated that he saw debris being emitted into the air.

The Penalty Policy explains that the gravity component as to a work-practice violation depends, in part, on the amount of asbestos involved in the operation, which relates to the potential for environmental harm associated with improper removal and disposal. Penalty Policy, App. III at 3. That policy breaks the amount of asbestos down into "units," which equal the threshold amount specified in the asbestos NESHAP. *Id*. For instance, one unit would equal 160 square feet of asbestos, two units would equal 320 square feet, and ten units would equal 1,600 square feet. Citing to EAB case-law, EPA emphasizes the seriousness of a failure to adequately keep asbestos wet violation.

For such violations, the Policy provides a matrix in which a first-time violation involving 10 or less "units" carries a base penalty of $5,000 with an additional $500 for each additional day of violation. Trotter estimated the number of units present to be 10 units or less. Tr. at 194. In estimating the amount of RACM present for purposes of the penalty calculation, Trotter stated that he estimated that there was 1,600 square feet present, although he asserted there may have been as much as 3,600 square feet present throughout the buildings at the demolition and renovation site. Tr. at 185-87. EPA also points to Respondent's own asbestos forms indicated that 3,200 square feet of RACM was removed from the Town and Country buildings.[32] *See* CX 3. Trotter based the 1,600 square feet estimate on the square footage determined by SMAQMD's inspectors at their inspection of the Town and Country buildings. Tr. at 187. Trotter calculated the duration of the violation to be 17 days based on the first day of the inspection, which was August 21, 1997, and the end date, when the asbestos company began to work towards compliance. Tr. at 188, 195-96.

[32]This attempt to claim that the amount of RACM was much more than the amount EPA used to compute the penalty is rejected. EPA is held to the estimate it relied upon in formulating the penalty. Further, because the Court has found that the Calderwood material may not be considered, the actual amount of asbestos is only that from the ceiling at Marconi.

Under the Penalty Policy, the economic benefit component measures the benefit accruing to the operator, the facility owner, or both, as a result of failing to comply with NESHAP. To determine the economic benefit, Trotter multiplied 1,600 square feet by $20 per square foot. Tr. at 189. The penalty policy's $20 figure was based on general EPA estimates of the average national cost of properly removing asbestos. Tr. at 189. Applying this economic benefit component increased the penalty by $32,000. Tr. at 188. Trotter conceded he was aware that the cost of removing acoustic ceiling material in Respondent's geographic area was much less, at $4 per square foot, than the policy's estimate. However he attempted to explain away this disparity by asserting that it was reasonable for him to assume that Friedman hired Schmitt, who was not certified to remove asbestos, instead of certified asbestos contractors who were already working for Friedman because Friedman stood to gain an economic benefit from doing so. Compl. Br. at 23, *citing*, Tr. at 210, 213. This explanation is rejected because Trotter conceded that the beginning and end of the economic benefit analysis was his blind adoption of the Policy's $20 estimate and nothing more.

Trotter then increased the penalty by $62,500 based on the size of the violator component, which he determined by using the net worth of Friedman instead of Schmitt or Schmitt Construction Company. Tr. at 188-90, 222. Schmitt informed that his net worth was approximately $150,000. In calculating the size of Friedman, Trotter used a 70 to 100 million dollar figure and then, applying the policy, reduced that amount to be less than the amount of the substantive violation. Tr. at 190.

According to Trotter, the purpose of the size of the violator penalty adjustment is to account for a violator's ability to pay. Tr. at 191. Trotter remarked that he used Friedman's net worth to determine size instead of Schmitt Company's because Friedman owns several other properties and thus needs to be deterred from committing violations at his other properties. Tr. at 222-23. He also stated that he used Friedman's net worth because he did not know Schmitt's net worth. Tr. at 262-63. At the hearing, the parties stipulated that Friedman's net worth is in excess of $100 million. Tr. at 169.

As to size of the violator factor, the Penalty Policy, at Appendix III, provides, in part:

> Where there are multiple defendants, the Region has discretion to base the size of the violator calculation on any one or all of the defendants' assets. The Region may choose to use the size of the more culpable defendant if such determination is warranted by the facts of the case or it may choose to calculate each defendant's size separately and apportion this part of the penalty . . . .

Penalty Policy, App. III at 6.

Finally, Trotter added an additional $9,300 for inflation. Tr. at 188. The total penalty proposed amounted to $134,300. Tr. at 189.

Trotter stated that he relied upon the Action Environmental Executive Summary dated June 19, 1996, (EPA ex. 5), Action's June 13, 1997 Inspection report, (EPA ex. 6) and Action's August 6, 1997 Post removal report, both to determine that there were violations and for calculating the proposed penalty. Tr. 172 -175.

Trotter admitted that he was aware of the ambiguity with the SMAQMD rule and that this ambiguity was a reason why it was considered better for EPA to pursue the action.[33] Tr. 200. He also conceded that local contractors, and local owners "rely on the local districts." Tr. 205. Further, Trotter acknowledged that the Sacramento Air Quality District has been delegated certain responsibilities and that it is the EPA delegatee for the Asbestos NESHAP program. Tr. 248. Consequently, EPA expects SMAQMD to have rules and regulations that are consistent with EPA's. *Id*. In fact, Trotter disclosed that he confers with and instructs people who hold local positions such as Singleton's, explaining these responsibilities to them. Yet he stated that normally he does not examine the local rules and regulations to be sure there is consistency with the federal rules. Tr. 249-250. However, as mentioned, Trotter disclosed that EPA has a Rule Development Section which has the responsibility of reviewing local rules to make sure that they are consistent with the federal rules. Tr. 250. Despite knowing of this Rule Development Section, Trotter stated that he never examined whether that Section reviewed the Sacramento rules to evaluate their consistency. *Id*.

C. Respondents' Penalty Argument

Respondents argue that EPA's proposed $134,300 penalty is excessive in light of both the circumstances of this case and penalties assessed for violations in other cases. In support, Respondents note: (1) that Schmitt reasonably believed he was exempt from notification requirements due to the wording of the local rules, citing to Schmitt's testimony, Tr. at 403, (2) Schmitt was forthright with the investigators and did not attempt to hide his actions, (3) it was Schmitt himself who alerted the government to the removal of asbestos at the Calderwood apartment building, Tr. at 410, (4) the amount of asbestos left in the Marconi building, if any, was *de minimus*, Tr. at 143, (5) Action Environmental, an asbestos consultant for Respondents, had determined that there was no need to notify concerning Calderwood because it believes the amounts removed fell within the exemption. Hussey believed that the buildings did not have to be grouped together as one "facility" for purposes of the asbestos regulations' threshold amount.

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[33]Like Singleton, Trotter was not particularly forthcoming. While admitting that he knew about the Respondents' defense to the local rule and conceding that the local rule's ambiguity was a reason for EPA's prosecution, he would not concede that the local rule was not as clear as the EPA rule, nor could he "recall" if he discussed with the local officials whether it would be wise to change their regulation. Yet, at another point in his testimony Trotter, while aware of the local rule, denied looking at it, and maintained that his only focus was the federal rule. Tr. 241-242. When he recommended that the federal complaint should go forward, he asserted that no one asked to see the local rule. Tr. 244-245.

Tr. at 349, (6) Respondents had no prior violations, Tr. at 223, and (7) this case did not involve a major environmental problem. RX 11, Tr. at 316, 363-64. Resp. Br. at 22.

As to the amount of asbestos present at the time of the notice and failure to maintain waste records violations, Respondents emphasize that the risk of harm was not that great, because, applying a cubic foot measurement, the amount of asbestos at the Marconi building was less than the threshold amount. Tr. at 164, 366. Further, for the reasons articulated by Schmitt, Respondents maintain that applying the cubic foot measurement in this instance provides a more accurate assessment of the amount of asbestos than a square foot measurement, for purposes of determining the seriousness of the violations.

Regarding the wetting violation, Respondents point out that there was a very small amount of material that was not wet and that EPA never advised them to wet this small amount. Respondents also claim that EPA never told them that they had to wet the material. They also cite to Hussey's report that all the RACM had been removed from the building. Given these circumstances, Respondents argue that no environmental damage occurred.

Respondents also challenge EPA's calculation that the wetting violation continued for 17 days. Respondents complain that EPA refused to explain during those 17 days how they could bring their facility into compliance. As such, Respondents seek to cast some of the blame on EPA for at least part of this delay in coming into compliance.[34]

Additionally, Respondents assert that the hazard was contained after they were served with the NOVs. On that point, they note that the Marconi building was locked after they received the NOVs and that Singleton testified that the duration of a violation stops running when the hazard is contained. Resp. Br. at 24 *citing* Tr. at 146 and 316. Because of that, Respondents argue that EPA should not have counted the duration of the wetting violation in calculating the penalty.

As for the economic benefit factor, as noted earlier Respondents take issue with EPA's calculation of the cost of proper asbestos removal, which is based on a national estimate of $20 per square foot. Instead, Respondents argue that the actual cost of removal in the Sacramento area provides a more accurate assessment of Respondents' economic benefit, if any. Respondents contend that the actual cost of removal of asbestos by a certified contractor to be $3 per square foot, based on testimony from different people providing estimates in a range from $2.50 per square foot to $4.50 per square foot. Apart from EPA's use of inaccurate cost figures, Respondents also maintain that, in fact, they did not accrue any economic benefit at all. They claim that the difference between what was paid Schmitt, a non-certified asbestos abatement contractor, and a certified asbestos abatement contractor was only $1,000 and that they incurred

[34]EPA's response to this blame-sharing contention is that Respondents had several asbestos consultants working for them, any of whom could have instructed Respondents how to bring their facility into compliance.

$7,500 costs in decontaminating the Marconi building. Tr. at 320. Respondents additionally contend that their demolition project was not the type that included deadlines or timeliness, where delays mean additional costs. In response, EPA points to Respondents' asbestos consultant, Mr. Hussey, and his statement[35] that he had to perform his testing for asbestos early in the morning because several buildings were scheduled for demolition and there was a need to act expeditiously. Compl. Br. at 24, *citing*, Tr. at 365.

Respondents also challenge EPA's upward adjustment to its penalty based on the size of Friedman instead of the size of Schmitt Construction Company. Respondents contend that Schmitt is a more culpable actor than Friedman. They maintain that EPA's own penalty policy requires it to base its size of violator factor on the more culpable violator. Respondents also charge that EPA attempted to mislead the Court by submitting the incorrect penalty policy appendix, which addresses this very issue, thereby sidestepping an adverse example from its own Policy. This is found in Example 2 of the revised Appendix III, and is also known as the "Bert and Ernie" hypothetical. The hypothetical supports Respondents' argument that the size of violator should be based on the net worth of the more culpable violator. In the "Bert and Ernie" hypothetical, a company named Consolidated Conglomerate with assets greater than $100 million dollars and annual sales beyond $10 million hires Bert and Ernie Trucking, a limited partnership of two brothers owning two tow-trucks and having less than $25,000 worth of business per year. Bert and Ernie had committed a prior violations of the CAA, and the EPA in this hypothetical calculated substantial increases in the penalty due to its repeat violator status. Additionally, as to the size of the violator, EPA in this hypothetical chose the size of business based on the net worth of Bert and Ernie instead of that of Consolidated Conglomerate. This hypothetical clearly favored Friedman's argument that Schmitt, as the more culpable actor, should have been used as the measure when EPA evaluated the size of the violator. Thus, in submitting the outdated appendix into evidence, EPA could be perceived as intending to avoid dealing with the policy's adverse hypothetical.

The CAA Penalty Policy along with Appendix III to that policy was revised October 1991. Afterwards, on May 5, 1992, Appendix III was separately revised. *In the Matter of Lyon County Landfill*, 2000 WL 382190, (EPA ALJ), April 4, 2000. The 1992 version of Appendix III includes the Bert and Ernie hypothetical whereas the 1991 version does not. Respondents contend that EPA either deliberately submitted the 1991 version of Appendix III in order to mislead the Court or that their mistaken reliance on the 1991 version shows lack of competence in meeting their burden of establishing an appropriate penalty. Resp. Initial Br. at 2, 25-26.

Finally, Respondents argue that the Court should consider that the proposed penalty is excessive in light of Respondents good faith in general, including its reliance on the SMAQMD rules. For all of the foregoing reasons, Respondents maintain that EPA's use of Penalty Policy does not reflect the reality of the situation in the case at hand.

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[35] However, while there were reasons to expedite, Hussey's statement does not suggest that delays would increase Respondent's costs. Tr. at 365.

D. Preliminary Determination

As a threshold matter, the Court examines whether EPA intentionally submitted the outdated version of Appendix III of the CAA Penalty Policy at the hearing. First, it is uncontested that EPA provided a copy of the current version of Appendix III, the one with the "Bert and Ernie" hypothetical, to Respondents when it served the Complaint. *See* Tr. at 287. It is possible that EPA staff, in preparing documents for the case, incorrectly provided the outdated 1991 version of Appendix III along with the 1991 version of the general policy. As the Court noted at the hearing, as long as the Policy itself never changed, it would not be unusual for an old appendix be attached to that Penalty Policy, as the old appendix and the Penalty Policy were issued at the same time. Tr. at 285-86. Here, only Appendix III was revised in 1992. This revision occurred *after* the initial publication of the Penalty Policy and the earlier Appendix III, in 1991.

Respondents further assert that EPA was improperly motivated to use Friedman's net worth as to the size of violator in order to gain the highest penalty possible. *Id.* at 25-26. Contending that Schmitt was the more culpable but that Friedman has the deep pocket, they suggest that EPA acted in bad faith, by ignoring culpability and focusing on achieving the highest penalty. *Id.* at 2, 25-26.

In response EPA maintains that it made an innocent mistake in submitting the older (i.e. 1991) version of Appendix III with the General CAA Penalty Policy. It asserts that it actually calculated its proposed penalty using the 1992 version of Appendix III and that it sent Respondents a copy of the most recent (i.e. 1992) version of Appendix III when it served its Complaint on them. Tr. at 265, 268. However, the fact that EPA had submitted the outdated Appendix III into evidence was not disclosed during EPA's case on direct. Rather this came out during the cross-examination of EPA's Trotter when Counsel for Respondent referred to the current Appendix III and the "Bert and Ernie" example within it, addressing culpability. It was only then that EPA Counsel alerted the Court that it had offered the incorrect (i.e. outdated) version into evidence.

The Court finds these events troubling. While it is true that the prehearing exchange document included the correct Appendix, and therefore had the Bert and Ernie example in it, that fact, contrary to the implication EPA suggests, also could be construed as tending to show that the substitution was not innocent and reflective of an eve-of-trial awareness that the Bert and Ernie example could undercut the Agency's decision to look only at Friedman's financial picture. After all, it is hard to imagine how the Agency initially delivers the correct appendix during the prehearing exchange and then, at trial, submits a decade-old version. The Court was also surprised by the speed with which EPA Counsel recognized the problem and rose to admit the error. Nor has EPA Counsel ever offer any explanation how it came to be that the decade-old version worked its way into the trial exhibits. Having noted this skepticism, and the way in which the outdated submission coincidentally aided EPA's penalty analysis, ultimately the Court is unable to reach a definite conclusion as to whether the document's admission was intentional or inept. A separate inquiry would have been required to conclude which explanation was more

plausible and neither side suggested such a course. Under all these circumstances, on this record, the Court finds that EPA's submission of the outdated, 1991 version of Appendix III was inept but not intentional. Respondents were not misled by this error, as EPA served the current policy, the 1992 version of Appendix III, along with the Complaint.

E. The Court's Analysis and Determination of Penalty

1. Recent decisions by the Environmental Appeals Board Regarding Review of EPA Penalty Policies

Throughout its short history, the EAB has endorsed the principle that penalty policies are *not* rules, and as such, an ALJ may reject a penalty policy so long as the statutory penalty criteria

are properly applied.[36] For instance, in *DIC Americas, Inc.*, the EAB reiterated that an ALJ is not bound to penalty policies, but only must *considehr* such policies:

> Agency regulations specifically provide that the presiding officer "*must consider* any civil penalty guidelines issued under the Act" and must set forth in the Initial Decision specific reasons for deviating from them (emphasis added). 40 C.F.R. § 22.27(b).(emphasis added)[sic]. The clear implication of this language is that the presiding officer may either approve *or reject* a penalty suggested by the guidelines. In other words, a presiding officer has *the discretion either to adopt the rationale of an*

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[36] Following is a detailed, but not exhaustive history of cases in which the EAB and its predecessor, the EPA Chief Judicial Officer, determined that penalty policies were *not* binding and were not to be treated as such: *In re Industrial Chem. Corp.*, CWA Appeal No. 00-7, 2002 EPA App. LEXIS 7, at *40 n.14 (E.P.A., Jan. 15, 2002), 10 E.A.D. ___; *In re Rogers Corp.*, TSCA Appeal No. 98-1, 2000 EPA App. LEXIS 28, at *89 (E.P.A., Nov. 28, 2000), 9 E.A.D. ___, *remanded on other grounds*, 275 F.3d 1096 (D.C. Cir. 2002); *In re Steeltech, Ltd.*, 8 E.A.D. 577, 585-86 (E.P.A. 1999), *aff'd*, 105 F. Supp. 2d 760 (W.D. Mich. 2000), *aff'd*, 273 F.3d 652 (6th Cir. 2001); *In re Hall Signs, Inc.*, EPCRA Appeal No. 97-6, 1998 EPA App. LEXIS 113, * 7-9 (E.P.A., Dec. 16, 1998) (unpublished); *In re B & R Oil Co.*, 8 E.A.D. 39, 64 (E.P.A. 1998) (EAB declines to disturb an ALJ's penalty assessment unless there is "clear error or abuse of discretion"); *In re Employers Insurance of Wausau*, 6 E.A.D. 735, 761 (E.P.A. 1997); *In re Rybond, Inc.*, 6 E.A.D. 614, 639 (E.P.A. 1996) ("Under the circumstances of a given violation, reduction of a penalty assessment may be appropriate even if the penalty has been properly calculated in accordance with the Penalty Policy."); *In re McLaughlin Gormley King Co.*, 6 E.A.D. 339, 350 (E.P.A. 1996) ("We note, however, that the GLP ERP, which has never been put out for notice and comment, is a non-binding Agency policy whose application is open to attack in any particular case . . . (While Agency penalty policies 'facilitate application of statutory penalty criteria, they serve as guidelines only and there is no mandate that they be rigidly followed.')") (case citations omitted); *In re DIC Americas, Inc.*, 6 EAD 184, 189-91 (E.P.A. 1995); *In re Johnson Pacific, Inc.*, 5 E.A.D. 696, 701 (E.P.A. 1995); *In re Pacific Refining Co.*, 5 E.A.D. 607, 612-13 (E.P.A. 1994); *In re James C. Lin and Lin Cubing, Inc.*, 5 E.A.D. 595, 599 (E.P.A. 1994) (". . . as the Board has noted on numerous occasions, . . . penalty policies . . . serve as guidelines only and there is no mandate that they be rigidly followed."); *In re General Elec. Co.*, 4 E.A.D. 884, 908 (E.P.A. 1993), *vacated on other grounds*, 53 F.3d 1324 (D.C. Cir. 1995) (accepting the Presiding Officer's penalty assessment while noting, ". . . the Presiding Officer disregarded the 1980 PCB Penalty Policy . . . ."); *In re ALM Corp.*, 3 E.A.D. 688, 693 n.9 (E.P.A. 1991) (dicta); *In re Empire Ace Insulation Mfg. Corp.*, 3 E.A.D. 226, 226 n.1 (E.P.A. 1990) (dicta); *In re Samsonite Corp.*, 3 E.A.D. 196, 204 (E.P.A. 1990) ("On appeal, deference must be accorded to the regulatory delegation of discretion to the presiding officer in determining an appropriate penalty under the statute."); *In re A.Y. McDonald Industries, Inc.*, 2 E.A.D. 402, 414-15 (E.P.A. 1987); *In re Sandoz, Inc.*, 2 E.A.D. 324, 330 and 330 n.13 (E.P.A. 1987) (and citing additional cases).

> *applicable penalty policy where appropriate or to deviate from it where the circumstances warrant.*

6 E.A.D. 184, 189 (E.P.A. 1995) (additional emphasis supplied). In that decision, the EAB also recognized both its own history and the EPA Chief Judicial Officer's history of treating penalty policies as non-binding and allowing each ALJ wide discretion to reject or deviate from a penalty policy:

> It has long been the position of the Agency that our regulations governing the assessment of civil penalties do not bind either the presiding officer or the final decisionmaker (in this case, the Board) to the formulas set forth in the penalty guidelines. *See, e.g., In re Great Lakes Division of National Steel Corp.*, 5 E.A.D. 355, 374, (EAB 1994) (dicta); *In re General Electric Company,* 4 E.A.D. 884, 908 (EAB 1993) (accepting the Presiding Officer's penalty assessment while noting that "the Presiding Officer *disregarded* the 1980 PCB Penalty Policy"); *In re 3M Company*, 3 E.A.D. 816, 822 (CJO 1992); *In re ALM Corp.*, 3 E.A.D. 688 (CJO 1991) (dicta); *In re Empire Ace Insulation Mfg. Corp.*, 3 E.A.D. 226 (CJO 1990) (dicta); *In re A.Y. McDonald Industries, Inc.*, 2 E.A.D. 402, 414 (CJO 1987) ("*An ALJ's discretion in assessing a penalty is in no way curtailed by the Penalty Policy* so long as he considers it and adequately explains his reasons for departing from it."); *In re Sandoz, Inc.*, 2 E.A.D. 324 (CJO 1987) (citing additional cases at note13).

Id. at 190-91 n.10 (emphasis supplied).

Not long after *DIC Americas, Inc.*, the EAB, in the *Wausau* case, not only reaffirmed the non-binding nature of penalty policies but also encouraged ALJs to scrutinize such policies instead of mechanically adhering to them: "We readily agree that EPA's adjudicative officers must refrain from treating the PCB Penalty Policy as a rule, and must be prepared 'to re-examine the basic propositions' on which the Policy is based, *McLouth*, 838 F.2d at 1321 [D.C. Cir. 1988], in any case in which those 'basic propositions' are genuinely placed at issue." *In re Employers Insurance of Wausau*, 6 E.A.D. 735, 761 (E.P.A. 1997).

Furthermore, as recent as 1999 in the *Steeltech* case, the EAB implied that it would be an error to establish a high standard for being able to depart from a penalty policy. *See In re Steeltech, Ltd.*, 8 E.A.D. 577, 585-86 (E.P.A. 1999), *aff'd,* 105 F. Supp. 2d 760 (W.D. Mich. 2000), *aff'd,* 273 F.3d 652, 655-56 (6th Cir. 2001). In particular, where the ALJ indicated that she would *only* depart from a penalty policy under "extraordinary circumstances," the EAB corrected that a penalty policy is *not* a rule and thus there is no requirement of "extraordinary circumstances" in order to depart from such a policy:

> In this case, the Presiding Officer's choice of language in one sentence of her decision implies that she may have applied an inappropriately high

> standard for deviation from the guidance of the ERP. Specifically, the Presiding Officer stated that "this case presents no extraordinary circumstances which would suggest any deviation from the ERP." Initial Decision at 18 (emphasis added). Because the ERP is not a rule, the ERP does not generally restrict the Presiding Officer's discretionary authority and a finding of "extraordinary" circumstances is not required for deviation from the ERP's guidance.

Steeltech, 8 E.A.D. at 585-86 (footnotes omitted).

Finally, just a few months ago, the EAB reaffirmed the ALJ's discretion to *reject* a proposed penalty *even if* that proposed penalty is calculated in accordance with the penalty policy.

> We note that, in general, a presiding officer is not required to strictly follow Agency penalty policies and can depart from a penalty policy as long as he or she adequately explains the reasons for doing so. *In re B&R Oil Co.*, RCRA (3008) Appeal No. 97-3, slip op. at 32 (EAB, Nov. 19, 1998); *In re Everwood Treatment Co.*, 6 E.A.D. 589, 600 (EAB 1996); *In re DIC Americas, Inc.*, 6 E.A.D. 184, 190 and n.10 (EAB 1995). Moreover, *a presiding officer may reject a proposed penalty even if that penalty is calculated is accordance with the penalty policy*, as long as the statutory penalty criteria are properly applied. *B & R Oil*, slip op. at 32; *In re Employers Insurance of Wausau*, 6 E.A.D. 735, 756 (EAB 1997).

In re Industrial Chem. Corp., CWA Appeal No. 00-7, 2002 EPA App. LEXIS 7, at *40 n.14 (E.P.A., Jan. 15, 2002), 10 E.A.D. ___ (emphasis supplied).

In a sharp turn of events, the EAB recently revoked its deference towards an ALJ's power to disregard penalty policies and now effectively treats such policies more as *rules* rather than mere policies or mere guidance. *See In re Carroll Oil Co.*, RCRA (9006) Appeal No. 01-02, 2002 WL 1773052, slip op. (E.P.A., July 31, 2002), 10 E.A.D. ___; *In re M.A. Bruder and Sons, Inc.*, RCRA (3008) Appeal No. 01-04, 2002 WL 1493844, slip op. (E.P.A., July 10, 2002), 10 E.A.D. ___. The EAB now confines the discretion of an ALJ to reject a penalty "policy" within seemingly insurmountable walls:

> Therefore, in reviewing an ALJ's penalty assessment in circumstances where the ALJ has chosen not to apply the policy at all – rather than, for example, applying the policy differently than advocated by the complainant -- we will *closely scrutinize* the ALJ's reasons for choosing not to apply the policy to determine if they are *compelling*.

M.A. Bruder, supra, slip op. at 21 (emphasis supplied); *accord Carroll Oil, supra*, slip op. at 28. The EAB announced that it would *not* defer to an ALJ's penalty determination in cases in which

he or she rejects the penalty policy without such a "compelling" reason but *would* continue to defer to an ALJ's penalty determination when he or she abides by the penalty policy. *M.A. Bruder, supra,* slip op. at 21-22.[37] In both *Carroll Oil* and *M.A. Bruder*, the EAB rejected the ALJ's reasons for refusing to use the penalty policy and instead proceeded to calculate the penalty by using the "policy."

The EAB's requirement that there be a "compelling" purpose in order to disregard a penalty policy results in treating such policies as de facto rules. Further, the EAB's intent to "closely scrutinize" to see whether there is a "compelling" reason for refusing to apply a penalty policy sets an exceedingly difficult test.[38] Although, in theory, such a strict test might afford an ALJ some opportunity to reject a policy, in practice adherence to such a policy will be the standard for all intents and purposes. Under it, Respondents drawn into EPA proceedings effectively will be subject to the penalty "policy" as if it were a binding rule.[39]

When the EAB was in its early years, one of its own judges wisely cautioned that if the EAB were to treat EPA policies as if they had binding authority, they would be struck down as improperly promulgated rules in violation of the Administrative Procedure Act ("APA"):

> It has long been the position of the Agency that our regulations governing the assessment of civil penalties do not bind either the presiding officer or the final decision-maker (in this case, the Board) to the formulas set forth in the penalty guidelines . . . I hope that the Board's adherence to the penalty guidelines in this case does not signal a trend away from this line of authority, for the consequences may be similar to those experienced by the Federal Communications Commission in *U.S. Telephone Ass'n v. Federal Communications Commission,* 28 F.3d 1232 (D.C. Cir., decided July 12, 1994). In *U.S. Telephone Ass'n* the D.C. Circuit held that the

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[37] The EAB has taken note that it has generally refrained from substituting its judgment as to penalty determinations for that of an ALJ's discretion. *See Carroll Oil, supra,* slip op. at 28**,** (citing cases). *See also, e.g., In re City of Salisbury,* CWA Appeal No. 00-01, 2002 EPA App. LEXIS 6, at *37 n.19 (E.P.A., Jan. 16, 2002), 10 E.A.D. ___.

[38] The new test is analogous to the Supreme Court's strict scrutiny test applied to abhorrent practices such as state-sponsored racial discrimination. United States Supreme Court's Under the "strict scrutiny" test, government-sponsored racial classification is stricken when the party seeking to uphold that classification cannot prove that it is "narrowly-tailored" toward a "compelling" governmental interest. Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw,* 149 U. PA. L. REV. 1, 14 (2000).

[39] *See cf.* Rubin, *A Comprehensive Approach to Strict Scrutiny,* 149 U. PA. L. REV. at 3-4 (although a handful of cases survive a "strict scrutiny" test, such challenges almost invariably fail).

> FCC's administrative penalty schedule was not merely a "policy statement" that provides guidance to the Commission in imposing fines, but was in fact a "framework for sanctions" intended to cabin the Commission's discretion, and therefore the schedule was subject to APA rulemaking procedures. *Id.* According to the D.C. Circuit, the FCC labeled its forfeiture standards a "policy statement" and "reiterated 12 times that it retained discretion to depart from the standards in specific applications." *U.S. Telephone Ass'n*, 28 F.3d at 1234. The Court nevertheless found unavailing the Commission's effort to distinguish between its "policy statement" and substantive rules subject to APA notice-and-comment. The distinction, in the Court's view, turned on the FCC's intent to bind itself to the penalty schedule contained in the "policy statement." Although the FCC had expressed a different intention in its public pronouncements, the Court found that the FCC had in fact adhered to the schedule in the overwhelming majority of cases in which the schedule had been applied. The Court therefore set aside the FCC's forfeiture standards, and ruled that they should have been issued for comment under the Administrative Procedure Act.

In re Pacific Refining Co., 5 E.A.D. 607, 624-25 (E.P.A. 1994) (dissenting opinion of Judge McCallum). Judge McCallum further prophesied, "If the Board persists in its adherence to the penalty guidelines, while steadfastly maintaining that neither it nor the Presiding Officer is 'bound' by the guidelines, its statements to that effect may ring hollow to a Court of Appeals in some future case." *Id.* at 625.

That prediction may become a reality in light of the D.C. Circuit's recent reaffirmance that statements of policy are to be treated as legislative rules, and thus subject to the notice and comment procedures of the APA, when they have ". . . binding effects on private parties ***or on the agency itself***." *General Electric Company v. EPA*, 290 F.3d 377, 382 (D.C. Cir., May 17, 2002), *quoting, Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999) (emphasis supplied). Furthermore, ". . . '[T]he ultimate focus of the inquiry is whether the agency action partakes of the fundamental characteristic of a regulation, i.e., that it has the force of law.'" *Id.* at 382, *quoting, Molycorp*, 197 F.3d at 545. In *General Electric*, the D.C. Circuit clarified its test for determining whether a statement of policy is binding:

> [A]n agency pronouncement will be considered binding as a practical matter if it *either* appears on its face to be binding, *Appalachian Power*, 208 F.3d at 1023 ("[T]he entire Guidance, from beginning to end . . . reads like a ukase. It commands, it requires, it orders, it dictates."), *or is applied by the agency in a way that indicates it is binding*, *McLouth* [*Steel Products Corp. v. Thomas*], 838 F.2d [1317] at 1321 [(D.C. Cir. 1988)].

General Electric, 290 F.3d at 383 (emphasis supplied).

Regarding statements of policy that are applied as if they were binding rules, in *McLouth* the D.C. Circuit struck down an EPA policy statement setting forth a standard to apply *unless* a petitioner could make a "compelling" case for the Agency *not* to apply that standard. *McLouth*, 838 F.2d at 1321.[40] Although adherence to the policy was not ironclad, the D.C. Circuit ultimately concluded that it was a binding rule rather than a mere policy. *See id.* at 1321-22.[41] *See also cf. Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974), *cited in, McLouth*, 838 F.2d at 1322 (striking parole guidelines as improperly promulgated rules where they "define a fairly tight framework to circumscribe the [Agency's] statutorily broad power.").

Similarly, in *Carroll Oil* and *M.A. Bruder*, the EAB treated penalty policies as if they were effectively binding, as they *presume* that such policies will result in an appropriate penalty *except* in those rare circumstances in which it determines that the ALJ had a "compelling" purpose to reject them. For instance, in *Carroll Oil* it is apparent that the EAB has placed the burden on the ALJ to overcome the presumptively binding effect of the penalty "policy." After the EAB determined that the ALJ had not overcome its strict test of "compelling" purpose, it then applied the policy as written:[42]

> For the foregoing reasons, we conclude that *the ALJ* provided no *compelling* reason for departing from the Penalty Policy in the case at hand, and thus we will not accord his penalty determination our usual deference. *See Bruder*, slip op. at 21, 10 E.A.D. ___. In assessing a penalty upon Carroll Oil *de novo*, we will use the Penalty Policy as a starting point for implementing the statutory penalty factors.

Carroll Oil, supra, slip op. at 35 (emphasis supplied).

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[40] In particular, the policy statement in *McLouth* was a leachate model that EPA required a waste-owner to use when petitioning to delist its hazardous waste from the requirements of the Resource Conservation and Recovery Act. 838 F.2d at 1319-20.

[41] Additionally, in *McLouth*, the D.C. Circuit took note that EPA had applied the policy/model in each delisting application, and the Circuit found that EPA's pattern of using the policy and statements made after the initial promulgation showed that it was not willing to reexamine the principles underlying the policy. 838 F.2d at 1321-22. Thus, *McLouth* is analogous to the EAB's rigid deference towards penalty policies.

[42] Although the EAB disagreed with the EPA Region's interpretation of how to *apply* the penalty policy, the EAB strictly adhered to the policy itself. *Carroll Oil, supra*, slip op. at 46: ". . . we will adopt, with one exception, the Region's *application* of the Penalty Policy . . . ." (emphasis supplied). *See also M.A. Bruder, supra*, slip op. at 22: "While we agree with the ALJ that the Region's proposed penalty produces an unduly harsh result, we believe that the Penalty Policy can be applied in a way that would ensure an appropriate penalty, and choose to use it in determining the penalty we assess."

By effectively treating penalty policies as de facto rules, Respondents may ask themselves whether the APA's Congressionally mandated notice and comment requirements for legislative rules has been avoided. Respondents may also querie whether the EAB's requirement that there be a "compelling" reason to disregard a penalty policy makes such a policy the standard, with the result that the burden has been impermissibly placed on alleged violators to engage in the costly practice of attacking a penalty policy and proving to the ALJ and to the EAB that there is a "compelling" basis to reject the "policy."[43]

2. Application of the Penalty Policy in this instance would not yield an appropriate penalty.

While mindful of the Board's new standard of scrutiny for penalty policies, the Court, in determining the appropriate penalty for each case, still must look to the particular circumstances involved. As applied to this case, several provisions in the Penalty Policy resulted in an inappropriate penalty. For example, the Penalty Policy produced an unrealistic assessment of the economic benefit by calculating the asbestos removal cost at the rate of $20 per linear, square, or cubic feet of asbestos. CAA Penalty Policy, App. III at 17. EPA's witness, Mr. Trotter, who has worked as an EPA enforcement official for many years, admitted that the $20 figure was based on nationwide estimates of the cost of properly complying with asbestos NESHAP requirements. However, this figure is potentially suspect as it is based on "rough cost estimates of asbestos removal nationwide." Penalty Policy, App. III at 7. The Penalty Policy itself describes this figure to be used "in absence of reliable information regarding a defendant's actual expenses."

It is clear that, in conducting his economic benefit analysis, Trotter cast a blind eye to the particular facts. He used the Policy's $20 per square foot figure and ignored any other considerations. Tr. 209. He did this despite being aware that the cost of hauling asbestos containing material could be as little as $2.50 to $3.00 per square foot in the Sacramento area. Tr. 211. The fact that his method produced an economic benefit figure of $32,000 instead of the realistic cost of $3,000 to $4,000 also tends to confirm that EPA, aware that Friedman was wealthy, tried at every turn to maximize its penalty.

Trotter's analysis was troublesome in other respects as well. While he asserted that the Respondent Friedman avoided the higher cost of having a certified asbestos contractor remove the asbestos,[44] he took no steps to determine in fact what the comparative costs would be and he

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[43] *See also* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public*, 41 DUKE L.J. 1311, 1317-19 (1992) (describing the costly and unfair impact on the regulated community when an agency circumvents the APA requirements by treating policy as if it were binding authority).

[44] As often as EPA has asserted the failure to hire a certified contractor, one might lose sight of the determination that the Respondents reasonably believed there was no need to retain (continued...)

had no knowledge whether the amount Schmitt charged actually was less than the cost of such a certified contractor would impose. More troubling was his claim that the policy does not require looking to the financial picture of the respondent with the most blame for the violations. Instead, Trotter maintained this was only a matter of discretion. Further, despite acknowledging that this was Friedman's first violation, Trotter's penalty analysis factored in pure adverse speculation about Friedman:

> One of my concerns would be when you have a property owner that has a lot of different properties, if this is indicative of what their general operating procedure would be. I think in this particular case there would probably be as much or more of a likelihood of any other problems from the Friedmans as opposed to the Schmitts.

Tr. 222-223.

Thus, Trotter's mindset was to ignore that Friedman's record was, even by EPA's reckoning, previously pristine and to assume that because he had a lot of other properties, there were likely other violations out there. That thinking, as Respondents' Counsel asserted, suggests that Friedman's wealth was uppermost in Trotter's mind and may have caused him to ignore the Bert and Ernie example. As noted this was the example that lost its way in getting into the record by virtue of the outdated Appendix being introduced. While Trotter tried to maintain that he also looked into Schmitt's financial state, he could not remember if he put Schmitt's name in when he researched documents at the Sacramento Recorder's Office. Tr. 275. His memory failed him again when he went to the Secretary of State's Office, as he was unable to recall if his search included looking for information on Schmitt. Finally, he conceded the obvious: "we were looking more at Mr. Friedman's assets." Tr. 276. As further evidence that he was only focusing on the deep pocket of Friedman, Trotter, when asked whether in evaluating the size of the violator it would be important to have a true and accurate policy, revealed that "It wouldn't have changed [his] decision. So, in this particular case, no." Beyond that, it is perplexing that Trotter jumped to the unfounded conclusion that, merely because Friedman had many properties, that suggested to him a likelihood of other environmental violations at them. A penalty analysis which is based on such assumptions need not be burdened by the inconvenience of proof. In the Court's view that thinking alone is enough to disregard the Agency's penalty analysis in toto.

In addition, the Court has determined that the Penalty Policy's matrix for the gravity component resulted in an inappropriate value in this instance. Instead of taking into account the actual amount of asbestos involved in a violation, the matrix proposes penalties for first time

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[44](...continued)
such a certified individual as the threshold had not been exceeded.

violators in base amounts of $5,000 for 10 or less units[45] of asbestos, $10,000 for greater than 10 but no more than 50 units, and $15,000 for greater than 50 units of asbestos. *See* Penalty Policy, App. III at 17. Thus, EPA's gravity calculation was based solely on the number of units of asbestos. Trotter acknowledged that the penalty policy affords no discretion to assess a figure below $15,000 for gravity. Tr. 226. In contrast, Respondents maintain that the gravity of the violations was not great in light of several factors, *inter alia*, that Respondents tests of the air quality within the Marconi building showed air quality to be well within safe limits and that the actual amount of material involved in the wetting violation was very small and, at any rate, was contained.

In the Court's view, the actual gravity, that is the "seriousness" of the violation, was of a low order, and as such, adherence to the matrix's three-tiered system in this case would not provide an accurate depiction of the seriousness of the violations. Whether the seriousness is measured by the health risk or the harm to the program, in either instance, for the reasons already articulated, it was of a low order. Accordingly, because the economic benefit and the gravity figures derived under the Policy also do not yield an appropriate penalty, the Court departs from the Penalty Policy in order to arrive at the most appropriate penalty for the case at bar.

3. Application of the Statutory Penalty Criteria[46]

Turning to the statutory penalty factors, the Clean Air Act provides:

> In determining the amount of any penalty to be assessed . . . the court, as appropriate, 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 (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

CAA § 113(e)(1).

a. Good Faith Efforts to Comply and Full Compliance History

[45]A "unit" of asbestos is equal to the threshold amount of asbestos under the NESHAP, such as 160 square feet.

[46]The Court notes that the *General Electric* decision and the comments the Court made about that case in the context of fair warning, have applicability in this alternative penalty analysis, *see supra* at 15-18.

Respondents maintain that they were acting in good faith to comply throughout the events involved in the Complaint, and consequently, that they deserve mitigation of any penalty imposed. In particular, they emphasize their reliance on the SMAQMD regulations. Both Schmitt and Friedman asserted early on that the asbestos regulations were not applicable to them and that they relied to their detriment on the local regulations.

Schmitt explained that he thought the amount of asbestos was below the threshold level[47] because the local regulations suggested to him that there was an exemption if the amount of RACM present fell below certain amounts measured by either square feet *or* cubic feet. He calculated the amount of RACM based on cubic feet, as it was his practice to use cubic foot measurements in his experience as a drywaller. Schmitt's reasonable reliance on the plain wording of the local regulation was augmented by a reasoned view in support of the plain wording. As he explained it, he opted to use cubic feet because it "is a readily available measurement for ceiling spray, and [he believed] it was more accurate." Tr. 404. His view was based on the fact that square feet does not take into account thickness and he gave an example to support his position:

> So if it's square feet and it's a foot thick, it's 160 cubic feet. If it's only an eighth-of-an-inch thick, then it's, what, a couple cubic feet? Much smaller. So I felt cubic was more reliable and more accurate.

Tr. 404. Schmitt displayed that he was fully aware of the process where the threshold is exceeded. Tr. 407. Thus, the Court concludes that the Respondents were acting in good faith in relying upon the local regulation.[48]

The Court also finds that the Respondents were relying in good faith on a perception that a "facility" referred only to individual buildings instead of groups of buildings. Their failure to provide notification of asbestos removal prior to the renovation of the Calderwood buildings[49] was based on good faith because the local regulations required an owner or operator to fill out a separate demolition form for each building. This supports their belief that each individual

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[47]While one might ask why Schmitt was wetting and removing the asbestos in the Marconi building if he truly thought the asbestos regulations did not apply. Schmitt explained that wetting the ceiling of the facility allowed for easier scraping and removal of the asbestos. A large amount of time was involved in that work, as Schmitt stated that it took him four or five days working part time to remove the asbestos. Tr. at 403.

[48]That the Respondents used certified asbestos abatement contractors, such as Sunsuri and Associates, for larger aspects of the project, further demonstrates its good faith belief that the smaller aspects involved in the case at bar were within the exemption.

[49]Though obvious, the Court reminds that the reference to Calderwood in the alternative penalty analysis does not alter the finding that the Calderwood violations were not pled or pursued.

building or structure constituted a "facility." For the Calderwood buildings, Respondents filled out a separate demolition form for each building. Those forms indicate that RACM had already been removed from three Calderwood buildings and that the amount of RACM was "Less than 160 SF [square feet] in 3 separate units." CX 2. Those forms further break down the amount of RACM into the amount in each individual building, which was 80 square feet, 94 square feet, and 90 square feet. Although cumulatively, these measurements push the amount of RACM over the threshold of applicability, if counted separately, they would fall short of the threshold.

Also relevant to the good faith determination is Respondents' conduct in remediating the Marconi building involved in the wetting violation. After receiving their NOVs, Respondents did not act to have a certified asbestos abatement contractor abate the asbestos in that Marconi building until about two weeks afterwards. Friedman complained that EPA refused to explain how to wet the small amount of asbestos material left behind in that building, which consisted of small particles with the largest two pieces being no longer than 2 1/2 inches long. In fact, it is true that EPA refused to explain to Friedman how to wet that material or how to abate the building. While EPA tries to avoid the government's failure to explain what it wanted the Respondents to do at Marconi by noting that the Respondents had their own asbestos consultants, this overlooks that the Respondents and Hussey believed that Marconi was clean. This put the Respondents in the position of having to expend $7,500 to chase down a quantity of asbestos which was not more than the surface area of ½ a file folder. Thus, while Respondents believed that no further work was needed, they also appreciated that when the government said it had to be done, they had little choice but to keep them happy. Tr. 405.

The Court also notes that Schmitt acted in good faith when he openly revealed the location of the bags of asbestos he had removed from the facility. As to history of prior violations, it is undisputed that Respondents have not committed any prior violations, nor have they previously been served with NOVs unrelated to the case at hand. Considering the totality of the circumstances, Respondents merit significant mitigation in the penalty for their good faith efforts to comply and full compliance history penalty factors.

b. Seriousness

EPA draws a distinction between the degree of seriousness based on the amount of asbestos involved in a violation. For instance, in the Penalty Policy's Appendix III, in discussing the gravity of a violation, EPA recommends higher penalties when larger quantities of asbestos are present. In doing so, one can infer that it's EPA's conclusion that a larger quantity of asbestos will involve a larger quantity of asbestos fibers and thus pose a greater risk. As already discussed at length, the asbestos NESHAP provides that the notice requirements for pre-renovation activities are not applicable when the amount of asbestos at a facility falls below the threshold amount. 40 C.F.R. §§ 61.145(a)(4), (a)(4)(i)-(ii).

As to the wetting violation, the amount of material recovered was very small in size. The amount of dry asbestos involved in the violation covered an area no greater than a half of the surface area of a file folder. The two largest pieces were no greater than 2 1/2 inches long and

the rest of the asbestos consisted of small particles. This small amount of material points to a penalty along the lowest range of possible amounts.

As to the degree of seriousness in terms of quantity, there is the question of whether a cubic foot or square foot measurement of the amount of spray-on asbestos material provides a better assessment of the threat to human health. Neither party has supplied expert evidence on this matter. Nevertheless, the asbestos NESHAP's threshold prefers square foot measurements as to the amount of asbestos with cubic foot measurements to be used only as a fallback method. Lending some support to Respondents' position, however, is a commentary prior to adoption of the 1990 asbestos NESHAP explaining the cubic foot measurement was intended to be an equivalent of the linear foot and square foot measurements: "A volume *equivalent* will facilitate the determination of how much asbestos is involved." Asbestos NESHAP Revision, Including Disposal of Asbestos Containing Materials Removed From Schools, 54 Fed. Reg. 912, 916 (Jan. 10, 1989) (emphasis supplied). EPA's own witness, Singleton, estimates that the amount of asbestos material removed from the Marconi Avenue building was 13 to 14 cubic feet of material, which would be less than half the threshold amount, if measured by cubic feet.

Further discussion of the seriousness of the violations is unnecessary, as these issues have already been fully explored. In summary, the quantity involved was minuscule and, given the misleading local rule, there was no measurable harm to the regulatory program.

c. Duration

As for the duration of the violations, the parties focus on the duration of the wetting violation. EPA witnesses Singleton and Trotter calculated the duration of the wetting violation to last from the date of Singleton's inspection of the Marconi building with the dry RACM to a date 17 days later, when Respondents began to clean the remaining asbestos in that building. Respondents claim that by locking the door to that building after receiving the NOV, they contained the asbestos and that the duration of the violation should have stopped shortly after receiving notice that they were in violation. As such, Respondents argue that the duration, if any, should be limited to only the few days between the inspection and receiving the NOV. Locking the door to the building would impede people from unintentionally coming into close proximity to the remaining asbestos, which mitigates the danger. The text of the Clean Air Act, however, refers to duration in terms of the "duration of the violation." The asbestos in the Marconi building was not wet until at least from the date of inspection until when Respondents began to clean up that building. Accordingly, the actual duration of the wetting violation was 17 days. Respondents deserve some mitigation credit for reducing the danger of contact with the asbestos. Furthermore, due to the very small quantity of asbestos involved in the wetting violation, this duration penalty factor is appropriately of a low order.

d. Size of the Business and Economic Benefit of Noncompliance

The parties have engaged in much debate as to whether Respondents should be penalized based on the size of Friedman, who has a net worth greater than $100 million dollars or the size

of Schmitt, who has a net worth of approximately $150,000. The Penalty Policy itself suggests that the "size of the business" penalty factor should have been based on Schmitt as that of the more egregious violator.

It was Schmitt who made decisions to strip the asbestos himself although he was not certified, to fail to notify the authorities prior to the stripping of the asbestos, failing to wet some of the asbestos, and failing to maintain asbestos shipment records. The troublesome business regarding the outdated Appendix has already been discussed. The Court concludes that Schmitt's size should have been used for this factor.

The last element is the amount of economic benefit, if any, Respondents garnered from their violations. Of particular dispute is the cost of using certified asbestos contractors to remove asbestos. Although $20 per square foot may be the national average, the actual cost in the Sacramento area is much lower. The local estimate provided for a more accurate assessment of the actual economic benefit accruing to Respondents. Of the estimates, one of Respondent's own asbestos experts, Mr. Hussey, had the largest estimate, which was between $3.75 to $4.50 per square foot. Other, lower estimates, were from Respondent Schmitt, who is not a certified asbestos contractor, and EPA's witness Mr. Trotter, who knew of estimates lower than Hussey's in that area but did not appear to have firm knowledge of the average amount. In light of Hussey's expertise on this particular matter, his estimate of $3.00 to $4.50 per square foot is the most reliable estimate of the cost of using a certified asbestos contractor to remove asbestos.

Contradicting a calculation that solely takes into account the cost of a certified contractor, however, is that these estimates do not compare the price of employing a certified contractor against the price of employing a non-certified contractor, such as Schmitt. Schmitt testified that the actual difference between the amount he was paid and the amount a certified asbestos contractor would have been paid was only $1,000. In addition, Respondents eventually had to hire asbestos personnel at the cost of $7,500 to abate the asbestos hazards due to Schmitt's deficient removal of the asbestos. Tr. at 322. Ultimately, the Respondents had no economic gain from the violations.

Penalty Assessment In the Alternative and Consideration of Miscellaneous Penalty Factors

Based on the foregoing discussion, the Court, in the alternative, should the findings of no liability be reversed, would assess a total penalty of **$ 3,500** for violations of Counts I, II, and III of the Complaint.

As for the "other matters as justice may require" factor, the matters of justice raised by Respondents have been adequately considered in the Court's discussion of the other penalty factors listed under the Clean Air Act, including but not limited to seriousness, duration, economic benefit, good faith, and size of violator. As such, in accordance with EAB policy, those issues do not require any additional consideration.[50] *See In re Catalina Yachts, Inc.*, 8 E.A.D. 199, 216 (E.P.A. 1999), *aff'd*, 112 F. Supp. 2d 965, 968-70 (C.D. Cal. 2000).

Conclusion

For the reasons set forth above, Respondent is found not liable for any of the three Counts alleged in the Complaint. Accordingly, the Complaint is DISMISSED.

SO ORDERED.

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William B. Moran
United States Administrative Law Judge

Dated: August 28, 2002
Washington, D.C.

[50]However, in the event the Penalty Policy were applied and a penalty derived under it approximating the amount EPA proposed, the Court would reevaluate the "justice" factor and arrive at the same penalty it calculates today.