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**DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY
WASHINGTON, DC 20590**

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In the Matter of)	
)	
Belle Fourche Pipeline Company,)	CPF No. 5-2007-5002
Bridger Pipeline Company LLC)	CPF No. 5-2007-5003
Butte Pipeline Company)	CPF No. 5-2007-5008
)	
Respondents)	
_____)	

POST-HEARING SUBMITTAL

Respondents, Belle Fourche Pipeline Company, Bridger Pipeline Company LLC and Butte Pipeline Company respectfully submit this Post-Hearing Submittal of further written material pursuant to 49 C.F.R. § 190.211(i).

I. BACKGROUND

This matter came before the Pipeline and Hazardous Materials Safety Administration, Office of Pipeline Safety ("OPS") for an informal hearing on August 31, 2007, at OPS's offices in Lakewood, Colorado. The Presiding Official was Mr. Benjamin Fred. Appearing for OPS were Mr. Chris Hoidal and Mr. Gerry Davis. OPS was represented by Ms. May Chiranand.

Appearing for Respondents Belle Fourche Pipeline Company, Butte Pipeline Company, and Bridger Pipeline Company LLC (collectively, Respondents) were Mr. Robert Stamp (by phone), Mr. César de Léon, counsel for Respondents, Mr. Manuel Lojo and Mr. Colin Harris, and a Legal Assistant, Ms. Catherine Moore. Respondents also submitted testimony from Mr. Stamp and Mr. de Léon by affidavit. These witnesses were present for cross-examination regarding the contents of their affidavits. Finally, Respondents submitted the affidavit of Mr. Ryan Dehner.

Respondents appreciate the courteous, professional and constructive manner in which the informal hearing was conducted. Respondents further appreciate the opportunity to submit this post-hearing submittal, which serves to summarize the proof (or lack thereof) at the hearing.

II. BURDEN OF PROOF

In an enforcement matter, the burden of proof rests with OPS. As the proponent of the underlying NOPV's, the Agency is clearly responsible for coming forward with proof for each element of the allegations contained therein, and also bears the risk of nonpersuasion as to each of those elements.

Other federal agencies follow this rule. *See, e.g., In the Matter of Lyon County Landfill*, Docket No. CAA-5-96-011, 2000 EPA ALJ LEXIS 20, at *21 (April 4, 2000) (copy attached as Exhibit A). Thus, OPS has both the initial burden of production and the ultimate burden of persuasion as to each allegation in the Order as well as the proposed remedies in the Order.

This standard is, moreover, consistent with the standard found in the Administrative Procedure Act (“APA”), which establishes that “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof” 5 U.S.C. § 556(d). The federal courts too have held that, in agency enforcement actions, the “burden of establishing a violation of the applicable regulation would be carried by the Government.” *See Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349, 357 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (citing *United States v. Bishop Processing Co.*, 423 F.2d 469 (4th Cir. 1970), *cert. denied*, 398 U.S. 904 (1970)).

III. OPS HAS FAILED TO MEET ITS BURDEN OF PROVING A VIOLATION OF 49 C.F.R. SECTION 195.230.

A. Allegation.

This allegation is directed only to Bridger. The regulation is as follows:

§ 195.230 Welds: Repair or removal of defects.

- (a) Each weld that is unacceptable under § 195.228 must be removed or repaired. Except for welds on an offshore pipeline being installed from a pipe lay vessel, a weld must be removed if it has a crack that is more than 8 percent of the weld length.**
- (b) Each weld that is repaired must have the defect removed down to sound metal and the segment to be repaired must be preheated if conditions exist which would adversely affect the quality of the weld repair. After repair, the segment of the weld that was repaired must be inspected to ensure its acceptability.**

OPS alleged:

Records show that weld number XR 11 made during a short segment replacement project on the Poplar pipeline was rejected for a pinhole. There is no record that this weld was repaired and re-inspected. This weld XR 11 is not the same weld XR 11 that was part of the 17,000 foot repair project on the Poplar Pipeline.

The Proposed Compliance Order is:

Excavate and examine XR 11 on a short replacement project on the Poplar pipeline not to be confused with weld XR 11 that was part of the 17,000 foot repair project on the Poplar pipeline.

If defects are found then those defects shall be repaired.

Document all inspection and repair activities and provide those records to PHMSA.

B. OPS Failed to Prove that Weld (XR-11) was “Unacceptable”.

Under § 195.230, the “acceptability” of a construction (as opposed to a repair) weld is determined pursuant to § 195.228, which incorporates the weld acceptability criteria in Section 9 of API 1104. The criteria is listed at pages 21-26 of Section 9 of API 1104, which is contained in Exhibit 4, at the tab marked “API 1104.”

As Mr. Stamp explained at the hearing, Bridger used radiography to determine the acceptability of the construction welds. This process utilizes a radiation source to expose and capture an image of a weld on film. This film can be evaluated for possible defects in the weld. *Stamp Testimony; Affidavit of Robert Stamp (“Stamp Aff.”) ¶ 24.*

Bridger used a company named T&K Inspection to perform the radiography. OPS claims that T&K located a defect on a weld that was not acceptable under Section 9 of API 1104. *The only proof offered by OPS* was a May 2005 T&K work sheet that references an x-ray location (XR-11) and a notation “0-2 P.H.” The “0-2” reference means that something was seen at the “zero to two-o’clock” location on the weld, and the “P.H.” stands for “pinhole.” *Stamp Testimony; Stamp Aff. ¶¶ 24-25.¹*

The flaw in OPS’s proof is that a “pinhole” is not listed as an unacceptable defect in Section 9 of API 1104, as OPS’s own witness acknowledged at the hearing. Specifically, Mr. Davis testified that he did not rely on API-1104 as the basis for this allegation. Instead, he relied on the word “unacceptable” on the T&K form. However, to prove a violation of § 195.230, OPS must show that weld failed to meet the specific criteria in API 1104, not that a contractor wrote the word “unacceptable” on a worksheet.

Moreover, although OPS bears the risk of nonpersuasion, Bridger came forward with unrefuted expert testimony that a reference to “pinhole” does not establish a violation of § 195.230. As Mr. Stamp testified, and as summarized in his affidavit: “[b]ased on my review of and experience with the regulations and the API standards, Section 9 of API 1104 does not require rejection of a weld for an observed “P.H” or pinhole anomaly. Section 9.3 lists and explains the defects that (depending on their size) may warrant rejection in connection with radiographic testing. A “pinhole” is not one of them.” *Stamp Testimony; Stamp Aff. ¶ 26.*

Bridger also admitted into the record, without objection, the affidavit testimony of César de León. Mr. de León explained that as a matter of regulatory construction, the T&K worksheet is not proof of a violation of Section 9 of API 1104. Specifically:

I have reviewed the record that forms the basis for the NOPV regarding the “pinhole.” The record was generated by the radiographer and lists any “defects” in welds. As to XR-11, the weld at issue, the radiographer used the acronym “P.H.” to reference a “pinhole.” Apparently, OPS contends that the reference to a “P.H.” proves that the weld did not conform to the acceptability criteria in API-1104.

¹ It is important to keep in mind that the work at issue here was installation of a completely new pipe segment and the alleged “pinhole” feature was on the weld, not in the pipeline itself.

Since API-1104 is, in effect, the “regulation,” it is part of the official rulemaking record, and the regulated community can look to the plain language of API-1104 to determine their obligations. I have reviewed the acceptance standard for radiographic testing in connection with this matter. As explained at section 9.3 of API-1101, if the radiography exam locates one or more of the listed defects, then the weld is not acceptable. The list of unacceptable defects does not include a “pinhole.” Therefore, from the standpoint of regulatory interpretation, the mere fact that a radiographer found a “pinhole,” without placing that condition under one of the categories in the API-1104 criteria, does not mean that the weld failed the acceptability criteria of API-1104.

Affidavit of César de Léon (“de Léon Aff.”) ¶¶ 11-12. API 1104 “is the regulation” because it is incorporated by specific reference in 49 C.F.R. § 195.3.

Moreover, as Mr. de Léon also explains, and as is evident from the criteria in Section 9 of API 1104, certain weld defects must be of a certain size before they are considered to be “unacceptable.” See API 1104 at 21-26; *de Léon Aff.* ¶ 15. The T&K worksheet does not identify the size of the “pinhole” on the weld, and therefore is not a basis for concluding that the condition was unacceptable under Section 9 of API 1104. *Id.*

C. OPS Failed to Prove that Bridger Failed to “Repair” Weld XR-11.

Even if OPS had proven that weld XR-11 was unacceptable under Section 9 of API 1104 - - which it clearly did not - - the overwhelming evidence at the hearing was that the “pinhole” condition was repaired by Bridger. OPS correctly noted that the T&K worksheet did not have a check mark in the “weld acceptable” box for XR-11. Although, as established above, this does not even prove a violation of the regulation, Bridger nonetheless took measures to confirm that the pinhole condition was addressed. Bridger contacted the welder who made weld XR-11 and who prepared the T&K worksheet. He testified by affidavit that the condition was a “tiny surface imperfection.” *Affidavit of Ryan Dehner* ¶ 3. Bridger repaired all such pinhole conditions by grinding, and visual inspection. *Id.* ¶ 4. OPS did not refute this testimony, or call Mr. Dehner as a witness, or proffer any other evidence to substantiate its bare reliance on the T&K worksheet. Therefore, OPS failed to sustain the burden of proof as to a violation of § 195.230.

IV. OPS HAS FAILED TO MEET ITS BURDEN OF PROVING A VIOLATION OF 40 C.F.R. SECTION 195.422.

A. Allegation.

This allegation is directed at both Bridger and Butte. The regulation is as follows:

§ 195.422 Pipeline Repairs.

(a) Each operator shall, in repairing its pipeline systems, insure that the repairs are made in a safe manner and are made so as to prevent damage to persons or property.

The allegation against Butte is:

Of the several “Type B” repair sleeves installed on the Butte pipeline in 2004, only two were non-destructively tested (NDT) at the sleeve to pipe fillet welds. Operator’s records do not appear to indicate if these welds were visually examined. Industry practice has been to use some type of NDT inspection of all sleeve to pipe fillet welds to insure that repairs are made in a safe manner to prevent damage to persons or property during and after repairs.

The allegation against Bridger is:

None of the several type B repair sleeves installed on the Poplar pipeline in 2005 were NDTed at the sleeve to pipe fillet welds. Operator’s records do not appear to indicate if these welds were visually examined. Industry practice has been to use some type of NDT inspection of all sleeve to pipe fillet welds to insure that repairs are made in a safe manner to prevent damage to persons or property during or after repairs

The Proposed Compliance Order for both companies is:

Excavate and nondestructively test 50% of all sleeve to pipe fillet welds made as a part of the [Butte and Bridger] pipeline integrity repairs of [2004 and 2005].

If any of the excavated welds show indications of cracking then the balance of all welds will be excavated and nondestructively tested.

Provide documentation of all weld inspections and any associated repairs to PHMSA.

B. OPS Failed to Prove that Bridger did not Safely Repair the Pipelines.

1. *The NDT issue.*

OPS contended at the hearing that the test for “safe” repair was whether some unquantified percentage of fillet welds had been non-destructively tested (NDT). The issue thus becomes whether NDT is required under § 195.422. OPS’s own regulations, and interpretation reveal that it is not, and OPS offered no proof to the contrary.

First, OPS’s reading of the regulation is plainly erroneous. The regulation, on its face, does not say anything about NDT, and in fact was specifically designed to avoid the sort of strict, command and control scheme advocated by OPS here. As Mr. de Léon explained:

49 C.F.R. § 195.422(a) (the “Pipeline Repairs” regulation for operating and maintaining pipelines per 49 C.F.R. § 195.400) was promulgated in 1969 at 34 Fed. Reg. 15473 (Oct. 4, 1969). The

Pipeline Repairs regulation has not been amended since the original rulemaking because it has ensured adequate pipeline repairs for over 30 years. There has never been any reason to change that rule. Therefore, the 1969 preamble to the final rule, and the rule itself, constitutes the official rulemaking record. The Pipeline Repairs rule does not require non-destructive testing. To the contrary, the Pipeline Repairs regulation is a “performance based” rule (per the preamble language at 33 FR 10214 (July 17, 1968)) that leaves discretion with the operator to determine what is “safe” repair based on the operator’s unique circumstances. The 1969 preamble, which I have reviewed, does not require or even mention any need for non-destructive testing.

de Léon Aff. ¶ 4. The history of the regulation, including the relevant preamble interpretation, is at Respondents’ Exhibit 4.

OPS’s interpretation is also erroneous because, when OPS wants to impose NDT, it does so directly by writing that requirement into the regulations, which it did not do in 49 C.F.R. § 195.422(a), but which it has done elsewhere. Thus, for example, the pipeline construction regulations generally require that 10% of the welds made during construction (i.e., when two pieces of pipe are welded together) must be NDT. See 49 C.F.R. § 195.234(d). Clearly, if OPS had wanted to impose NDT as a legal requirement under 49 C.F.R. § 195.422(a), it knew how to and would have done so. See also, *de Léon Aff.* ¶ 6. The fact that OPS consciously and affirmatively chose not to do so means that NDT is not required under 49 C.F.R. § 195.422(a), based on the plain language of that regulation.²

In fact, our notes indicate that Mr. Hoidal acknowledged during the informal hearing that the regulations have a “gap” in defining what testing is required, and that NDT is not “reflected in the code.” Therefore, the plain language of § 195.422(a), and OPS’s own interpretation of it and related regulations, are sufficient for a determination that NDT is not mandatory under § 195.422(a), and that Bridger and Butte therefore are not liable. No reference to external (i.e., beyond what the regulation says) evidence should be necessary. The fact that OPS believes that the regulation *should* require NDT is irrelevant to the question of liability. See, e.g., *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979) (“It has become axiomatic that an agency is bound by its own regulations. The fact that a regulation as written does not provide FERC a quick way to reach a desired result does not authorize it to ignore the regulation or label it ‘inappropriate.’”).

² OPS’s failure to consider that NDT is mandated in other rules renders its compliance order nonsensical. The NOPV is requiring 50% of pipeline weld repairs to be non-destructively tested, while the regulation for new pipeline construction (§ 195.234(d)) only requires that 10% of welds be non-destructively tested (subject to a few exceptions). This means that OPS is holding new pipeline construction welds to a lower standard of safety than welds created during repair. *Id.*

OPS tried to get NDT in through the back door by offering “proof” that NDT is an “industry standard.” Even if this “proof” was relevant - - which it is not - - OPS still has not satisfied its burden of persuasion. First, OPS did not offer into evidence any “industry standard.” OPS vaguely referenced a repair manual by a John Kiefner, but did not offer specific testimony about NDT in relation to the manual, nor offer the manual into evidence, nor show that the manual is listed in § 195.3 as incorporated by reference, nor demonstrate that the manual is an industry standard, nor explain why the NDT references (whatever they were) in the manual would have necessarily applied to the work that Butte and Bridger had done in 2004 and 2005. This alone renders the Kiefner “evidence” immaterial and entirely non-persuasive.

Indeed, based on Mr. de Léon’s almost twenty years’ experience in regulating the pipeline industry throughout the United States, establishing “industry practice” would require a statistically defensible survey of the pipeline industry. *de Léon Aff.* ¶ 8. He is not aware that any such survey has been conducted regarding the frequency of use of non-destructive testing. *Id.* Furthermore, OPS did not provide any such statistical information in response to a March 7, 2007 FOIA request related to this matter, which specifically asked for all information regarding industry practice in relation to the § 195.422 regulation.

Furthermore, OPS pipeline safety regulations sometimes specifically adopt an external standard as the means for determining compliance with the regulation, *but neither the Kiefner manual or any other standard requiring NDT has been adopted pursuant to § 195.422(a).* See 49 C.F.R. § 195.3. Unless compliance with the external standard is specifically mandated by the OPS regulation, and unless the regulation specifically incorporates by reference the outside standard as done in § 195.3, industry standards or customs are not legally binding and enforceable. *de Léon Aff.* ¶ 9. While outside industry standards may be more stringent in certain cases, they are voluntary. *Id.* If OPS wants an external standard to legally bind the regulated community, it must do so by notice and comment rulemaking, and then only prospectively.

For all of the above reasons, OPS’s interpretation is owed no deference, and in fact would violate its own regulation. “[T]he power of an agency to interpret its own regulations must not be confused with the power to rewrite. Deference is not abdication, and it requires [the court] to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.” *Rhodes v. Johnson*, 153 F.3d 785, 789-90 (7th Cir. 1998) (internal quotations and citations omitted). OPS is bound to apply the test that the rules explicitly provide, not some “plausible” approach that is nowhere to be found in the rules themselves. *Panhandle E. Pipe Line Co.*, 613 F.2d at 1135.

OPS’s contemporaneous interpretation, as reflected in the 1969 Federal Register preamble explaining that §195.422(a) is a performance-based rule, and without any absolute requirement for NDT, is the only interpretation that reflects what OPS intended when it issued the regulations. The inspector’s result-oriented interpretation in the context of enforcement decades after the fact violates § 195.422(a), and is owed no deference. See *Ohio Dep’t of Human Servs. v. HHS*, 862 F.2d 1228, 1234-35 (6th Cir. 1988) (“[d]eference to an agency’s ‘interpretation’ . . . is not a hard and fast rule”) (internal citations omitted).

2. *Bridger and Butte safely repaired the Pipelines.*

Although OPS failed to sustain its burden at the hearing, and bears the risk of non-persuasion, meaning that Bridger and Butte were not required to present further evidence, they did present substantial, persuasive evidence that the pipelines were safely repaired. *Stamp Testimony; Stamp Aff.* ¶¶ 6-10. OPS disputed just one issue - - whether visual inspections had occurred - - and even then the dispute seemed to be that sufficient inspection records had not been maintained. Mr. Stamp testified at both the hearing, and in his affidavit, under oath, that the welding foreman, Lance Wineteer, had told him that all welds were visually inspected. *Stamp Testimony; Stamp Aff.* ¶ 9. Mr. Stamp also testified that Mr. Wineteer was an extremely competent welder, who Mr. Stamp trusted. *Stamp Testimony.* The testimony regarding visual inspections was not refuted or even questioned.³

C. OPS's Claim is Barred by the Administrative Procedure Act and the Fair Notice Doctrine.

1. *OPS's new interpretation is invalid because it was not subject to notice and comment rulemaking.*

An agency may change its interpretation of its own regulations. *See, e.g., Rust v. Sullivan*, 500 U.S. 173 (1991). However, when, as in the instant case, the practical result of this process is to change the legal rights or obligations of the regulated community, the agency involved must implement such a change through notice and comment rulemaking and promulgation of a new regulation, as required under the Administrative Procedure Act.

Here, OPS seeks to interpret 49 C.F.R. § 195.422(a) as requiring NDT, a substantive change in the regulation that imposes new and significant obligations on pipeline operators, greatly expanding the rule's sweep. OPS's failure to subject this change to notice and comment rulemaking renders any NDT requirement invalid. *See Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030,1033-34 (D.C. Cir. 1999). There, the FAA attempted to enforce a new interpretation of the regulatory term "commercial operators," without providing an opportunity for notice and comment to the Alaskan guide pilots who previously were exempted from the relevant rule. *See id.* at 1035-36. The court held that the agency's action was void because it violated the APA, reasoning that:

When an agency has given its regulations a definitive interpretation, and later significantly revises that interpretation, the

³ Mr. Wineteer is retired and no longer with Bridger. Respondents attempted to locate him so that he could testify by phone or affidavit, but were not successful, as Respondents understand he moved out of Wyoming for personal reasons. It is important to note that, since Mr. Wineteer's testimony formed the basis for OPS's case regarding visual inspections, it was incumbent upon OPS, which has the burden of proof, to locate and subpoena him. Also, OPS asked Butte and Bridger to provide any "notes of visual inspections." It must be emphasized that 49 C.F.R. § 195.422(a) does not require an operator to maintain any such notes. Again, the burden was on OPS to prove a violation, not on Butte and Bridger to prove the lack of a violation.

agency has in effect amended its rules, something it may not accomplish without notice and comment.... The [agency's] current doubts about the wisdom of the regulatory system followed ... for more than thirty years does not justify disregarding the requisite procedures for changing that system.

Id. at 1034-35.

Put simply, “[t]hose regulated by an administrative agency are entitled to know the rules by which the game will be played” before being penalized. *Id.* at 1035 (internal quotations omitted).⁴

OPS may very well doubt that the current version of 49 C.F.R. § 195.422(a) is sufficiently stringent, given its “performance based” nature and lack of any mandate to perform NDT. However, the solution is for OPS to propose a new rule, not to rewrite the rule through an inspection and enforcement proceeding.

2. *OPS failed to provide “fair notice” of its interpretation that 49 C.F.R. § 195.422(a) requires NDT.*

That a rule imposing binding legal obligations must provide the party being regulated “fair notice” of those obligations is a requirement that has been “thoroughly incorporated into administrative law.” *General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995), quoting *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987). Therefore, an agency may not impose liability for violation of a “regulation that fails to give fair warning of the conduct it prohibits or requires.” *General Elec.*, 53 F.3d at 1328, quoting *Gates & Fox Co., Inc. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). Fair notice “is not merely a mitigating circumstance,” but, rather, “is an element of proof of violation.” See *Rollins Env'tl Servs., Inc. v. EPA*, 937 F.3d 649, 654 n.1, 655 (D.C. Cir. 1991) (J. Edwards, dissenting in part and concurring in part).

Importantly, the test is “not what [the agency] might possibly have intended, but what [was] said.” *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995). Accordingly, even in those situations where an agency’s interpretation of its own regulation is upheld on the grounds that the interpretation is not a “plainly erroneous” reading of the regulatory language, a regulated entity cannot be found liable for having violated the regulation

⁴ In reaching this decision, the D.C. Circuit in *Alaska Professional Hunters* reaffirmed that public participation in the development, and interpretation, of agency rules is not a mere procedural formality, but a necessary component of lawful rulemaking, giving all of the relevant stakeholders the opportunity to make their concerns known. See also, *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (stating that the purpose of according notice and comment opportunities was “to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies and to assure that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions.” (internal quotations and citations omitted.))

where the interpretation on which the enforcement action is predicated is not itself “ascertainably certain.” *See, e.g., Trinity Broad. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (In determining whether a regulated party had fair notice, “we ask not whether interpreting the term [as the agency had done] is ‘plainly wrong,’ but whether that interpretation is ‘ascertainably certain.’”).

The question is “whether the regulated party received, or should have received, notice of the agency’s interpretation in the most obvious way of all: by reading the regulations.” *General Elec.*, 53 F.3d at 1329. Thus, only if, “by reviewing the regulations and other public statements issued by the agency,” a regulated entity “acting in good faith would be able to identify, with ‘ascertainable certainty’ the standards with which the agency expects parties to conform,” has the agency “fairly notified a petitioner of the agency’s interpretation.” *Id.* at 1329, quoting *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

In *United States v Chrysler Corp.*, 158 F.3d 1350 (D.C. 1998) the National Highway Traffic Safety Administration (NHTSA) had filed suit under the National Traffic and Motor Vehicle Safety Act (the “Act”) seeking to force Chrysler to recall cars whose seat belts allegedly failed to comply with a safety provision, “Standard 210.” Invoking *General Electric*, the court ruled, “Chrysler cannot be required to recall cars of noncompliance with Standard 210” if the company “had no notice of what NHTSA now says is required under the standard.” *Id.* at 1354. After evaluating the plain language of the standard and the NHTSA’s public pronouncements regarding its interpretation of the standard, the court concluded that the company had not been afforded such notice, observing that “Chrysler might have satisfied NHTSA with the exercise of extraordinary intuition or with the aid of a psychic,” but that these “possibilities are more than the law requires.” *Id.* at 1357.

Likewise in this case, Bridger and Belle could not have reasonably ascertained that OPS now considers NDT to be a mandatory requirement under 49 C.F.R. § 195.422(a). The regulation, on its face, imposes no such requirement. OPS proffered no evidence that it had informed the regulated community that NDT was mandatory. While OPS pointed to one repair text where NDT allegedly was recommended or required, there is no evidence that OPS formally notified Belle and Bridger or the regulated community that this was OPS’s official policy and the industry standard, and no evidence that the text was ever made available to Butte or Bridger.

Thus, even if OPS’s current interpretation is entitle to deference (which, as shown above, it is not), Butte and Belle have not had adequate notice of that interpretation. OPS apparently believes that its 1969 regulation is out of date, and that it now be interpreted to impose a new standard. While this may be laudable⁵, OPS must fairly inform the regulated community of the changed interpretation. As one court noted in the context of another statute regulating safety, “[t]o strain the plain and natural meaning of words for the purpose of alleviating a perceived safety hazard is to delay the day when the . . . regulations will be written in clear and concise

⁵ Of course, OPS’s apparent position that NDT should be mandatory for every weld in every instance on every pipeline may or may not be a reasonable approach. The purpose of notice and comment rulemaking - - which was absent here - - is to provide the regulated community with an opportunity to participate in that determination.

language so that employers will be better able to understand and observe them.” *Diamond Roofing Co.*, 528 F.2d at 649.

In short, OPS has failed to show that it notified Bridger and Belle and other operators that 49 C.F.R. § 195.422(a) is no longer performance based, meaning that operator can consider the unique circumstances of its pipelines and procedures in determining how to accomplish “safe” repair, but instead has a command and control structure mandating the specific type of practices that qualify as “safe;” i.e., NDT in all instances. Simply put, OPS has produced a test for “safe” that was inherently open-ended and incapable of determinable and predictable application at the time of the events at issue in the case, and remains so to this day. Therefore, Bridger and Belle did not have fair notice of OPS’s interpretation of the regulation, and cannot be held liable.

V. OPS HAS FAILED TO MEET ITS BURDEN OF PROVING A VIOLATION OF 40 C.F.R. SECTION 195.428.

A. Allegation.

This allegation is directed at Butte and Bridger. The regulation is as follows:

§ 195.428 Overpressure safety devices and overflow protection systems.

(a) Except as provided in paragraph (b) of this section, each operator shall, at intervals not exceeding 15 months, but at least once each calendar year, or in the case of pipelines used to carry highly volatile liquids, at intervals not to exceed 7 ½ months, but at least twice each calendar year, inspect and test each pressure limiting device, relief valve, pressure regulator, or other item of pressure control equipment to determine that it is functioning properly, is in good mechanical condition, and is adequate from the standpoint of capacity and reliability of operation for the service in which it is used.

The allegation against Butte and Bridger is:

[Butte and Bridger] do[es] not, once each calendar year not to exceed 15 months, test or calibrate pressure transducers that transmit data to the SCADA center on [their respective] pipeline[s]. Pressure transmitters that send pressure data to manned SCADA centers are part of the pressure control system and as such must be tested once each calendar year not to exceed 15 months.

The Proposed Compliance Order is:

Test all pressure transducers that are used for operations of the Butte pipeline including those transducers that are part of the computational pipeline monitoring (CPM) system.

Ensure that all pressure transducers that are used for operations of the Butte pipeline, including those transducers that are part of the CPM system, are tested and inspected once each calendar year not to exceed 15 months.

Provide documentation of tests for all pressure transducers that are used for operations of the Butte pipeline including those transducers that are part of the CPM system.

B. OPS's Proof Fails Because Butte and Bridger Conducted the Required Testing Within the Required Period.

Testimony at the hearing indicated that OPS may no longer be alleging that Butte and Bridger violated § 195.428. The PNOV alleges that Butte and Bridger failed to test both transmitters and transducers, or at least uses those terms interchangeably. Mr. Hoidel clarified that the intent of the PNOV was to allege that the Respondents had failed to test transducers only. As Mr. Stamp testified, Butte and Bridger do test transducers - - *i.e.*, the on-site mechanical devices that sense pressure and are hard-wired to mechanically shut down the system locally and independently of the SCADA system - - on an annual basis. *Stamp Testimony; Stamp Aff. ¶¶ 13-16.* This was not disputed by OPS.

To the extent OPS is still (or is now) alleging that SCADA-related transmitters should be subject to §195.428, Mr. Stamp testified at length about the reasons that such devices are not “overpressure safety devices” as that term is understood under § 195.428. *Stamp Testimony; Stamp Aff. ¶¶ 17-21.* In fact, OPS’s own treatment of SCADA systems demonstrates that such devices do not qualify:

- Apparently, OPS’s position is that a transmitter is part of the SCADA system and because the system, taken as a whole, may function to control pressure, the transmitter is “pressure control equipment” that must be tested every 15 months pursuant to § 195.428. The necessary and logical extension of this position is that *all other* SCADA equipment should be subject to § 195.428. Consequently, to be consistent, OPS should require that operators “test” *all* SCADA field location equipment (e.g., remote terminal units, flow computers, and software), alarms, computer displays, host computers and associated peripherals and software, servers, database tools, and electronic communications tools to transmit data. OPS’s position would even require any SCADA system that uses a satellite to transmit data to test that the satellite is operating correctly in space. The failure of any of these components could affect the ability to regulate pressure in a pipeline. However, OPS does not apply § 195.428 to a SCADA system.

Id. ¶ 21. OPS cannot pick and chose elements of a SCADA system and arbitrarily call them “overpressure safety devices.” Either the component elements of a SCADA system, including (in OPS’s view) transmitters, are overpressure safety devices, or they are not. Since OPS itself does not regulate the component elements of a SCADA system under §195.428, such elements - - including transmitters - - are not overpressure safety devices.

Furthermore, OPS’s position in this enforcement matter regarding the applicability of § 195.428 is contradicted by other pipeline regulations. The proposed compliance order would require Butte and Bridger to test transducers “that are part of the computational pipeline monitoring (CPM) system.” However, the testing of CPM systems is specifically governed by a separate regulation, § 195.444. Section 195.444 does not require the testing of a CPM system every 12 months, as does § 195.428. Section 195.444 incorporates API 1130, which has its own

testing requirements. OPS's position would subject an operator to two different regulations with different, and inconsistent requirements. Clearly, the more specific and directly applicable regulation should govern, which in this case is § 195.444. OPS has not alleged a violation of this regulation.

C. OPS's Claim is Barred by the Administrative Procedure Act and the Fair Notice Doctrine.

To the extent OPS is now interpreting "overpressure safety device" or "pressure control equipment" to encompass transmitters, or transducers that are related to SCADA operations, OPS has violated the APA for failure to subject that change to notice and comment rulemaking, and, therefore, Butte and Bridger cannot be held liable under that new interpretation.

Similarly, Butte and Bridger did not have fair notice of this change. They could not have reasonably ascertained that OPS's official, consistent, across-the-board interpretation would now be that all "transmitters" or SCADA-related "transducers" would be subject to § 195.428. This is particularly the case given that the industry understanding and custom was that such devices were not considered to be the sort of mechanical "pressure control equipment" that the regulation was intended to cover. *Stamp Aff.* ¶¶ 14-16.

VI. OPS FAILED TO MEET ITS BURDEN OF PROVING THE OTHER CONTESTED ALLEGED VIOLATIONS.

A. Atmospheric Corrosion.

OPS alleges that Butte and Bridger had not completed *any* atmospheric corrosion inspections, and had no inspection plans, at the time of the OPS inspections, in violation of 49 C.F.R. § 195.583. Butte and Bridger disputed this at the hearing because they had performed certain inspections, and did have certain plans in place. As Mr. Stamp testified:

Butte and Bridger had, at the time, reference to external corrosion on exposed surfaces in the O&M manual that they followed. Stations were routinely inspected by operations and maintenance staff on regular rounds. Although specific external corrosion inspection procedures were not necessarily written down, any significant external corrosion that was found would have been addressed appropriately. Bridger and Butte also had routine inspection procedures for pipelines, and if these procedures had detected any external corrosion, the practice was to address such issues in accordance with applicable regulations.

Since then, a specific section has been added to the O&M manual regarding identification and inspection of facilities exposed to the atmosphere. Additionally, a procedure was added to the Coating Specifications for soil/air interfaces. Concrete supports have been and are being removed and replaced in a prioritized manner. Pipe has been inspected at the soil/air interface; and certain some [sic] sections have been recoated as necessary. There is an ongoing process of identifying exposed sections of pipe.

Stamp Testimony; Stamp Aff. ¶¶ 28-29. Consequently, Butte and Bridger were in material compliance, or have been addressing the alleged deficiencies even in the absence of a Final Order in this matter.

B. Alignment Maps.

OPS alleges that Bridger maintains only one copy of updated alignment sheets, in violation of § 195.402. However, that section requires only that records and maps be available as “necessary for safe operation and maintenance.” The updated maps were in the Glendive office, which is where pipeline operations and maintenance are based. *Stamp Aff.* ¶ 30. Maps have been and are currently being updated. *Id.*

VII. OTHER MATTERS

A. Miscellaneous Allegations

OPS alleged that Bridger failed to qualify its welding procedures in compliance with § 195.214. As the testimony showed, Bridger used procedures that had been qualified by a predecessor operator of the pipeline. In any event, Bridger now has its own qualified welding procedures.

OPS also alleged that Belle Fourche was using temporary blocks as supports at a station. As the testimony demonstrated, this matter has been corrected.

B. FOIA Issue

Both prior to and at the hearing, the Respondents objected to the setting of the hearing because OPS had not (and still has not) adequately responded to Respondents’ Freedom of Information Act (FOIA) request. On March 7, 2007, OPS partially responded, but withheld over 100 documents (most of which apparently are emails). Respondents, through Belle Fourche, appealed the response, on grounds that the withholding was improper. On July 12, 2007, OPS informed Belle Fourche it would issue an appeal decision. No such decision has ever been issued.

OPS’s decision to go forward with this hearing, despite Respondents’ objections based on OPS’s failure to comply with FOIA, was a violation of Respondent’s due process rights. Respondents are entitled to know whether there is a valid, lawful basis for withholding the 100-plus documents, and (for those that should be disclosed) whether the documents provide OPS interpretations or admissions that are favorable to Respondents. The FOIA request was squarely directed at the factual and legal issues that were the subject of the NPOV’s and the hearing, so it is reasonable to believe that the withheld documents are relevant to those issues. Thus, the degree of prejudice simply cannot be measured unless and until the documents are disclosed.

C. Data Requests Subsequent to the Hearing

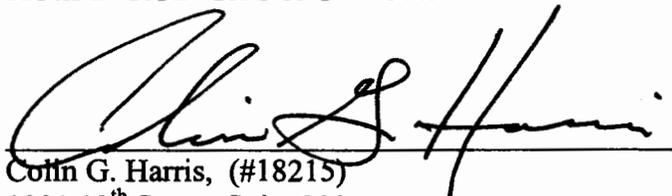
Finally, in an August 31, 2007 email, OPS asked Respondents to estimate how many of the 200 plus sleeve repairs done on the Poplar and Butte pipeline “were required repairs as per 195.452”. OPS also asked for a procedure for pipeline repairs. Respondents are, of course, more

than willing to engage in a constructive dialogue with OPS regarding its current procedures. In addition, Respondents have preliminary information that is responsive to the inquiry about the sleeve repairs, and will follow up shortly. However, we respectfully submit that such matters have no bearing on whether Respondents were in violation back in 2004 and 2005 as to the specific construction or repair projects at issue.

Dated this 11th day of October, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

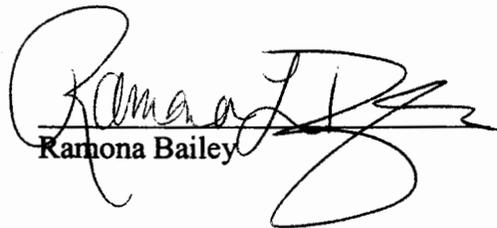
The undersigned hereby certifies that on this 11th day of October, 2007, a true and correct copy of the foregoing Post-Hearing Submittal was served via Federal Express Overnight Delivery as follows:

Benjamin Fred, Esq., Presiding Official,
Office of Chief Counsel
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety
Administration
1200 New Jersey Avenue, SE
East Building, 2nd Floor (PHC)
Washington, DC 20590

and by U.S. mail, postage prepaid, to the following:

Chris Hoidal, P.E.
Director of Regional Office
Office of Pipeline Safety
12300 W. Dakota Avenue, Suite 110
Lakewood, CO 80228

May Chiranand, Esq.
Attorney Advisor
Office of Chief Counsel
1200 New Jersey Avenue, SE
East Building, Suite E-26
Washington, DC 20590


Ramona Bailey

SECRET

SECRET

1 of 1 DOCUMENT

IN THE MATTER OF LYON COUNTY LANDFILL, RESPONDENT

DOCKET NO. CAA-5-96-011 n1

n1 The docket number for this case has been changed to conform to the United States Environmental Protection Agency's standard docket numbering system.

United States Environmental Protection Agency
Office of Administrative Law Judges

2000 EPA ALJ LEXIS 20

April 4, 2000

PANEL:

[*1]

Barbara A. Gunning, Administrative Law Judge

OPINION:

INITIAL DECISION

Clean Air Act: Pursuant to Section 113(d)(1) of the Clean Air Act, *42 U.S.C. § 7413(d)(1)*, Respondent, Lyon County, is assessed a civil administrative penalty of \$ 45,800 for violating the Asbestos National Emission Standards for Hazardous Air Pollutants regulations for active waste disposal sites, 40 C.F.R. § 61.154, and Section 112 of the Clean Air Act, *42 U.S.C. § 7412*.

Issued: April 4, 2000
Washington, D.C.

Barbara A. Gunning
Administrative Law Judge

Appearances:

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PROCEEDINGS

This civil administrative penalty proceeding arises under the authority of Section 113(d)(1) of the Clean Air Act, [*2] 42 U.S.C. § 7413(d)(1). The applicable rules of procedure governing the instant matter are the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.01-22.32 (7/1/97 edition).

The Director of the Air and Radiation Division for Region 5 of the United States Environmental Protection Agency ("EPA" or "Complainant") filed the Complaint in this matter against Lyon County ("Respondent") on August 14, 1996, alleging violations of the Clean Air Act, 42 U.S.C. §§ 7401-7671q, by Respondent in its operation of the Lyon County Landfill in Lynd, Minnesota. The Complaint charges Respondent with six violations of Section 112 of the Clean Air Act, 42 U.S.C. § 7412, for allegedly failing to comply with the National Emission Standards for Hazardous Air Pollutants for Asbestos ("asbestos NESHAP" or "NESHAP for asbestos") regulations, 40 C.F.R. Part 61, Subpart M. Complainant claims that Respondent violated the asbestos NESHAP regulations for active waste disposal sites, 40 [*3] C.F.R. § 61.154, by improper handling of asbestos-containing waste material and failing to maintain required records related to asbestos waste handling. The EPA seeks a civil administrative penalty of \$ 58,000 for the alleged violations.

Specifically, the Complaint alleges six violations of the asbestos NESHAP regulations by Respondent: 1) Respondent violated 40 C.F.R. § 61.154(a) for allowing the discharge of visible emissions to the outside air from an active waste disposal site where asbestos-containing waste material ("ACWM") had been deposited and for not adequately covering the ACWM on July 20, 1994; 2) Respondent violated 40 C.F.R. § 61.154(a) for allowing the discharge of visible emissions to the outside air from an active waste disposal site where ACWM had been deposited and for not adequately covering the ACWM on July 21, 1994; 3) Respondent violated 40 C.F.R. § 61.154 (e)(1)(iii) for failing to maintain complete waste shipment records ("WSR(s)"), including the quantity of ACWM; 4) Respondent violated 40 C.F.R. § 61.154(i) when it failed to furnish upon request, and make available during normal business hours for inspection, a map or a diagram showing the location, depth [*4] and area, and quantity of ACWM within the disposal site; 5) Respondent violated 40 C.F.R. § 61.154(f) for failing to maintain an updated map or diagram recording the location, depth and area, and quantity of the ACWM within the disposal site; and 6) Respondent violated 40 C.F.R. § 61.154(j) for failing to notify the Administrator forty-five (45) days prior to excavating or otherwise disturbing any ACWM that had been deposited at the waste disposal site and was covered. Respondent's Answer to the Complaint was filed on April 29, 1997, and consisted of a denial of each of the alleged violations described in the Complaint.

An evidentiary hearing was scheduled to be held in this case beginning on June 2, 1998, in Marshall, Minnesota, but the hearing was delayed one day because the EPA had failed to obtain the services of a court reporter. The hearing was held on June 3, and 4, 1998. Both parties were present at the hearing and had the opportunity to put forward evidence and to cross-examine witnesses. Respondent and Complainant each filed a Post-Hearing Brief elucidating the arguments which had been presented during the hearing.

In an Initial Decision issued on August 21, 1998, the undersigned [*5] Administrative Law Judge ("ALJ")

dismissed the Complaint against Respondent for lack of jurisdiction. Lyon County Landfill, EPA Docket No. CAA-5-96-011 (ALJ, Aug. 21, 1998) (Order Granting Respondent's Motion to Dismiss Complaint). The ALJ's jurisdictional holding was based on the findings that the twelve-month limitations period in Section 113(d)(1) of the Clean Air Act had expired prior to the filing of the Complaint and that the proffered waiver of such limitation was not valid. Specifically, the holding was based on the ALJ's interpretation of the phrase "longer period of violation" as used in the exceptions clause of Section 113(d)(1) of the Clean Air Act. The ALJ found that the waiver of the twelve-month limitations period for a matter involving a "longer period of violation" was not valid because the alleged violations had not continued for more than twelve months. In other words, the phrase "longer period of violation" was interpreted by the ALJ to mean the duration of a violation rather than the time between the first date of violation and the filing of the complaint.

The EPA appealed the August 21, 1998, ALJ's Initial Decision to the United States Environmental Protection [*6] Agency Environmental Appeals Board ("EAB"). The EAB affirmed the ALJ's findings in part, reversed them in part, and reinstated and remanded the Complaint to the ALJ for consideration of the merits of the case. *Lyon County Landfill*, CAA Appeal No. 98-6, slip op. at 24 (EAB, Aug. 26, 1999). The EAB affirmed the ALJ's decision to evaluate the validity of the waiver of the statutory twelve-month limitations period but reversed the ALJ's interpretation of the phrase "longer period of violation" as used in the exceptions clause of Section 113 (d)(1) of the Clean Air Act. The EAB held that in light of the statutory language and structure, legislative history, and policy arguments, the better reading of the phrase "longer period of violation" is that it refers to a period of time between the first date of violation and the date of the complaint.

Respondent appealed the EAB's August 26, 1999, Remand Order by filing a Petition for Review with the United States District Court for the District of Minnesota on September 24, 1999. On February 14, 2000, the District Court granted Defendant's motion to dismiss for lack of subject matter jurisdiction because the Plaintiff had failed to exhaust [*7] its administrative remedies and there had been no final order addressing the merits of the action as required by 42 U.S.C. § 7413(d).

This case, therefore, is now before the ALJ for consideration of the merits of the case.

FINDINGS OF FACT

1. Respondent is Lyon County, which is and was at all times relevant to the Complaint, a municipality which operates under the laws of the State of Minnesota. Joint Stipulations P7.
2. Lyon County owns and operates the Lyon County Landfill ("Landfill"), located at Rural Route # 1, Lynd, Minnesota. The Landfill's business hours generally are from 6 or 7 a.m. until 4 p.m. on weekdays and Saturday morning. Joint Stipulations P8; Tr. at 40 (Connell); Tr. at 447 (Henriksen).
3. Lyon County is a "person", as defined at Section 302(e) of the Clean Air Act, 42 U.S.C. § 7602(e). Joint Stipulations P9.
4. The Landfill was an active waste disposal site at all times relevant to the Complaint. Joint Stipulations P19.
5. On May 5, 1994, the EPA received from L & L Insulation, Inc. a Notification of Intent to Perform a Demolition or an Asbestos Abatement ("Notice of Abatement") [*8] form for an asbestos abatement project at the Church of St. Michael from May 16, 1994, to May 20, 1994. This form reflects that the amounts of asbestos-containing material ("ACM") to be abated were 434 linear feet on pipes and 310 square feet on other facility components and that the Lyon County Landfill was the designated waste disposal site. L & L Insulation, Inc. stated that "PLM Bulk Samples" was the method used to detect the presence of ACM. The asbestos abatement plan attached to the form states that all asbestos-containing waste would be double-bagged and loaded into an enclosed truck for proper transportation to an approved landfill. Complainant's Exb. 4.

6. On July 20, 1994, at approximately 4:00 p.m., two inspectors from the Minnesota Pollution Control Agency ("MPCA"), Jeffrey Thomas Connell and Janelle Jacobson Meier, arrived at the Landfill to conduct an asbestos inspection. When the inspectors requested to see the asbestos disposal records, Steve Rundle, an employee of the Landfill, advised the inspectors that the records were kept at the Lyon County courthouse in Marshall, Minnesota. Complainant's Exb. 1; Tr. at 38 (Connell); Tr. at 269, 278, 307 (Meier).

7. At the [*9] July 20, 1994, inspection, the two MPCA inspectors then asked to be directed to the area where asbestos waste was received at the Landfill. Mr. Rundle directed the inspectors to a rectangular mound in the southeast corner of the fenced Landfill which was approximately 100 feet from the scale house. Mr. Rundle advised the inspectors that this area of the Landfill was designated as the asbestos waste disposal area, that the Landfill requires 24-hour advance notice for disposal of asbestos by waste generators, and that the asbestos waste material is covered immediately. Complainant's Exb. 1; Tr. at 54-56 (Connell); Tr. at 269-70, 309 (Meier).

8. While inspecting the asbestos disposal area on July 20, 1994, the two MPCA inspectors observed ripped plastic bags, some with asbestos warning labels, and dry suspect ACWM on the surface of the asbestos disposal area and roadway leading to the disposal area. The inspectors also observed that when there were wind gusts in the asbestos disposal area, dust and particulate matter which was gray-brown, emanated from the area around the suspect ACWM, the broken bags, and the asbestos disposal area. Before leaving the Landfill at approximately 4:40 [*10] p.m., the inspectors advised Lenny Gruhot, an employee of the Landfill, that the exposed ACWM was a violation of the asbestos NESHAP regulations and that all ACWM must be covered immediately. Mr. Gruhot assured the inspectors that the ACWM would be covered immediately. Complainant's Exb. 1; Tr. at 86-94 (Connell); Tr. at 269-78 (Meier).

9. The inspectors returned to inspect the Landfill on July 21, 1994, at approximately 11:20 a.m. While inspecting the asbestos disposal area on July 21, 1994, the two MPCA inspectors noted that since the previous day some of the disposal area and the suspect ACWM had been covered with dirt but that again they observed ripped plastic bags, some with asbestos warning labels, and dry suspect ACWM on the surface of the disposal area. During the July 21, 1994, inspection, the inspectors observed that when there were wind gusts in the asbestos disposal area, dust and particulate matter which was gray-brown, emanated from the area around the suspect ACWM, the broken bags, and asbestos disposal area. Complainant's Exb. 1; Tr. at 86-94 (Connell); Tr. at 284-89.

10. During the inspection on July 21, 1994, the inspectors observed exposed suspect ACWM that [*11] was not present at the asbestos disposal area on the previous inspection on July 20, 1994. In particular, the inspectors noted an ACWM disposal bag with an asbestos waste generator label from Tyler High School that was ripped open and lying exposed on the surface of the disposal area. This bag from Tyler High School was not observed on inspection of the asbestos waste disposal area on the July 20, 1994, inspection. Complainant's Exb. 1; Tr. at 86-94 (Connell); Tr. at 286-88 (Meier).

11. During their inspections on July 20, and 21, 1994, the two MPCA inspectors collected a total of six samples of suspect ACWM and took twenty-two photographs of the material they had observed at the Landfill. The samples were analyzed via polar light microscopy for asbestos content by the Braun Intertec Corporation. Each sample was found to contain asbestos. The total asbestos content for each of the samples ranged from five to thirty percent with at least one sample from each day of inspection containing ten percent or more asbestos. Complainant's Exbs. 1, 2.

12. The Category I nonfriable asbestos-containing material ("ACM"), vinyl asbestos tile ("VAT"), observed and sampled by the inspectors on [*12] the July 20, and 21, 1994, inspections was VAT or a part of VAT that had been subjected to grinding or cutting. The Category II nonfriable ACM, transite, observed and sampled by the inspectors on the July 20, and 21, 1994, inspections was transite or a part of transite that had become crumbled. This Category I nonfriable ACM and Category II nonfriable ACM were regulated asbestos-containing materials ("RACM(s)") as defined in 40 C.F.R. § 61.141. Complainant's Exbs. 1, 2; Tr. at 59-76, 89-92, 114, 148-49 (Connell); Tr. at 274-78, 285-88 (Meier).

13. On the morning of July 21, 1994, prior to their second inspection of the Landfill, the two MPCA inspectors went to the Lyon County courthouse, which is about 10 to 15 miles from the Landfill. The two inspectors met with Paul Henriksen, an environmental administrator for Lyon County, and requested the Landfill's asbestos records and its map or diagram for asbestos waste. Mr. Henriksen furnished the inspectors with documents then available, including WSRs, purchase orders, and a map of the asbestos disposal area at the Landfill. All the requested documents were not produced at the time of the inspection because Mr. Henriksen was unaware [*13] that a new file had been opened. Complainant's Exhs. 1, 7; Tr. at 435-37 (Henriksen).

14. During the MPCA inspectors' review of the records furnished at the Lyon County courthouse on July 21, 1994, they found a MPCA Asbestos-Containing Material Transport and Disposal Manifest ("WSR") reflecting that on May 19, 1994, the Landfill received from L & L Insulation, Inc., an asbestos abatement contractor, "Friable-ACM Pipe Insulation an Tank wrap Non-Friable-Poly" in double 6 millimeter plastic bags via an enclosed trailer which had been removed from the Church of St. Michael. The space provided on the May 19, 1994, WSR form for the Church of St. Michael for the total quantity of material brought to the Landfill (# 7) was blank. The inspection also disclosed an Enviro Safe Air purchase order from the Landfill dated July 1, 1994, for the disposal of 12 yards of ACM that had been removed from Tyler High School. There was no corresponding WSR for the July 1, 1994, Enviro Safe Air (Tyler High School) purchase order. Complainant's Exhs. 1, 7; Tr. at 80-83 (Connell); Tr. at 280-81 (Meier).

15. The map of the asbestos disposal area at the Landfill furnished to the inspectors by Mr. Henriksen [*14] on the July 21, 1994, inspection contained entries showing the date and location of deposited ACWM. The last entry on the map was dated May 19, 1994, and the inspectors were mistaken in their recollection and report that May 9, 1994, was the last date entered on the map. Generally, Mr. Henriksen received the WSRs from the Landfill at his office on a weekly basis and he then updated the map approximately every month. Complainant's Exhs. 1, 7; Tr. at 160-63 (Connell); Tr. at 304-05 (Meier); Tr. at 438 (Henriksen).

16. The two MPCA inspectors, Mr. Connell and Ms. Meier, met with Mr. Robert Fenske, the Chairman of the Lyon County Board of Commissioners, on the morning of July 21, 1994, prior to their inspection of the Landfill. The MPCA inspectors advised Mr. Fenske of the alleged violations of the asbestos NESHAP regulations. Tr. at 84-85 (Connell); Tr. at 283-84, 305 (Meier).

17. As a follow-up to the Landfill inspections, the MPCA sent to Respondent on July 28, 1994, a request for additional information and all WSRs for ACWM received by the Landfill since May 2, 1994. The WSRs submitted by Respondent included the following: May 2, 1994, 8 cubic yards of "Non-friable asbestos [and] [*15] transite/an Poly" by L & L Insulation, Inc. from the Municipal Utilities Offices for the City of Marshall; May 19, 1994, 8 cubic yards of "Friable-ACM Pipe Insulation an Tank wrap Non-friable-Poly" by L & L Insulation, Inc. from the Church of St. Michael; July 1, 1994, MSW 11960 pounds of "Asbestos Containing Shingles Non Friable" by Northern Asbestos from Holy Redeemer (Parish); July 1, 1994, 12 cubic yards of pipe insulation, spray on acoustical, floor tile, and plastic tear down by Enviro Safe Air from Tyler High School; July 8, 1994, 24 cubic yards of pipe insulation, spray on acoustical, and floor tile by Enviro Safe Air from Tyler High School. Complainant's Exb. 7.

18. In addition, pursuant to the July 28, 1994, MPCA request for additional information, Respondent reported that the quantity of ACWM received from the Church of St. Michael on May 19, 1994, was 8 cubic yards but such amount was not listed on the WSR available at the time of the inspection because the employee signing the manifest was relatively new. In regard to the map for the asbestos at the Landfill and the missing WSRs, Mr. Henriksen explained that at the time of the inspection he was unaware that another [*16] file existed with mapping locations and the missing manifest but that the files had been consolidated and placed at the Landfill. Complainant's Exb. 7.

19. The Landfill, an active waste disposal site, received RACM from L & L Insulation, Inc. which removed it during renovation activity at the Church of St. Michael, a source covered under the provisions of 40 C.F.R. §§ 61.145, 61.150.

Joint Stipulations PP25, 26, 27; Complainant's Exbs. 1, 2, 7.

20. The Landfill, an active waste disposal site, also received RACM from the renovation activities at the Municipal Utilities Offices for the City of Marshall, Holy Redeemer Parish, and Tyler High School, sources covered under the provisions of 40 C.F.R. §§ 61.145, 61.150. Complainant's Exbs. 1, 2, 7.

21. Respondent derived an economic benefit of \$ 1,675 as a result of its noncompliance with the asbestos NESHAP regulations for active waste disposal sites. This economic benefit component of the penalty was mitigated by the EPA because the amount involved was less than \$ 5,000 and Respondent is a county.

22. The preliminary deterrence amount of the penalty, consisting of the gravity component, is calculated as follows: \$ 16,500 for Count [*17] I; \$ 15,000 for Count II; \$ 1,000 for Count III; \$ 1,000 for Count IV; \$ 1,000 for Count V; and \$ 15,000 for Count VI. The total preliminary deterrence amount is \$ 49,500.

23. No adjustments to the gravity component are warranted under the Penalty Policy. Pursuant to "other factors as justice may require" under Section 113(e) of the Clean Air Act, Respondent's penalty of \$ 49,500 is reduced to \$ 45,800 to account for the additional costs incurred by Respondent due to the delay in the hearing caused by fault on the part of the EPA.

CONCLUSIONS OF LAW

1. The Landfill, an active waste disposal site, received RACM from sources covered under the provisions of 40 C.F.R. § 61.145 and ACWM from sources covered under 40 C.F.R. § 61.150. Respondent, therefore, is subject to the asbestos NESHAP regulations for active waste disposal sites at 40 C.F.R. § 61.154.
2. The visible emissions to the outside air from the ACWM and the surrounding asbestos disposal area at the Landfill on inspection on July 20, 1994, in the absence of adequate cover over the ACWM or the use of an approved emissions control method is a violation of the asbestos NESHAP regulations at 40 C.F.R. § 61.154(a).
[*18]
3. The visible emissions to the outside air from the ACWM and the surrounding asbestos disposal area at the Landfill on inspection on July 21, 1994, in the absence of adequate cover over the ACWM or the use of an approved emissions control method is a violation of the asbestos NESHAP regulations at 40 C.F.R. § 61.154(a).
4. Respondent's failure to include the quantity of the ACWM received at the Landfill on May 19, 1994, on the WSR for the Church of Saint Michael is a violation of the asbestos NESHAP regulations at 40 C.F.R. § 61.154(e)(1)(iii).
5. Respondent's failure on July 20, 1994, to furnish upon request, and make available during normal business hours for inspection, all records required under 40 C.F.R. § 61.154, including a map or diagram of the ACWM within the disposal site is a violation of the asbestos NESHAP regulations at 40 C.F.R. § 61.154(i).
6. Respondent's failure to maintain updated records of the location, depth and area, and quantity of ACWM within the disposal site on a map or diagram of the disposal area is a violation of the asbestos NESHAP regulations at 40 C.F.R. § 61.154(f).
7. Respondent's failure to notify the Administrator in writing at least [*19] 45 days prior to excavating or otherwise disturbing any ACWM that has been deposited at a waste disposal site and was covered is a violation of the asbestos NESHAP regulations at 40 C.F.R. § 61.154(j).
8. An appropriate and reasonable civil administrative penalty for Respondent's violations of the asbestos NESHAP regulations for active waste disposal sites at 40 C.F.R. § 61.154 and Section 112 of the Clean Air Act is \$ 45,800.

DISCUSSION

Regulatory Background

The Clean Air Act requires the EPA to develop and enforce regulations to protect the general public from exposure to airborne contaminants that are known to be hazardous to human health. Section 112 of the Clean Air Act authorizes the Administrator of the EPA to publish a list of air pollutants that the EPA determines to be hazardous and to promulgate regulations which establish emission standards for these pollutants. This authority was granted to the Administrator by the 1970 Amendments to the Clean Air Act. The emission standards for hazardous waste pollutants collectively are called the National Emissions Standards for Air Pollutants ("NESHAP"), 40 C.F.R. Part 61.

On March 31, 1971, the EPA identified asbestos [*20] as a hazardous pollutant. The National Emission Standard for Asbestos, 40 C.F.R. Part 61, Subpart M, was promulgated on April 6, 1973, and amended in 1974, 1975, and 1977. In 1978, the Supreme Court held in *Adamo Wrecking Company v. United States*, 434 U.S. 275 (1978), that the asbestos NESHAP work practice requirements were not authorized by the 1970 Clean Air Act Amendments under which they had been originally promulgated because they were not emission standards. The work practice regulations were then re-promulgated under the authority of the 1977 amendments to the Clean Air Act. The asbestos NESHAP regulations were later amended in 1984, 1990, and 1991.

The asbestos NESHAP regulations specify work practice requirements to be followed during demolitions and renovations, and disposal, and at active waste disposal sites. The asbestos NESHAP regulations relating to these activities, therefore, do not place specific numerical emission limitations for asbestos fibers but instead require specific actions to be taken to control emissions. The asbestos NESHAP regulations, however, do specify zero visible emissions to the outside air from activity relating to [*21] the transport and disposal of ACWM and from ACWM at an active waste disposal site. 40 C.F.R. §§ 61.150, 61.154. The standard for active waste disposal sites at 40 C.F.R. § 61.154 utilizes both the zero visible emission standard and the work practice requirements by providing for compliance with the requirements in the alternative. 40 C.F.R. § 61.154 (a), (c), (d). In other words, if the emission standard is not met, then the work practice requirements must be satisfied.

Standard of Proof

In this civil administrative enforcement proceeding, the complainant has both the burden of production and the burden of persuasion. Section 22.24 of the Rules of Practice, 40 C.F.R. § 22.24. This means that the EPA has the burden of going forward with and of proving that the violation occurred as set forth in the Complaint and that the proposed penalty is appropriate. *Id.* In order to prevail, the EPA must prove its case by a preponderance of the evidence. *Id.*

In the instant case, the EPA alleges that Respondent violated Section 112 of the Clean Air Act and its implementing regulations at 40 C.F.R. § 61.154. Liability can only be imposed under the asbestos NESHAP regulations if the EPA [*22] has made a two-fold showing. First, the EPA must establish that the asbestos NESHAP regulations apply in this case. Second, the EPA must establish that the asbestos NESHAP emission standard was violated and that the asbestos NESHAP work practice requirements were not satisfied. *See Norma J. Echevarria and Frank J. Echevarria d/b/a Echeco Environmental Services, CAA Appeal No. 94-1, 5 E.A.D. 626, 633 (EAB, Dec. 21, 1994); United States v. MPM Contractors, Inc., 767 F.Supp 231, 233 (D. Kan. 1990).* The Clean Air Act and the asbestos NESHAP regulations "provide strict liability for civil violations of their provisions." *United States v. Ben's Truck and Equipment, Inc., No. S-84-1772-MLS, 1986 U.S. Dist LEXIS 25595 at * 8 (E.D. Cal May 12, 1986); see Echevarria, supra, at 633; United States v. Sealtite Corp., 739 F.Supp. 464, 468 (E.D. Ark. 1990).*

Credibility Findings

At the outset, I address the question of the credibility of the witnesses testifying before me at the hearing. The EAB has found that "when an inspector trained to [*23] determine compliance with the applicable regulations reasonably

determines that a violation has occurred and provides a rational basis for that determination, liability should follow absent proof that the inspector's testimony lacks credibility." *Echevarria*, 5 E.A.D. at 640-641. Under this rationale, an inspector's determination of a respondent's compliance can be used as a basis for liability as long as the inspector's testimony is found to be credible.

Much of the instant case is dependent upon the testimony of the two MPCA inspectors, Jeffrey Connell and Janelle Jacobson Meier. Both inspectors testified that they personally met with Mr. Robert Fenske, the Chairman of the Lyon County Board of Commissioners on the morning of July 21, 1994. Tr. at 84-85 (Connell); Tr. at 283-84, 305 (Meier). The inspectors testified to some of the specific topics discussed with Mr. Fenske during this meeting, including his experience with asbestos removal as a former school board member. Tr. at 85 (Connell); Tr. at 283-284 (Meier). However, Mr. Fenske directly contradicted the testimony of the two MPCA inspectors by testifying that prior to the hearing he had never met [*24] Mr. Connell or Ms. Meier. Mr. Fenske testified that he did not recall personally meeting with the two MPCA inspectors on the morning of July 21, 1994, and that he assumed he left his office that day about 8:30 to 9:00 a.m. to attend a conference out of town. Tr. at 562-563 (Fenske). Mr. Fenske instead asserted that he had spoken telephonically with Ms. Jacobson (Meier) during the afternoon of July 20, 1994, concerning the alleged asbestos NESHAP violations. n2 Tr. at 560 (Fenske).

n2 Respondent's Reply Memorandum states as follows: "The MPCA inspectors (which included a young, attractive new employee that had worked for the MPCA as a summer intern) themselves had many contradictory statements regarding the inspections, the preservation of the evidence, the retention of original documents, and face to face meetings with Lyon County personnel and Lyon County Board Chairman Robert Fenske."

Respondent's Reply Memorandum at 18. Respondent's comment concerning the appearance of the inspector is - inappropriate.

Generally, the [*25] testimony and written reports of Government officials concerning their official duties and findings are considered credible unless the evidence establishes otherwise. In the instant matter, I find that the testimony of the two MPCA inspectors concerning their meeting with Mr. Fenske is more credible than the testimony of Mr. Fenske who denied such meeting. In making this determination, I observe that the testimony of each of the inspectors concerned their official duties and was corroborated by the other's testimony. The testimony of the inspectors included specific details of their meeting with Mr. Fenske. Further, the testimony of the inspectors concerning their meeting with Mr. Fenske is not relevant to the issue of liability or penalty. On the other hand, the contradictory testimony of Mr. Fenske only serves the purpose of impeaching the credibility of the inspectors as witnesses. In addition, based on my observation of the demeanor of the witnesses appearing before me, I find that the inspectors are the more credible witnesses. I therefore conclude that the testimony of the two MPCA inspectors may be used as a basis for determining Respondent's liability as alleged in the Complaint [*26] and the appropriateness of the proposed penalty.

Applicability of the Asbestos NESHAP Regulations for Active Waste Disposal Sites

A. Respondent's Arguments

Respondent argues that the asbestos NESHAP regulations for active waste disposal sites are inapplicable to the Landfill. Respondent maintains that the only ACM regulated by the asbestos NESHAP regulations for active waste disposal sites is ACWM as defined by 40 C.F.R. § 61.141, and that the only ACM received at the Landfill was not RACM and thus was not ACWM as defined by 40 C.F.R. § 61.141. In this regard, Respondent notes that the EPA has made no allegation nor presentation of evidence that the Landfill accepted ACWM from any source other than demolition and renovation activities. Respondent continues this argument by noting that ACM or RACM from non-regulated sources or ACM and RACM that is under the threshold amount as defined in 40 C.F.R. § 61.145 are not subject to the requirements for disposal found at 40 C.F.R. § 61.150. In addition, Respondent argues that the asbestos NESHAP requirements for active waste disposal sites only require certain record keeping and handling procedures if the

sites receive ACWM from a [*27] source covered under 40 C.F.R. §§ 61.149, 61.150, or 61.155. According to Respondent, the asbestos NESHAP regulations do not address any ACM that may be delivered to the Landfill from non-regulated sources or ACM which is not RACM. Respondent's Post-Hearing Memorandum at 4-5.

Respondent contends that the EPA's argument that the asbestos NESHAP regulations are applicable fails because the EPA has not established, as required, the following: that the laboratory testing of the suspect ACM at the Landfill established that the material was friable asbestos material; or that the asbestos content of the sampled material contained more than one percent asbestos as determined using the authorized testing methods; that the ACM observed at the Landfill on inspection was friable and when dry can be reduced to powder under hand pressure; that the Category I and II ACM was rendered friable at the renovation or demolition site; that the ACM at the Landfill was RACM; that there was RACM from a source covered under 40 C.F.R. §§ 61.145, 61.150, or 61.155; or that there was a threshold amount of the RACM at the Landfill. In support of these arguments, Respondent cites *U.S. v. Owens Contracting Services, Inc.*, 884 F.Supp. 1095 (E.D. Mich. 1994); [*28] *Coleman Trucking, Inc.*, EPA Docket No. 5-CAA-96-0 (ALJ, Nov. 6, 1996, Order Denying Motion for Judgment on the Pleadings) and *L & C Services, Inc.*, EPA Docket No. VII-93-CAA-112 (ALJ, Jan. 29, 1997). Respondent's Post-Hearing Memorandum at 5.

B. EPA's Arguments

The EPA argues that the standard for active waste disposal sites at 40 C.F.R. § 61.154 is applicable in this case because the evidence establishes that the Respondent is the owner of an active waste disposal site that received ACWM from a source covered under 40 C.F.R. §§ 61.149, 61.150, 61.155. The EPA asserts that the Landfill received ACWM from sources covered under 40 C.F.R. § 61.145 pertaining to demolition and renovation operations, which are sources covered by 40 C.F.R. § 61.150. Complainant's Post-Hearing Brief at 8-9. Specifically, the EPA submits that Respondent received ACWM from four specific regulated sources: the Municipal Utilities Offices of Marshall, the Church of Saint Michael, the Holy Redeemer Church, and Tyler High School. It is argued that Respondent received ACWM from these regulated sources as evidenced by the WSRs, the Notice of Abatement, and the inspectors' discovery of a waste generator label [*29] on a bag labeled as containing asbestos.

In addition, to support its position that the ACWM received at the Landfill was from covered sources, the EPA argues that the requirement that owners or operators of demolition or renovation activities inspect the affected facility for the presence of asbestos subjects them to the provisions of 40 C.F.R. § 61.150 regardless of whether the threshold amount is met. Also, the EPA avers that the Respondent received commercial asbestos. Complainant's Post-Hearing Brief at 7-9.

The EPA asserts that Respondent has incorrectly interpreted the asbestos NESHAP regulations for active waste disposal sites to require that the active waste disposal site receive a threshold quantity from a regulated source. The EPA maintains that 40 C.F.R. § 61.154 does not contain a threshold requirement and that the provisions of 40 C.F.R. § 61.154 apply when the active waste disposal site receives ACWM from a source covered under 40 C.F.R. § 61.150. In the alternative, the EPA maintains that although not necessary to establish liability, it has proven that sources covered by 40 C.F.R. § 61.150, which in turn applies to sources covered under 40 C.F.R. § 61.145, sent quantities [*30] of ACWM to the Landfill above the threshold amount. The EPA argues that the purpose of the asbestos NESHAP regulations would be defeated if a landfill receiving ACWM from a covered source were not required to ensure that the ACWM does not emit visible emissions once it is received. Complainant's Reply Brief at 11-13.

The EPA also asserts that Respondent has incorrectly interpreted the asbestos NESHAP regulations for active waste disposal sites to require that it be proven that the ACWM at the disposal site is RACM and that it is friable. In this regard, the EPA contends that Respondent's argument ignores the fact that standards for active waste disposal sites at 40 C.F.R. § 61.154 specifically apply to ACWM rather than RACM. Again, the EPA returns to the underlying premise that ACWM includes RACM but is not limited to RACM such as when the standards for demolition and renovation activities include requirements concerning ACM that is not RACM. Also, the EPA contends that Respondent's argument ignores the fact that the definition of RACM at 40 C.F.R. § 61.141 includes ACM that is not friable. In the

alternative, the EPA submits that, although not necessary, it has established that there [*31] was RACM at the Landfill. Complainant's Reply Brief at 13-14.

C. Analysis

This is a case of first impression and involves issues that are not facily resolved. Analysis of the question of whether Respondent is subject to the provisions of the asbestos NESHAP regulations for active waste disposal sites begins with examination of 40 C.F.R. § 61.154, the standard for active waste disposal sites. In pertinent part, 40 C.F.R. § 61.154 states:

Each owner or operator of an active waste disposal site that receives asbestos-containing waste material from a source covered under §§ 61.149, 61.150, or 61.155 shall meet the requirements of this section.

40 C.F.R. § 61.154. (Emphasis added).

1. Determination of whether Respondent's Landfill was an active waste disposal site.

The first step in determining whether Respondent's Landfill is subject to the asbestos NESHAP regulations for active waste disposal sites at 40 C.F.R. § 61.154 is to determine whether the Landfill is an active waste disposal site. An active waste disposal site is defined by the asbestos NESHAP regulations as "any disposal site other than an inactive disposal site." 40 C.F.R. § 61.141. An inactive waste [*32] disposal site is "any disposal site or portion of it where additional asbestos-containing waste material has not been deposited within the past year." *Id.* The parties have stipulated that the Landfill operated by Respondent is an active waste disposal site. Joint Stipulations P19.

2. Determination of whether ACWM was received at Respondent's Landfill.

a. ACWM

The second step in determining whether Respondent's Landfill is subject to the asbestos NESHAP regulations for active waste disposal sites at 40 C.F.R. § 61.154 is to determine whether the Landfill received ACWM. The term "asbestos-containing waste materials" (ACWM) is defined by the asbestos NESHAP regulations as meaning:

mill tailings or any waste that contains commercial asbestos and is generated by a source subject to the provisions of this subpart . . . This term includes filters from control devices, friable asbestos waste material, and bags or other similar packaging contaminated with commercial asbestos. As applied to demolition and renovation operations, this term also includes regulated asbestos-containing material waste and materials contaminated with asbestos including disposable equipment and clothing.

[*33]

40 C.F.R. § 61.141. (Emphasis added).

At this juncture, I note that Respondent correctly points out that in the instant matter the EPA seeks to invoke the jurisdiction of 40 C.F.R. § 61.154 only on the basis of alleged ACWM received from demolition or renovation operations. There is no allegation in the Complaint and no evidence was presented at hearing that the Landfill received ACWM in the form of mill tailings. Inasmuch as the allegations made and evidence presented by the EPA seek to invoke the jurisdiction of 40 C.F.R. § 61.154 only on the basis of ACWM received from demolition or renovation operations, this analysis will be limited to the question of whether there was ACWM received within the context of demolition or renovation operations.

As described above, the term ACWM as applied to demolition and renovation operations "includes RACM waste." The EPA raises the argument that the ACWM need not be RACM in order for the asbestos NESHAP regulations for active waste disposal sites to apply to a site. I disagree but emphasize that this question arises within the context of

demolition and renovation operations. The holding that the ACM must be RACM to be regulated under the asbestos [*34] NESHAP regulations is underscored in 40 C.F.R. Part 61, Subpart M, Appendix A to Subpart M-Interpretive Rule Governing Roof Removal Operations.

The EPA's argument that ACWM need not be RACM because the standards for demolition and renovation activities in 40 C.F.R. § 61.145 include requirements concerning ACM that is not RACM and the definition of visible emissions refers to both RACM and ACWM is unavailing. The EPA couches its argument in terms of whether the demolition or renovation activity is covered under the regulations at 40 C.F.R. § 61.145 or in terms of another regulatory definition contained in 40 C.F.R. § 61.141 that is not directly relevant to the regulatory definition of ACWM within the context of demolition or renovation operations. In other words, the EPA is ignoring the regulatory definition of ACWM by attempting to jump to the question of whether the ACWM is from any covered source or meets the definition of another term used to describe the alleged violation. ACM that is not RACM does not constitute ACWM as applied to demolition or renovation operations.

b. RACM

I now turn to the definition of RACM as that term is defined by the asbestos NESHAP regulations. RACM [*35] is defined as meaning:

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

40 C.F.R. § 61.141.

Pursuant to this definition of RACM, the first element that must be shown is that the material at issue is ACM. The asbestos NESHAP regulations classify ACM as either "friable" or nonfriable." Friable ACM is ACM that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure. Nonfriable ACM is ACM that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure. 40 C.F.R. § 61.141. The regulations further classify nonfriable ACM as either Category I or Category II. Under the asbestos NESHAP regulations, nonfriable and friable ACM, whether Category I or II, is material containing more than 1 percent asbestos as determined using the methods specified [*36] in appendix A, subpart F, 40 C.F.R. part 763, section 1, Polarized Light Microscopy. 40 C.F.R. § 61.141.

The second element that must be shown to establish that the material at issue is RACM is that the condition of the ACM is such that it may be classified as RACM. As described above, the ACM must be friable or have been subjected to certain activities such as grinding or cutting, or is crumbled. By definition, RACM is ACM regulated under the asbestos NESHAP regulations.

Category I nonfriable ACM includes resilient floor coverings and resilient floor covering mastic. Vinyl asbestos tile ("VAT") is classified as Category I nonfriable ACM. Transite boards or panels are nonfriable Category II ACM. In the instant case, the two suspect ACMs are VAT and transite.

Respondent argues that the RACM must be friable in order for 40 C.F.R. § 61.154 to apply to the Landfill. In this regard, Respondent contends that in order for ACM to be considered RACM, it must be friable and capable of being reduced to powder by hand pressure. This argument is rejected. The regulatory definition of RACM includes nonfriable ACM, albeit ACM that has been cut, ground, crumbled or pulverized. The condition of the [*37] Category I or II nonfriable ACM at the time of demolition or renovation or the nature of the operation to which the material was subjected determines whether this nonfriable ACM may be classified as RACM.

c. Evidentiary burden

The next question that arises concerns the evidence that is necessary for the EPA to present to sustain its burden of proving that the Landfill received RACM from a demolition or renovation operation, thereby satisfying the ACWM requirement. The EPA argues that the Abatement Notice, the WSRs, and the inspectors' discovery of a waste generator label on a bag labeled as containing asbestos demonstrate that the Landfill received ACWM. The EPA also argues that, although unnecessary, the evidence establishes that RACM was present at the Landfill. Specifically, the EPA submits that laboratory test results show that there was Category I and II nonfriable ACM at the site and that the photographic evidence and inspectors' testimony establish that the Category I nonfriable ACM had been subjected to sanding, grinding, cutting, or abrading and that the Category II nonfriable ACM had become crumbled, pulverized, or reduced to powder in the course of demolition or renovation [*38] operations.

On the other hand, Respondent argues that the EPA failed to prove that the suspect material was ACM or that RACM was at the Landfill. Specifically, Respondent contends that the laboratory tests fail to establish that the suspect ACM contained more than 1 percent asbestos as determined using the approved method or that the nonfriable ACM had been sufficiently degraded to constitute RACM. Respondent reiterates its argument that the EPA presented no evidence to show the presence of friable asbestos at the Landfill.

At the hearing, the EPA introduced several documents pertaining to the deposit of ACM at Respondent's Landfill during the period from May 19, 1994, through July 20, 1994. These documents include a Notice of Abatement reflecting that L & L Insulation, Inc. scheduled an asbestos abatement project at the Church of St. Michael from May 16, 1994, to May 20, 1994. The abatement project was for the removal of ACM on pipes and on other facility components. L & L Insulation, Inc. stated that "PLM Bulk Samples" was the method used to detect the presence of ACM. The Lyon County Landfill was designated as the waste disposal site. The asbestos abatement plan attached to the [*39] form states that all asbestos containing waste would be double-bagged and loaded into an enclosed truck for proper transportation to an approved landfill. Complainant's Exb. 4. A corresponding WSR reflects that on May 19, 1994, the Landfill received from L & L Insulation, Inc., 8 cubic yards of "Friable-ACM Pipe Insulation an Tank wrap Non-Friable-Poly" in double 6 millimeter plastic bags via an enclosed trailer which had been removed from the Church of St. Michael. Complainant's Exbs. 1, 7.

This Notice of Abatement and WSR for the Church of St. Michael are sufficient evidence to support the EPA's *prima facie* showing that the Landfill received RACM from the renovation operation at the Church of St. Michael. These records establish that the material to be removed from the Church of St. Michael was ACM as determined by polarized light microscopy and that the ACM received at the Landfill from the Church of St. Michael included friable ACM. Friable ACM, by definition, is RACM. Although the persons who prepared these documents did not testify at the hearing, these documents were prepared in the ordinary course of business and the accuracy or authenticity of the records was not placed [*40] in issue. It is further observed that the WSR for ACWM was prepared by a waste generator and such document, in itself, is some evidence that the ACM was RACM and ACWM.

For the purposes of establishing the applicability of the asbestos NESHAP regulations for active waste disposal sites, the EPA does not have to prove that RACM was found at the site on inspection. The EPA need only show that the Landfill received ACWM. Inasmuch as the EPA has established on a *prima facie* basis that the Landfill received RACM from a demolition or renovation operation, it has satisfied the requirement that it show that the Landfill received ACWM.

Along this same line of reasoning, I also find that the other WSRs presented at the hearing, along with the MPCA inspectors' testimony that they observed asbestos labeled bags, including one with a waste generator label, adequately establish that Respondent's Landfill received ACWM. n3 In this regard, I note that such evidence is circumstantial in nature but is sufficiently probative to support the EPA's burden of proof. According to the asbestos NESHAP regulations, WSRs are prepared for all ACWM by waste generators. Although it is plausible that non-regulated [*41]

waste generators and/or sources would prepare such forms and/or use asbestos labeled bags, incurring substantially increased waste deposit fees, such circumstantial evidence is sufficiently probative to establish the receipt of ACWM in the absence of contrary evidence.

n3 The Abatement Notice for the asbestos abatement project at Tyler High School is referred to by the EPA as part of Exhibit 3. However, the Notice of Abatement for Tyler High School was not introduced into evidence at the hearing.

Here, Respondent did not rebut the circumstantial evidence. In particular, I note the testimony of Mr. Franklin H. Dickson, an industrial hygienist and Respondent's expert witness. Mr. Dickson opined that most waste generators in Minnesota used clear polyethylene disposal bags for RACM and he noted that some of the bags in question were not of clear plastic. Mr. Dickson testified that contractors use clear plastic bags for ACM as well as RACM and regardless of whether the ACM is from a regulated source. First, it is noted that [*42] according to Mr. Dickson's testimony, the requirement to use clear plastic bags for ACWM was not in effect in Minnesota until 1996. Tr. at 502-03 (Dickson). Second, Respondent's argument does not address the use of plastic bags with asbestos warning labels or waste generator labels. Tr. at 502-06 (Dickson); Respondent's Exb. 13. Third, in this case there were some clear plastic bags at the site. Moreover, Mr. Dickson's testimony is not sufficient to rebut all the circumstantial evidence presented, including the WSRs.

Assuming *arguendo* that the EPA must prove that RACM was at the disposal site in order to establish the applicability of the asbestos NESHAP regulations for active waste disposal sites, I examine the evidence to determine whether the EPA has established that RACM was present at the Landfill. Pursuant to the definition of RACM, discussed above, the first element that must be shown is that the material at issue is ACM. Under the asbestos NESHAP regulations, nonfriable and friable ACM, whether Category I or II, is material containing more than 1 percent asbestos as determined using the methods specified in appendix A, subpart F, 40 C.F.R. part 763, section 1, Polarized [*43] Light Microscopy. 40 C.F.R. § 61.141.

During their inspections on July 20, and 21, 1994, the two MPCA inspectors collected six samples of suspect Category I and II nonfriable ACM (VAT and transite). These samples were tested by the Braun Intertec Laboratory to determine their asbestos content. The results of this testing indicated that the samples had asbestos contents which ranged from five to thirty percent. Complainant's Exb. 2.

Respondent contends that the Braun Intertec test results are invalid. Respondent's Post-Hearing Memorandum at 10. The basis for this argument is Respondent's contention that samples 1, 2, and 5 had an asbestos content of less than ten percent and because of this, under 40 C.F.R. § 61.141, the samples should have been subjected to point counting. According to Respondent, the fact that these samples were not subjected to point counting "casts doubt on the entire testing of the samples collected." *Id.* In addition, Respondent contends that as the EPA argued during the hearing that each layer of the sample should have been reported as a sample, then the Braun Intertec tests are invalid for failure to do so. *Id.*

Respondent's argument ignores the fact [*44] that the asbestos content for each layer of each sample was reported in Braun Intertec's report. Complainant's Exb. 2. Respondent is also mistaken in its assertion that samples 1, 2, and 5 had an asbestos content of less than ten percent. According to the information in the Braun Intertec report, sample 2 was the only sample with a total asbestos content of less than ten percent. Samples 1 and 5 had an asbestos content of ten percent. Thus, only sample number 2 should have been subjected to point counting under 40 C.F.R. § 61.141. The absence of point counting for this one sample, however, does not mean that the Braun Intertec results are invalid. The results of the other samples are adequate to establish the asbestos content for each day of inspection. This would also be the case even if samples 1 and 5 had in fact had an asbestos content of less than ten percent because there were other samples which were found to have an asbestos content of ten percent or more.

Further, although not raised by the EPA, I point out that the requirement to verify the asbestos content by point counting using PLM appears to apply only to the testing of friable asbestos material. 40 C.F.R. § 61.141. Here, [*45] the material tested was Category I and II nonfriable ACM, not friable asbestos material.

Respondent has also raised questions concerning the validity of the laboratory testing on the ground that there were defects in the documentation of the chain of custody of the samples. Mr. Connell testified that when he transferred the client project number from the internal MPCA chain of custody record to the Braun Intertec Corporation chain of custody record he transposed two numbers. Tr. at 250 (Connell); Complainant's Exb. 2. I agree with the EPA's position that other information on the two chain of custody forms adequately identifies the samples and client so as to remove any serious doubt as to the client project involved. I also note that Mr. Connell testified that the only samples he sent to the laboratory on that date were from Respondent's Landfill.

Finally, Respondent argues that the laboratory tests are inadmissible evidence because the samples were destroyed and Respondent was precluded from testing the material for asbestos content. The record reflects that Landfill personnel were present at the Landfill when the samples were taken by the MPCA inspectors. Mr. Gruhot was advised [*46] that samples had been taken on July 20, 1994, and Mr. Rundle was advised that samples had been taken on July 21, 1994. Tr. at 78, 252 (Connell). Respondent was not prevented from taking its own samples. Although on September 7, 1994, Respondent was advised in writing of the alleged violations and recommended enforcement action, including a civil penalty, it did not challenge the testing before the samples were destroyed six months after the inspection. Complainant's Exb. 9. The testing was performed by an accredited laboratory. Complainant's Exb. 2. Under such circumstances, there is no basis to find the laboratory test results inadmissible as evidence.

Based on the foregoing discussion, I find that there was material found at Respondent's Landfill on July 20, and 21, 1994, that had an asbestos content of one percent or greater. The material therefore qualifies as ACM. Thus, the first criterion of the definition of RACM is fulfilled.

The second criterion of the definition of RACM is that the ACM is one of four specified types: 1) Friable asbestos material; 2) Category I nonfriable ACM that has become friable; 3) Category I nonfriable ACM that will be or has been subjected to sanding, [*47] grinding, cutting, or abrading; or 4) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations. In this case, there is no evidence or allegation that the exposed ACM observed at the Landfill and sampled was friable asbestos or nonfriable ACM that had become friable. Respondent correctly points out that the MPCA inspectors did not subject the ACM to the hand pressure test for friability. Although the use of hand pressure is not a mandatory procedure in determining whether ACM is friable, there must be other probative evidence, such as photographs or testimony of visual observations, that establishes that the ACM has been or has a high probability of being reduced to powder. See *D & H Contractors, Inc.*, Docket No. CAA-III-022, 1997 EPA ALJ LEXIS 111 (February 4, 1997).

Rather, the EPA suggests that the ACM meets the definition of RACM because the Category I nonfriable asbestos VAT had been subjected to sanding, grinding, cutting, or abrading and the Category II nonfriable asbestos transite had become crumbled or pulverized. [*48] The photographic evidence and the testimony of the MPCA inspectors is sufficiently probative to sustain the finding that the exposed asbestos-containing VAT had been cut or abraded and that the exposed asbestos-containing transite had been crumbled.

The inspectors took a total of twenty-two photographs of the disposal area at the Landfill. Photographs 1 through 4 show a group of ripped open bags with the "asbestos danger warning sign" on the bags. Complainant's Exb. 1.; Tr. at 59 (Connell). These bags were broken open and the ACWM was ground up and mixed in with the dirt. Complainant's Exb. 1; Tr. at 59 (Connell). A broken-open prelabeled bag is also the subject of Photograph number 6. Complainant's Exb. 1. The ACM in Photograph number 6 is VAT. This material was spread out around the bag and was described as being "dry" in the inspection report completed by the two MPCA inspectors. Complainant's Exb. 1. The material in Photograph 9 was also crushed and dry VAT. Complainant's Exb. 1. Ms. Meier testified that the material in the bag

from Photograph 9 appeared to have been "crushed into very small pieces." Tr. at 274 (Meier). Photographs 10 and 11 depict transite material that had been [*49] crushed and mixed in with the soil. Complainant's Exb. 1. The remaining photographs in the record contain similar images of torn bags and crushed asbestos material. Complainant's Exb. 1. Mr. Connell testified that most of the material at the site was "extensively broken" and "looked as if . . . [it] had been operated on by some sort of mechanical chipper or grinder." Tr. at 148 (Connell).

This photographic and testimonial evidence strongly supports the finding that the exposed asbestos-containing VAT had been cut or abraded and that the exposed asbestos-containing transite had been crumbled. Accordingly, I conclude that on each day of inspection there was exposed Category I or II nonfriable ACM found at the Landfill that meets the definition of RACM.

3. Determination of whether the ACWM received at Respondent's Landfill was from a source covered under 40 C.F.R. § 61.150.

Finally, the third and last step in determining whether Respondent's Landfill is subject to the asbestos NESHAP regulations for active waste disposal sites is to determine whether the ACWM received at the Landfill was from a source covered under 40 C.F.R. § 61.150, the standard for waste disposal for manufacturing, [*50] fabricating, demolition, renovation, and spraying as required under 40 C.F.R. § 61.154. The provisions of 40 C.F.R. § 61.150 in turn provide, in pertinent part, that:

Each owner or operator of any source covered under the provisions of §§ 61.144, 61.145, 61.146, and 61.147 shall comply with the following provisions:

40 C.F.R. § 61.150. (Emphasis added).

Again, I note that inasmuch as the EPA seeks to invoke the jurisdiction of the asbestos NESHAP standard for waste disposal sites at 40 C.F.R. § 61.154 only on the basis of ACWM received from demolition or renovation operations, this analysis will be limited to the question of whether the Landfill received ACWM from a source covered under the provisions of 40 C.F.R. § 61.150 and § 61.145.

The asbestos NESHAP standard for demolition and renovation is found at 40 C.F.R. § 61.145. It is undisputed that 40 C.F.R. § 61.154, when read together with 40 C.F.R. § 61.145 and § 61.150, provides that the asbestos NESHAP standard for active waste disposal sites applies when the site receives ACWM from a demolition or renovation operation covered under 40 C.F.R. § 61.145 and is then subject to the asbestos NESHAP standard for waste disposal [*51] for demolition or renovation operations under 40 C.F.R. § 61.150.

Pursuant to 40 C.F.R. § 61.145(a), an owner or operator of a demolition or renovation operation must inspect the affected facility for the presence of asbestos, including Category I and II nonfriable ACM. Facilities being renovated or demolished must comply with the notification requirements and procedures for asbestos emission control (work practice requirements) set forth in 40 C.F.R. §§ 61.145(b) and (c) if the combined total of RACM removed or disturbed is:

- (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
- (ii) At least 1 cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously.

40 C.F.R. § 61.145(a). If the combined amount of RACM in a facility being demolished is less than the above-specified amounts or there is no asbestos, the owner or operator of the demolition activity is only required to comply with the notification requirements set forth in 40 C.F.R. § 61.145(b). 40 C.F.R. § 61.145(a)(2). Facilities that must comply with the work practice requirements of 40 C.F.R. [*52] § 61.145(c) must deposit all ACWM as soon as practical at a waste disposal site operated in accordance with the provisions of 40 C.F.R. § 61.154 or an EPA-approved site that converts RACM and ACWM into nonasbestos (asbestos-free) material. 40 C.F.R. § 61.150(b).

The initial question that arises is when is a demolition or renovation activity "covered" under the provisions of 40 C.F.R. § 61.145 so as to then qualify as a source covered under 40 C.F.R. § 61.150. In order for a demolition or renovation activity to be "covered" under 40 C.F.R. § 61.145 and thus also under 40 C.F.R. § 61.150, the amount of RACM removed or disturbed must meet the threshold amounts specified to trigger both the notification and work practice requirements. That is, the combined total amount of RACM must be at least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components, or at least 1 cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously. If there is a lesser amount of RACM, the provisions of 40 C.F.R. § 61.150 for the disposal of ACWM are not applicable.

The EPA's suggestion that any renovation [*53] or demolition activity is subject to the provisions of 40 C.F.R. § 61.150 simply because the owner or operator is required to inspect the affected facility for the presence of asbestos is rejected. Similarly, I find that a demolition or renovation operation that is subject to no requirements or only to the notification requirements based on an amount of RACM below the threshold levels is also not covered by the asbestos NESHAP standard for waste disposal at 40 C.F.R. § 61.150.

In the instant case, the EPA presented a Notice of Abatement reflecting that L & L Insulation, Inc. was to remove 434 linear feet of ACM on pipes and 310 square feet of ACM on other facility components from the Church of St. Michael and deposit the ACM at Respondent's Landfill. The corresponding WSR reflects that on May 19, 1994, the Landfill received from L & L Insulation, Inc. 8 cubic yards of "Friable-ACM Pipe Insulation an Tank wrap Non-Friable-Poly" in double 6 millimeter plastic bags via an enclosed trailer which had been removed from the Church of St. Michael. Complainant's Exhs. 1, 4, 7. As discussed above, these records are sufficient to establish that the Landfill received RACM and thus ACWM from the [*54] Church of St. Michael.

The more difficult question that now arises is whether the records concerning the asbestos removal from the renovation operation at the Church of St. Michael establish that the RACM was at the threshold level to trigger the notification and work practice requirements. The stated amount of ACM on pipes to be abated was 434 linear feet, and it is reasonable to assume that such ACM on pipes is friable. Moreover, the WSR reflects that the ACM pipe insulation was friable. This evidence is sufficient to establish that the RACM at the Church of St. Michael was at the requisite threshold level. Respondent presented no evidence to show that the RACM was below the threshold level. As the amount of RACM to be removed from the Church of Saint Michael exceeded the threshold amount, the notification and work practice requirements of 40 C.F.R. § 61.145 were triggered and, thus, this asbestos abatement project was subject to the requirements of 40 C.F.R. § 61.150. As such, the ACWM from the Church of St. Michael is from a source covered by 40 C.F.R. § 61.145 and § 61.150.

In addition, the other WSRs presented at the hearing, along with the MPCA inspectors' testimony that they [*55] observed bags with asbestos warning labels and a broken bag with a waste generator label from Tyler High School, are sufficient to establish that Respondent's Landfill received ACWM from a source covered by 40 C.F.R. § 61.145 and § 61.150. Although such evidence is circumstantial in nature, this evidence is sufficient to support the EPA's *prima facie* case. As discussed above concerning a similar issue of proof, WSRs are prepared for all ACWM by waste generators. WSRs are required for ACWM from sources subject to the provisions of 40 C.F.R. § 61.150. Asbestos warning labels are required for ACWM from sources subject to the provisions of 40 C.F.R. § 61.150. Although it is plausible that non-regulated waste generators would prepare such forms or use asbestos labeled bags or waste generator labeled bags, incurring substantially increased waste deposit fees, such circumstantial evidence is sufficiently probative to establish the receipt of ACWM from a regulated source in the absence of contrary evidence.

Respondent argues that the asbestos NESHAP regulations for active waste disposal sites are not applicable to the Landfill because the EPA has failed to establish that a threshold amount [*56] of ACWM was found at the Landfill. Respondent's argument is unavailing. The asbestos NESHAP standard for active waste disposal sites at 40 C.F.R. § 61.154 does not contain a requirement that there be a threshold amount of ACWM at the disposal site. The only threshold requirement is found at the asbestos NESHAP standard for demolitions and renovations at 40 C.F.R. § 61.145, which determines whether these operations are regulated, and in turn are required to dispose of the ACWM at active

waste disposal sites in accordance with the provisions of 40 C.F.R. § 61.150. As discussed above, the EPA has established the requisite threshold amount of RACM under the standard for demolitions and renovations and that the Landfill received ACWM from a source covered under the provisions of 40 C.F.R. §§ 61.145 and 61.150.

In support of its position that a threshold amount of asbestos is required to establish the applicability of the asbestos NESHAP regulations for active waste disposal sites, Respondent asserts that it is unaware of any reported cases where a NESHAP work practice violation was proven without a finding that there was a threshold amount of RACM. Respondent cites the following cases [*57] in support of the proposition that a threshold level must be met. *Fried v. Sungard Recovery Services, Inc.*, 925 F.Supp. 363 (E.D. PA. 1996); *U.S. v. Owens Contracting Services, Inc.*, *supra*. Respondent's Post-Hearing Memorandum at 4. Respondent's reliance on these cited cases is misplaced as these cases involve demolition and renovation operations. Active waste disposal sites are not subject to the same regulatory provisions as renovation or demolition operations and these regulations provide different prerequisites for their application.

In response, the EPA persuasively argues that the asbestos NESHAP regulations do not impose a second threshold for asbestos NESHAP applicability at active waste disposal sites. As the EPA points out, a regulated source may not send all the RACM to one particular landfill at one time. As such, the purpose of the asbestos NESHAP regulations for the disposal and handling of ACWM by regulated sources would be defeated if the disposal site were not required to ensure that the ACWM does not emit visible emissions once the ACWM is received.

Finally, Respondent argues that the asbestos NESHAP standard [*58] for active waste disposal sites is not applicable to the Landfill because the EPA has failed to establish that the ACM found by the MPCA inspectors came from a regulated source. Again, Respondent's argument is unavailing. As similarly discussed above, the EPA must only show that Respondent's Landfill received ACWM from a regulated source in order for the asbestos NESHAP standard for active waste disposal sites to apply to the Landfill. The EPA does not have to trace the specific ACWM at the Landfill back to a particular regulated source in order to establish the applicability of the asbestos NESHAP regulations.

Respondent contends that "nonregulated" RACM (*i.e.*, RACM below the threshold quantity or from a residence) is also deposited in the asbestos disposal area of the Landfill. Even if I were to assume that the evidence establishes that nonregulated RACM is deposited in the asbestos disposal area of the Landfill, the fact that the Landfill commingles nonregulated RACM with RACM from covered sources does not exempt Respondent from the jurisdiction of the asbestos NESHAP regulations for active waste disposal sites. Once RACM from a covered source is deposited at the site, the [*59] site is subject to the asbestos NESHAP standard for active waste disposal sites. Also, once the EPA establishes the presence of RACM at the site and that the site received ACWM from covered sources, it must be presumed that the RACM came from a covered source. To hold otherwise, would impose an impossible requirement upon the EPA to trace the exact origin of the RACM. The commingling of regulated and nonregulated RACM cannot be used as a means to avoid jurisdiction under the asbestos NESHAP regulations. In the instant case, however, the EPA has shown that there was RACM at the Landfill that was received from Tyler High School, a source covered under 40 C.F.R. § 61.145 and § 61.150.

In summary, the EPA has established that Respondent's Landfill is an active waste disposal site, that the Landfill received ACWM, and that such ACWM is from a source covered under 40 C.F.R. § 61.150 and § 61.145. Accordingly, the EPA has established that the asbestos NESHAP regulations for active waste disposal sites are applicable to Respondent's Landfill in this case.

Count I

Count I of the Complaint charges that Respondent violated 40 C.F.R. § 61.154(a) on July 20, 1994, for allowing the discharge [*60] of visible emissions to the outside air from the active waste disposal site where ACWM had been deposited and for not covering the ACWM which had been deposited at the site at the end of the operating day or at least once every 24 hours, or using approved emission control.

A. Visible Emissions

Pursuant to the asbestos NESHAP standard for active waste disposal sites at 40 C.F.R. § 61.154(a), there must be no visible emissions to the outside air from any active waste disposal site where ACWM has been deposited or, in the alternative, there must be satisfaction of the work practice requirements in § 61.154(c) or implementation of an approved alternate emissions control method under § 61.154(d). Visible emissions are defined by the asbestos NESHAP regulations at 40 C.F.R. § 61.141 as "any emissions, which are visually detectable without the aid of instruments, coming from RACM or asbestos-containing waste material."

During the hearing, both MPCA inspectors testified that on July 20, 1994, they had observed visible emissions at the asbestos disposal area. According to Mr. Connell's testimony, he observed the emission of dust and particulate matter from the area around the broken plastic [*61] bags with asbestos warning labels and the asbestos disposal area when there were wind gusts in that part of the Landfill. Tr. at 63, 220-21 (Connell). Ms. Meier testified that on July 20, 1994, she observed "gray-brown" dust that emanated from the asbestos disposal area of the Landfill. Tr. at 278 (Meier).

According to Respondent, the EPA has failed to establish any violation of visible emissions from ACWM or RACM at the Landfill. In this regard, Respondent contends that the EPA cannot establish that the material they observed was RACM or ACWM. I disagree. Respondent's argument is very similar to its argument raised in support of its position that the asbestos NESHAP standard for active waste disposal sites is not applicable to the Landfill, and this argument is addressed above. It has been determined that the Landfill received ACWM from covered sources and that there was exposed RACM in the asbestos disposal area of the Landfill.

Although the regulatory definition of the term "visible emissions" specifies that the emissions come from RACM or ACWM, 40 C.F.R. § 61.154(a) proscribes visible emissions from any active waste disposal site where ACWM has been deposited. Inasmuch as 40 C.F.R. [*62] § 61.154(c) provides an alternative work practice requirement to cover the ACWM, there must be an assumption that the no visible emission requirement at 40 C.F.R. § 61.154(a) contemplates that the deposited ACWM is exposed or is inadequately covered. Thus, the language of 40 C.F.R. § 61.154(a) strongly suggests that the EPA must only show that the emissions came from the asbestos disposal area where the exposed or inadequately covered ACWM was deposited. Here, the inspectors observed emissions coming from the disposal area where the ACWM had been deposited. Assuming *arguendo* that the EPA must establish that the emissions came from the ACWM, I further find that the EPA has presented a *prima facie* case based on the inspectors' testimony that they observed emissions coming from the area immediately surrounding the ACWM.

Respondent further asserts that "nonregulated" RACM (*i.e.*, RACM below the threshold quantity or from a residence) and garbage are also deposited in the asbestos disposal area. The fact that the Landfill commingles nonregulated RACM with RACM from covered sources does not exempt Respondent from complying with the "no visible emission" standard or alternatively [*63] the work practice requirement to cover the ACWM. Once ACWM from a covered source is deposited at the site, the site is subject to the asbestos NESHAP standard for active waste disposal sites, including the "no visible emission standard." Similarly, once the EPA establishes that the emissions came from the disposal site or RACM or ACWM at the site, it must be presumed that the RACM or ACWM came from a covered source. To hold otherwise, would impose an impossible requirement upon the EPA to trace the exact origin of the RACM or ACWM. Again, I find that the commingling of regulated and nonregulated RACM cannot be used as a means to avoid liability under the asbestos NESHAP regulations.

B. Failure to Cover ACWM

Inasmuch as Respondent's Landfill failed to meet the "no visible emission" standard of 40 C.F.R. § 61.154(a), it must either satisfy the work practice requirements set forth in § 61.154(c) or implement an approved alternate emissions control method under § 61.154(d). The MPCA inspectors testified that they had not observed the use of any emission control mechanisms being used at the Landfill. Tr. at 76 (Connell); Tr. at 278 (Meier). Mr. Henriksen, an environmental

administrator [*64] for Respondent, testified that the Landfill did not use any dust suppressant or emission control mechanisms. Tr. at 477 (Henriksen).

The work practice requirements at 40 C.F.R. § 61.154(c)(1) provide, in pertinent part, that:

At the end of each operating day, or at least once every 24-hour period while the site is in continuous operation, the asbestos-containing waste material that has been deposited at the site during the operating day or previous 24-hour period shall: (1) Be covered with at least 15 centimeters (6 inches) of compacted non-asbestos containing material.

40 C.F.R. § 61.154(c)(1).

The Landfill received ACWM from the following covered sources: the Municipal Utilities Offices for the City of Marshall, May 2, 1994; the Church of St. Michael, May 19, 1994; Holy Redeemer Church, July 1, 1994; and Tyler High School, July 1, and July 8, 1994. The last shipment of ACWM received at the Landfill before the MPCA's inspection on July 20, 1994, was on July 8, 1994. As the no visible emissions requirement was not met, under the alternative work practice requirement highlighted above, this material should have been covered by 6 inches of nonasbestos containing material no [*65] later than July 9, 1994. Thus, there should have been no uncovered ACWM at the site when the inspectors were at the Landfill on July 20, 1994.

As described above, the two MPCA inspectors testified that visible emissions emanated from the asbestos disposal area at the Landfill. In addition, Mr. Connell and Ms. Meier testified that on July 20, 1994, they observed several pieces of suspect ACWM on the surface of the asbestos disposal area and roadway without any cover. Tr. at 77 (Connell); Tr. at 271-77 (Meier). The photographic evidence supports this testimony. The photographs depict exposed torn plastic bags with asbestos warning labels and exposed pieces of crumbled and broken suspect ACWM. Complainant's Exb. 1. As discussed above, the exposed suspect ACWM observed by the inspectors has been found to be ACWM from a covered source within the purview of 40 C.F.R. § 61.154. Accordingly, the Landfill is found to have failed to cover the ACWM in accordance with the provisions of 40 C.F.R. § 61.154(c)(1).

Because there were visible emissions to the outside air from the asbestos disposal area of the Landfill where ACWM has been deposited and not all the ACWM deposited more than 24 hours previously [*66] had been covered with at least 6 inches of compacted nonasbestos-containing material or dust suppression agent, and there had been no use of an approved alternate emissions control method, Respondent's Landfill is found to have violated the asbestos NESHAP regulations for active waste disposal sites at 40 C.F.R. § 61.154(a) on July 20, 1994. n4

n4 The EPA does not articulate its charge sufficiently to have notified Respondent whether it violated 40 C.F.R. § 61.154(a) for failing to cover the ACWM within 24 hours or by the end of the operating day. Thus, for purposes of establishing liability, Respondent is charged with meeting the greater time requirement. The language of 40 C.F.R. § 61.154(c), however, clearly indicates that the 24-hour period only applies when the site is in continuous operation. Otherwise, the ACWM must be covered at the end of each operating day. Here, the ACWM should have been covered at the end of the operating day as the site is not in continuous operation.

Count II

Count II of the Complaint [*67] charges that Respondent violated 40 C.F.R. § 61.154(a) on July 21, 1994, for allowing the discharge of visible emissions to the outside air from the active waste disposal site where ACWM had been deposited and for not covering the ACWM which had been deposited at the site at the end of the operating day or at least once every 24 hours, or using approved emission control.

According to the testimony of the MPCA inspectors, Mr. Gruhot, an employee of the Landfill, was informed by the MPCA inspectors after their July 20, 1994, inspection that there was exposed ACWM at the Landfill. Tr. at 78 (Connell); Tr. at 277 (Meier). Mr. Gruhot agreed to cover the ACWM with 6 inches of non-asbestos material so that the Landfill would be in compliance with the asbestos NESHAP regulations. Tr. at 78 (Connell); Tr. at 277 (Meier). The inspectors returned to the Landfill at approximately 11:20 a.m. on July 21, 1994, to conduct their second inspection of the site. Tr. at 85 (Connell); Tr. at 284 (Meier).

As discussed above in Count I, the last shipment of ACWM received at the Landfill before the MPCA's inspection on July 21, 1994, was on July 8, 1994. Under the asbestos NESHAP work practice requirement [*68] at 40 C.F.R. § 61.154(c)(1), this material should have been covered by 6 inches of nonasbestos containing material no later than July 9, 1994. Thus, there should have been no uncovered ACWM at the site when the inspectors were at the Landfill on July 21, 1994.

During their July 21, 1994, inspection of Respondent's Landfill, the MPCA inspectors found uncovered ACWM and torn bags with asbestos warning labels on the surface of the asbestos disposal area of the Landfill. Tr. at 86 (Connell); Tr. at 287 (Meier). The inspectors also observed visible emissions emanating from the asbestos disposal area and the area immediately surrounding the ACWM. Tr. at 89 (Connell); Tr. at 287 (Meier). The inspectors noted that Respondent had attempted to cover much of the ACWM that was exposed on July 20, 1994. However, Respondent had failed to completely cover all the ACWM and had uncovered ACWM that previously had been covered. Tr. at 92-93 (Connell); Tr. at 287 (Meier). One of the torn asbestos bags that had been uncovered had a waste generator label from Tyler High School. Tr. at 86-87 (Connell); Tr. at 286 (Meier).

Respondent contends that the second inspection occurred less than 24 hours after the [*69] first inspection and, therefore, there could be no violation of 40 C.F.R. §§ 61.154(a) and (c). This argument is rejected. As noted above, the last shipment of ACWM received at the Landfill before the second inspection was on July 8, 1994, from Tyler High School and, thus, no ACWM should have been visible on the July 21, 1984, inspection. n5

n5 See note 4.

Because there were visible emissions to the outside air from the asbestos disposal area of the Landfill where ACWM has been deposited and not all the ACWM deposited more than 24 hours previously had been covered with at least 6 inches of compacted nonasbestos-containing material or dust suppression agent, and there had been no use of an approved alternate emissions control method, Respondent's Landfill is found to have violated the asbestos NESHAP for active waste disposal sites at 40 C.F.R. § 61.154(a) on July 21, 1994.

Count III

Count III of the Complaint charges that Respondent violated 40 C.F.R. § 61.154(e)(1)(iii) for failing to properly maintain WSRs [*70] for all ACWM that had been received by the Landfill. Specifically, the EPA charges that the WSR for the ACWM received and accepted from the Church of St. Michael on May 19, 1994, did not include the quantity of ACWM in cubic yards.

The asbestos NESHAP regulations for active waste disposal sites at 40 C.F.R. § 61.154(e)(1)(iii) require an owner or operator of an active waste disposal site that receives ACWM from a covered source to maintain WSRs for all ACWM received that includes the name, address, and telephone number of the waste generator, the name, address, and telephone number of the transporter(s), and the quantity of the ACWM in cubic meters (cubic yards).

When the MPCA inspectors reviewed Respondent's asbestos records at the Lyon County courthouse on July 21, 1994, they found a WSR for the ACWM received from the Church of Saint Michael on May 19, 1994. Complainant's Exb. 1; Tr. at 280 (Meier). The inspectors found that there was no amount listed under the heading "quantity" on this

WSR. n6 Complainant's Exbs. 1, 7; Tr. at 80-81, 133 (Connell); Tr. at 280-81 (Meier).

n6 During their review of Respondent's asbestos records on July 21, 1994, the MPCA inspectors discovered a purchase order for the July 1, 1994, shipment of ACM from Tyler High School. Complainant's Exb. 1; Tr. at 82 (Connell); Tr. at 281 (Meier). The inspectors were unable to find a corresponding WSR for this purchase order. Tr. at 82 (Connell); Tr. at 281 (Meier). Complainant did not allege this as a violation in any of the counts against Respondent.

[*71]

Respondent argues that the EPA is attempting to impose liability on Respondent for a WSR that was produced by a waste generator. Respondent asserts that it inspected the May 19, 1994, shipment from the Church of St. Michael and generated an invoice for the material. Respondent points out that the "error" in the Church of Saint Michael WSR was remedied within 30 days of the inspection. According to Respondent, the amount of material received from the Church of St. Michael could have been obtained from other records. In addition, Respondent argues that the EPA, in its proffered exhibit, "selectively included portions of documents in an effort to impose a violation" and that this action was done in bad faith and could subject the EPA to sanctions in a civil court proceeding. Respondent's Post-Hearing Memorandum at 15-16.

Respondent's arguments are not persuasive. As stated earlier in this decision, the Clean Air Act and its implementing regulations provide for strict liability enforcement. Thus, the mere finding of a violation supports a finding of liability. As highlighted above, 40 C.F.R. § 61.154(e)(1)(iii) requires that an owner or operator of an active waste disposal site include [*72] the quantity of ACWM on the WSR. Respondent does not dispute that this information was absent from the Church of St. Michael's WSR when it was viewed by the MPCA inspectors on July 21, 1994. The need to review extraneous records to obtain information that is required to be on the WSR defeats the purpose of the regulation. Accordingly, the EPA has established that Respondent violated 40 C.F.R. § 61.154(e)(1)(iii) for failing to provide the quantity of ACWM on the WSR for the Church of St. Michael. Consequently, Respondent's liability under Count III has been established.

Respondent's averment of misconduct on the part of the EPA is unfounded. Although Respondent provided a completed WSR for the Church of St. Michael when it submitted WSRs to the EPA in response to an information request on July 28, 1994, and the EPA did not initially include such document in its proffered exhibit, such action is not misconduct warranting sanctions. Ultimately, the WSR in question was included in the exhibit that was received into evidence. Complainant's Exb. 7; Respondent's Exb. 11. Rather, the EPA deemed such document to be irrelevant, as do I, to the alleged violation.

Count IV

Count IV of [*73] the Complaint charges that on July 20, 1994, Respondent violated 40 C.F.R. § 61.154(i) for failing to furnish upon request, and make available during normal business hours for inspection, a map or diagram indicating the location, depth and area, and quantity of ACWM within the disposal area.

The asbestos NESHAP regulations at 40 C.F.R. § 61.154(f) require an owner or operator of active waste disposal site to "maintain until closure, records of the location, depth and area, and quantity in cubic meters (cubic yards) of asbestos-containing waste material within the disposal site on a map or diagram of the disposal area." Under 40 C.F.R. § 61.154(i), the owner or operator must "furnish upon request, and make available during normal business hours for inspection by the Administrator, all records required under this section."

The MPCA inspectors arrived at the Lyon County Landfill at approximately 4:00 p.m. on July 20, 1994. The business hours of the Landfill on weekdays are approximately 6 or 7 a.m. to 4 p.m., and then the Landfill personnel

remain for a short period of time to complete any work. Upon their arrival at the Landfill, the inspectors asked Mr. Rundle, a Landfill employee, [*74] to provide Respondent's WSRs and its map or diagram of the location of ACWM at the site. Tr. at 38-39 (Connell). The inspectors were advised that the records, including the map, were not kept at the Landfill but rather were stored at the Lyon County courthouse, which is located about 10 to 15 miles from the Landfill. Tr. at 40 (Connell). As Respondent's map was not kept at the Landfill, Respondent was unable to furnish its map to the inspectors when they requested it during the Landfill's normal business hours. This failure to furnish the map upon request constitutes a violation of 40 C.F.R. § 61.154(i).

Respondent argues that the regulation does not require Respondent to maintain its records, including the map, at the Landfill. 40 C.F.R. § 61.154(i). Respondent's argument has some merit. However, the more logical and reasonable interpretation of the regulation dictates that the records, including the map, be kept at the Landfill. Records kept at the Landfill allow for regular updating and documentation of the ACWM's exact location and depth within the disposal area. Such updating and documentation are required to ensure that the ACWM is properly covered each day and to prevent the [*75] disturbance of covered ACWM at the Landfill by the Landfill personnel. Further, inspection of the active waste disposal site is facilitated by the map reflecting the location of the ACWM at the site.

Inasmuch as Respondent's map was located at the Lyon County courthouse rather than at the Landfill, Respondent was unable to furnish and make available its map to the inspectors when they requested it during the Landfill's normal business hours. Such failure is a violation of 40 C.F.R. § 61.154(i).

Count V

Count V of the Complaint charges that Respondent violated 40 C.F.R. § 61.154(f) for failing to maintain a map or diagram recording the location, depth and area, and quantity in cubic meters (cubic yards) of ACWM within the disposal site. Specifically, the EPA alleges that Respondent's map of the disposal area available on inspection on July 21, 1994, had been updated last on or around May 9, 1994, and failed to include ACWM received by the Landfill on May 19, 1994, July 1, 1994, (two loads) and July 8, 1994.

The asbestos NESHAP regulations at 40 C.F.R. § 61.154(f) require an owner or operator of an active waste disposal site to "maintain, until closure, records of the location, [*76] depth and area, and quantity in cubic meters (cubic yards) of asbestos-containing waste material within the disposal site on a map or diagram of the disposal area."

Mr. Henriksen testified that Respondent's map was updated by him approximately every month based on the weekly receipt of WSRs from the Landfill. Tr. at 438 (Henriksen). Mr. Henriksen related that the frequency of these updates was dependent on the number of shipments of manifested waste material that came into the Landfill. Tr. at 438 (Henriksen). Mr. Henriksen testified that shipments of manifested waste material were received on May 1, 2, and 19, 1994, and that the map was updated to reflect these shipments at the end of May 1994. Tr. at 440 (Henriksen). According to Mr. Henriksen's testimony, there were no shipments in June but material was shipped into the Landfill on July 1, July 8, and July 28, 1994, and the map was updated at the end of July 1994. Tr. at 441 (Henriksen).

Mr. Connell testified that his examination of Respondent's records stored at the Lyon County courthouse on July 21, 1994, disclosed that Respondent's map was last updated on May 9, 1994. Tr. at 83 (Connell). Ms. Meier also testified that the last [*77] update to the map was on May 9, 1994. Tr. at 282, 304, 323 (Meier). During their review of Respondent's records at the courthouse, the inspectors did not make a copy of Respondent's map because they could not photocopy the large map. Tr. at 83 (Connell); Tr. at 169 (Meier). The inspection report signed by Mr. Connell and dated July 20, and 21, 1994, states that the last entry on the map was May 9, 1994. Complainant's Exb. 1.

Pursuant to the MPCA's July 28, 1994, request for additional information, Respondent provided a map for the disposal area reflecting that entries were made on the map for shipments of ACWM received on May 2, and 19, 1994, and July 1, (two shipments) 8, and 28, 1994. Mr. Henriksen explained that at the time of the inspection he was unaware that another file existed containing another map and the missing WSR. Mr. Henriksen noted that the files had been

consolidated and placed at the Landfill. Complainant's Exb. 7.

The undisputed evidence discloses that when the inspectors examined the map of the disposal area on July 21, 1994, the map did not contain entries for the ACWM received on July 1, (two shipments), and 8, 1994. Apparently, the inspectors mistakenly recalled [*78] and reported that the last entry made on the map was May 9, 1994, rather than May 19, 1994. Respondent argues that in view of this discrepancy in the record, the testimony of the inspectors is suspect. Respondent's Post-Hearing Memorandum at 17. Although the evidence indicates that the inspectors were mistaken about the date of last entry on the map, such mistake does not impeach their credibility as suggested by Respondent.

The remaining question before me is whether Respondent was in violation of 40 C.F.R. § 61.154(f) when it did not update the map with the July 1, 1994, and the July 8, 1994, shipments of ACWM until the end of July 1994. Respondent correctly points out that the regulation does not impose a timetable for the updating of the map of the disposal area. Respondent's Post-Hearing Memorandum at 18. The regulation simply states that an active waste disposal site must "maintain, until closure, records of the location, depth and area, and quantity" of ACWM on a map of the disposal area.

Despite the absence of a specified timetable for updating the map of the ACWM disposal area in the regulation, the regulatory scheme of the asbestos NESHAP regulations compels me to find that [*79] the monthly updating of Respondent's map is not a reasonable interval of time. The intent of the EPA in promulgating the asbestos NESHAP work practice requirements is to ensure "that asbestos emissions be controlled." *48 Fed. Reg. 32126 (1983)* (codified at 40 C.F.R. part 61, subpart M) (proposed July 13, 1983). In order for the record-keeping requirements of 40 C.F.R. § 61.154(f) to be consistent with this goal, the regulation is construed so as to require updating of the map concurrent with the deposit of the manifested ACWM. n7 The practice of monthly updating clearly is not consonant with the intended goal of the regulations. If a site's map is only updated once a month, the site's workers would be unable to track the location or depth of each shipment of ACWM resulting in the possible disruption of covered ACWM and the release of emissions. As the EPA points out in the instant case, Respondent could have avoided the disturbance of the ACWM from the Tyler High School if its map had been updated more frequently and maintained at the Landfill rather than the courthouse. Complainant's Post-Hearing Brief at 21 n. 6. Thus, Respondent is found to have violated [*80] 40 C.F.R. § 61.154(f).

n7 The record reflects that on June 25, 1992, Respondent received a photocopy of the November 20, 1990, revised asbestos NESHAP regulations for active waste disposal sites. In addition, Respondent received an EPA manual explaining the reporting and record keeping requirements of the revised asbestos NESHAP regulations for active waste disposal sites entitled Reporting and Recordkeeping Requirements for Waste Disposal- A Field Guide (November 1990). This guide states that the waste disposal site operator must maintain "up-to-date" records that indicate the location, depth and area, and quantity of ACWM within the disposal site on a map or diagram of the disposal area and that the map should be kept "current." Complainant's Exb. 16.

Count VI

Count VI of the Complaint charges that Respondent violated 40 C.F.R. § 61.154(j) for failing to notify the EPA Administrator 45 days prior to excavating or otherwise disturbing any ACWM that had been deposited at the waste disposal site and was covered. [*81] Specifically, the EPA alleges that on reinspection of the Landfill on July 21, 1994, the MPCA inspectors found ACWM with a waste generator label from the Tyler High School project that had not been at the Landfill on the previous day's inspection and they identified additional ACWM that had been unearthed or disturbed since the July 20, 1994, inspection.

A review of the record discloses that Respondent's employee, Mr. Gruhot, was told by the MPCA inspectors on

July 20, 1994, that the ACWM at the disposal site must be covered with at least six inches of nonasbestos-containing material to achieve compliance with the asbestos NESHAP regulations. Tr. at 78 (Connell); Tr. at 277 (Meier). According to the inspectors' testimony, Mr. Gruhot assured the inspectors that he would cover the ACWM and that he would obtain the nonasbestos-containing material from a "dirt pile" at the site. Tr. at 78 (Connell); Tr. at 277 (Meier). During their second inspection of the Landfill on July 21, 1994, the inspectors found an asbestos disposal bag with a waste generator label from the Tyler High School project. Tr. at 286 (Meier). The two inspectors had not seen this bag during their first inspection of [*82] the Landfill. The inspectors also found that some of the exposed ACWM still remained uncovered at the Landfill. Tr. at 93 (Connell); Tr. at 287 (Meier). According to Ms. Meier, on July 21, 1994, the asbestos disposal area of the Landfill looked as if some "work" had been done in an attempt to cover the previously exposed ACWM. Tr. at 287 (Meier). In addition, Mr. Connell testified that "there was fresh dirt that appeared to have come from the dirt pile and was pushed over and had covered areas" containing ACWM that had been exposed during the previous day. Tr. at 93 (Connell).

Respondent contends that the EPA's allegations contained in Count VI were not substantiated at the hearing. In this regard, Respondent asserts that the MPCA inspection report contains no allegation concerning this alleged violation and there was no testimony in support of this charge. According to Respondent, it is undisputed that Respondent did not intentionally or accidentally excavate any waste that was buried. Respondent's Post-Hearing Memorandum at 18. Moreover, Respondent asserts that the EPA has failed to establish that the material involved was ACWM that is friable and in excess of the threshold amount [*83] or ACWM from a regulated source. *Id.*

In response, the EPA argues that there is ample evidence that Respondent excavated or disturbed ACWM at the Landfill without providing the required notice. The EPA submits that as the ACWM from Tyler High School had been received no later than July 8, 1994, and it had not been observed by the MPCA inspectors on July 20, 1994, this ACWM must have been excavated or disturbed in the interim period between the July 20, 1994, and the July 21, 1994, inspections. Complainant's Post-Hearing Brief at 21.

The evidence indicates that Respondent attempted to follow the inspectors' instructions to cover the exposed ACWM with a six-inch layer of nonasbestos-containing material. Nonetheless, contrary to Respondent's assertion, the evidence establishes that Respondent accidentally excavated ACWM at the Landfill that previously had been covered. Respondent uncovered this material without first submitting written notification to the Administrator of the EPA. Respondent's arguments concerning the claimed absence of ACWM from a regulated source are addressed above and will not be restated. Thus, Respondent is found to have violated 40 C.F.R. § 61.154(j) as alleged [*84] in Count VI of the Complaint. Again, it is emphasized that the asbestos NESHAP regulations provide for strict liability enforcement. *United States v. Ben's Truck and Equipment, Inc.*, *supra*; see *Echevarria*, *supra*, at 633; *United States v. Sealtite Corp.*, *supra*.

PENALTY DETERMINATION

Introduction

The assessment of a civil administrative penalty for violations of the asbestos NESHAP regulations at 40 C.F.R. Part 61, Subpart M and Section 112 of the Clean Air Act is governed by Section 113(d)(1) of the Clean Air Act. Section 113(d)(1) of the Clean Air Act authorizes the assessment of civil administrative penalties of up to \$ 25,000 per day of violation. 42 U.S.C. § 7413(d)(1). Section 113(e) of the Clean Air Act sets forth various criteria that the EPA and the ALJ must consider in determining the appropriate amount of the civil administrative penalty for violations of the Clean Air Act. Section 113(e), in pertinent part, provides:

The Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice [*85] 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 . . . , payment by the violator of penalties previously assessed for the same violation, the

economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C. § 7413(e)(1).

In addition to consideration of the statutory penalty criteria, the ALJ must also consider any applicable EPA penalty policy. Section 22.27(b) of the Rules of Practice, 40 C.F.R. § 22.27(b), concerning the ALJ's initial decision provides:

If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set [*86] forth in the initial decision the specific reasons for the increase or decrease.

40 C.F.R. § 22.27(b). n8

n8 Section 22.14(c) of the Rules of Practice, 40 C.F.R. § 22.14(c), concerning the derivation of a proposed penalty by the EPA as set forth in the complaint provides the following:

The dollar amount of the proposed civil penalty shall be determined in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty and with any civil penalty guidelines issued under the Act.

40 C.F.R. § 22.14(c).

The EPA has developed guidelines that provide a method whereby an appropriate penalty can be calculated in accordance with the provisions of the Clean Air Act. These guidelines collectively are entitled the Clean Air Act Stationary Source Civil Penalty Policy and Appendices ("Penalty Policy"). Complainant's Exhs. 12, 13. The Penalty Policy can be characterized as being composed of two major parts: (1) the general penalty policy contained in the Clean Air Act Stationary Source [*87] Civil Penalty Policy (October 25, 1991) ("General Penalty Policy") which is applicable to civil administrative penalties assessed under Section 113(d) of the Clean Air Act and (2) the appendices which consist of guidelines applicable to specific hazardous air pollutants regulated by the Clean Air Act.

The General Penalty Policy states that it seeks to promote two primary goals, deterrence and fair and equitable penalties. General Penalty Policy at 3. The goal of deterrence is sought through a penalty that removes the economic benefit of noncompliance and reflects the gravity of the violation. The goal of fair and equitable penalties is sought through the application of adjustment factors. *Id.*

According to the General Penalty Policy, a penalty should be calculated by first determining a "preliminary deterrence amount" by assessing the "economic benefit of noncompliance component" and the "gravity component." *Id.* at 4. The factors indicating the seriousness of the violation set forth in section 113(e) of the Clean Air Act are reflected in the gravity component. *Id.* at 8. Under limited circumstances, adjustments to either component may be justified. *Id.* at 4. Mitigation [*88] of the economic benefit component can be made when the economic benefit component involves an insignificant amount, there are compelling public concerns, or there is concurrent administrative action under Section 120 of the Clean Air Act, 42 U.S.C. § 7420. *Id.* at 3. The adjustment factors applicable to the gravity component are: the degree of willfulness or negligence, the degree of cooperation, history of noncompliance, and environmental damage. *Id.* at 15-19. As a result, the gravity component can be increased or decreased. After the economic benefit and gravity components are combined to yield the preliminary deterrence amount, additional adjustments may be made based on factors such as the violator's ability to pay and the payment of penalties previously assessed for the same violation. *Id.* at

19-24.

Certain types of violations are more appropriately addressed in separate guidance, which are included as appendices to the General Penalty Policy. Appendix III of the Penalty Policy, the Asbestos Demolition and Renovation Civil Penalty Policy (May 5, 1992) ("Asbestos Penalty Policy") specifies how the gravity component and/or economic [*89] benefit components are calculated for asbestos NESHAP standard demolition and renovation violations. Complainant's Exb. 12. The General Policy governs the adjustment, aggravation, or mitigation of penalties calculated under any of the appendices. General Penalty Policy at 3.

At this point, it is emphasized that under the Administrative Procedure Act, 5 U.S.C. §§ 551-559, which governs these proceedings, a penalty policy, such as the General Penalty Policy or Asbestos Penalty Policy, is not unquestioningly applied as if the policy were a rule with "binding effect." See *Employers Insurance of Wausau and Group Eight Technology, Inc., TSCA Appeal No. 95-6*, 6 E.A.D. 735, 755-762 (EAB, Feb. 11, 1997). However, pursuant to Section 22.27(b) of the Rules of Practice, 40 C.F.R. § 22.27(b), which also govern these proceedings, the ALJ is required to consider civil penalty guidelines issued under the Act, such as the Penalty Policy, and to state specific reasons for deviating from the amount of the penalty recommended to be assessed in the Complaint. The ALJ "has the discretion either to adopt the rationale of an applicable penalty [*90] policy where appropriate or to deviate from it where the circumstances warrant." *In re DIC Americas, Inc., TSCA Appeal No. 94-2*, 6 E.A.D. 184, 189 (EAB, Sept. 27, 1995).

In the instant case, the EPA proposes that the Respondent be assessed a civil administrative penalty of \$ 58,000. Complainant's Exb. 32. The EPA submits that this amount was derived by considering the penalty factors delineated in Section 113(e) of the Clean Air Act and using the penalty calculation method set forth in the Penalty Policy. Specifically, the EPA calculated the economic benefit and gravity components of its proposed penalty in accordance with the Asbestos Penalty Policy and considered the adjustment factors pursuant to the General Penalty Policy. Nancy Mugavero, an environmental scientist with the Air and Radiation Division in the Enforcement and Compliance Section of the EPA, calculated the EPA's proposed penalty and testified during the hearing regarding her calculations.

A. Applicability of the Asbestos Penalty Policy

Respondent persuasively argues that the Asbestos Penalty Policy is inapplicable to this case because the alleged asbestos NESHAP standard violations [*91] pertain to an active waste disposal site and not a demolition or renovation operation. Tr. at 397-400; Respondent's Post-Hearing Memorandum at 19. The Asbestos Penalty Policy states that it is to be used for cases involving asbestos NESHAP standard demolition and renovation violations.

Although the Asbestos Penalty Policy is not expressly applicable and does not directly address waste disposal site violations, the rationale and guidance set forth in that policy is considered to be most useful and helpful in determining an appropriate penalty for Respondent's asbestos NESHAP active waste disposal site violations. The EPA's consideration of the Asbestos Penalty Policy in this case is deemed appropriate. In addition, it is noted that when Respondent's violations are considered under the Asbestos Penalty Policy and General Penalty Policy, the amount of the penalty is considerably less than when considered only under the General Penalty Policy. In this regard, it is noted that the General Penalty Policy serves as the civil penalty policy guidance used in calculating administrative penalties under section 113(d) of the Clean Air Act. The appropriate penalty for Respondent's violations when [*92] considered under the General Penalty Policy and the Asbestos Penalty Policy, by analogy, is \$ 49,500. Under the General Penalty Policy without consideration of the Asbestos Penalty Policy, however, the appropriate penalty for Respondent's asbestos NESHAP standard violations in this matter would be \$ 70,000. This amount is derived as follows: Count I, \$ 15,000; Count II, \$ 15,000; Count III, \$ 5,000; Count IV, \$ 10,000; Count V, \$ 10,000; Count VI, \$ 15,000.

Inasmuch as the Asbestos Penalty Policy can be applied appropriately, by analogy, and it is assumed that Respondent does not object to the lesser amount of penalty, the Asbestos Penalty Policy will be used as a guide in this matter. For the reasons described below, a civil administrative penalty of \$ 45,800 will be assessed against Respondent.

Discussion

Respondent's violations of the Clean Air Act and its implementing regulations fall into three general categories of violations, namely: work practice violations, record-keeping violations and a notification violation. *See* General Penalty Policy at 12. The work practice violations are the violations of 40 C.F.R. § 61.154(a) set forth in Counts I and II. The record-keeping [*93] violations are the violations of 40 C.F.R. §§ 61.154(e)(1)(iii), 61.154(i), and 61.154(f) set forth in Counts III, IV, and V, respectively. The notification violation is the violation of 40 C.F.R. § 61.154(j) set forth in Count VI.

As noted above, the General Penalty Policy and the Asbestos Penalty Policy provide guidance for achieving its two goals of deterrence and fairness and equitable treatment of the regulated community. Thus, the penalty is calculated in two major parts. The first part, referred to as the "preliminary deterrence amount", is comprised of two components, the economic benefit of noncompliance and the gravity of the violation. The preliminary deterrence amount, consisting of the economic benefit and gravity components, is calculated under the Asbestos Penalty Policy. After the preliminary deterrence amount is calculated, adjustments are made to that amount pursuant to the General Penalty Policy. Asbestos Penalty Policy at 1.

In the instant case, the EPA determined that Respondent had derived an economic benefit of \$ 1,675 as a result of its noncompliance with the asbestos NESHAP regulations for active waste disposal sites. Complainant's Exb. 32 at 3; Tr. at 356 [*94] (Mugavero). The EPA exercised its discretion and mitigated the economic benefit component based on the fact that this amount was less than \$ 5,000 and Respondent is a county. *Id.* The EPA, therefore, seeks only to recover the gravity component of the preliminary deterrence amount. *Id.* The EPA did not make any adjustments to the gravity component or to the preliminary deterrence amount. Thus, each of the violations will be examined to determine the appropriateness of the gravity component.

Count I

The EPA proposes that a civil administrative penalty in the amount of \$ 15,000 be assessed against Respondent for its violation of 40 C.F.R. § 61.154(a) as described in Count I of the Complaint. This violation falls under the category of a work practice violation. The \$ 15,000 represents the gravity component of the penalty. The statutory penalty criteria such as the size of the business, the duration of the violation, and the seriousness of the violation are reflected in the gravity component. As discussed in the Asbestos Penalty Policy, asbestos is a hazardous air pollutant warranting a high gravity factor associated with substantive violations such as failure to prevent visible [*95] emissions or to adhere to work practice standards. Asbestos Penalty Policy at 2.

The Asbestos Penalty Policy sets forth a matrix for calculating the gravity component for work practice or emission violations. Asbestos Penalty Policy at 17. The gravity component depends on the total amount of units of asbestos involved in the operation and whether the violation is a first violation, second violation, or subsequent violation. Also, additional amounts are assessed for each day of continuing violations. This matrix provides that the gravity component for a first time violation involving 50 or more units of asbestos is \$ 15,000 and \$ 1,500 for each additional day of violation.

Ms. Mugavero testified that she concluded that \$ 15,000 is appropriate for Count I in the instant case because the violation was a first time violation and there were more than 50 units of asbestos involved in the operation. Tr. at 354 (Mugavero). The total amount of asbestos involved in the operation was determined on the basis of the known amount of ACWM received by the Landfill from May 2, 1994, to July 21, 1994, as evidenced by the WSRs. The WSRs reflect the receipt of 67 cubic yards of ACWM at the Landfill for [*96] this time period and such amount converts to 51.7 units of asbestos pursuant to the calculation method set forth in the matrix. Asbestos Penalty Policy at 17.

Respondent contests this calculation on two grounds. First, Respondent asserts that there is no proof of violation for

the period from May 2, 1994, through July 21, 1994. Second, Respondent maintains that the only amount of suspect ACM found on inspection could probably "fit in a 5 to 10 gallon paid [sic]." Respondent's Post-Hearing Brief at 14. Although this aspect of the Asbestos Penalty Policy concerning the "total amount of asbestos involved in the operation" does not correlate directly with a waste disposal site violation, the quantity factor is considered to be particularly applicable by analogy. In this regard, I note that the total amount of asbestos deposited at the Landfill during the relevant period must be considered because such amount relates to the potential for environmental harm associated with improper handling at the disposal site. Here, exposed ACWM in the form of transite and VAT were observed on inspection on July 20, and 21, 1994. The WSRs disclose that the last shipment of transite was received on May [*97] 2, 1994, and that shipments of floor tile (VAT) were received on July 1, and 8, 1994. As such, the total amount of ACWM received for the period from May 2, 1994, through July 8, 1994, should be considered in assessing the penalty regardless of the amount actually found to be exposed on inspection.

In view of the above discussion, it is concluded that the proposed penalty of \$ 15,000 for Count I is appropriate. In addition, for the reasons discussed below an additional penalty of \$ 1,500 is assessed for the second day of the first violation under Count I.

Count II

The EPA proposes that a civil administrative penalty in the amount of \$ 25,000 be assessed against Respondent for its violation of 40 C.F.R. § 61.154(a) as described in Count II of the Complaint. Again, this violation falls under the category of a work practice violation.

Ms. Mugavero testified that she concluded that \$ 25,000 is an appropriate penalty for Count II because in addition to Respondent's failure to adequately cover ACWM at the Landfill on July 20, 1994, there was "new" exposed ACWM on July 21, 1994, and the emissions from this new ACWM constituted a "second" or "subsequent" violation of the asbestos NESHAP [*98] regulations at 40 C.F.R. § 61.154(a). Complainant's Exb. 32 at 3; Tr. at 359-61 (Mugavero).

Apparently, the determination of whether it is appropriate to escalate the penalty for a second or subsequent work practice or emission violation under the gravity component matrix of the Asbestos Penalty Policy is problematic. An EPA memorandum dated May 11, 1992, attached to the Asbestos Penalty Policy dated May 5, 1992, states that major changes from the August 22, 1989, policy include changes as to when it is appropriate to escalate the penalty for a second or subsequent violation. Complainant's Exb. 12. The memorandum goes on to note that EPA "policy now allows calculation of violations as second or subsequent violations only if the violation occurs in the context of a different demolition or renovation project or where the project was completed in stages or over a long period of time, which could be tantamount to a different project." Complainant's Exb. 12.

The Asbestos Penalty Policy, in pertinent part, states:

A "second" or "subsequent" violation should be determined to have occurred if, after being notified of a violation by the local agency, State or EPA at a prior demolition [*99] or renovation project, the owner or operator violates the Asbestos NESHAP regulations during another project, even if different provisions of the NESHAP are violated. This prior notification could range from simply an oral or written warning to the filing of a judicial enforcement action. . . . Violations should be treated as second or subsequent offenses only if the new violations occur at a different time and/or a different job site. Escalation of the penalty to the second or subsequent category should not occur within the context of a single demolition or renovation project unless the project is accomplished in distinct phases or is unusually long in duration.

Asbestos Penalty Policy at 4.

Respondent opposes the escalation of the penalty for a second work practice violation and cites the above-quoted

provisions of the Asbestos Penalty Policy in support of its opposition. The record reflects that Respondent was informed orally of its violation of the asbestos NESHAP regulations on July 20, 1994, by the MPCA inspectors. Respondent failed to come into compliance with 40 C.F.R. § 61.154(a) when it failed to adequately cover the exposed ACWM found at the site on July 20, 1994. Furthermore, [*100] Respondent uncovered additional ACWM and such work practice violation was found on inspection on July 21, 1994. Although it is reasonable to consider Count II as a "second" violation, I find that it is more reasonable and appropriate to characterize the violation described in Count II as a separate successive work practice violation that is treated as a first violation under the Asbestos Penalty Policy. Asbestos Penalty Policy at 6. By doing so, however, I further find that the violation of 40 C.F.R. § 61.154(a) under Count I continued for a second day. As such, the appropriate gravity component for Count II is reduced from \$ 25,000 to \$ 15,000 and the gravity component for Count I is increased \$ 1,500 to \$ 16,500.

Count III

The EPA proposes that a civil administrative penalty in the amount of \$ 1,000 be assessed against Respondent for its violation of 40 C.F.R. § 61.154(e)(1)(iii) as described in Count III of the Complaint. This record-keeping violation occurred when Respondent failed to maintain WSRs including the quantity of ACWM received from the Church of Saint Michael on May 19, 1994.

According to the Asbestos Penalty Policy, a \$ 1,000 penalty is recommended for a record-keeping [*101] violation where the violator fails to adequately maintain WSRs but other information regarding waste disposal is available. Asbestos Penalty Policy at 16. Here, the WSR maintained by Respondent for the ACWM received by the Landfill from the Church of Saint Michael failed to include the quantity of ACWM but other information regarding waste disposal was available to the inspectors.

The EPA's proposed penalty of \$ 1,000 for this Count is consistent with the Penalty Policy, by analogy, and is appropriate. Respondent, therefore, is assessed a penalty in the amount of \$ 1,000 for Count III.

Count IV

The proposed civil administrative penalty put forth by the EPA for Count IV of the Complaint is \$ 1,000. Count IV consists of Respondent's violation of 40 C.F.R. § 61.154(i) for failing to furnish upon request, and make available during normal business hours for inspection, its map of the ACWM at the Landfill.

Ms. Mugavero testified that the proposed penalty of \$ 1,000 is based on the categorization of this violation as a "one day" violation in which Respondent failed to adequately maintain its records but had made other information available regarding waste disposal. Tr. at 377 (Mugavero). [*102] This categorization under the Asbestos Penalty Policy, by analogy, is reasonable and generously results in a \$ 1,000 penalty. Asbestos Penalty Policy at 16. In this regard, it is noted that not all the WSRs were available on inspection. Respondent is assessed a penalty in the amount of \$ 1,000 for Count IV.

Count V

The EPA proposes that a civil administrative penalty in the amount of \$ 1,000 be assessed against Respondent for its violation of 40 C.F.R. § 61.154(f) as described in Count V of the Complaint. This record keeping violation occurred when Respondent failed to maintain an updated map of the location of the ACWM within the Landfill.

Ms. Mugavero testified that this violation was found to be one day in duration, namely, the day of the inspection on July 21, 1994. Tr. at 375 (Mugavero). The Asbestos Penalty Policy provides that where a violator has failed to maintain WSRs but has other information regarding waste disposal available, a penalty of \$ 1,000 is appropriate. Asbestos Penalty Policy at 16.

Again, this categorization under the Asbestos Penalty Policy, by analogy, is reasonable and generously results in a \$ 1,000 penalty. Asbestos Penalty Policy at 16. Accordingly, [*103] Respondent is assessed a penalty in the amount of \$ 1,000 for Count V.

Count VI

The EPA proposes that a civil administrative penalty in the amount of \$ 15,000 be assessed against Respondent for its violation of 40 C.F.R. § 61.154(j) as described in Count VI of the Complaint. This notification violation occurred when Respondent failed to provide written notification before it excavated or otherwise disturbed ACWM that had been deposited at the Landfill and was covered.

As discussed in the Asbestos Penalty Policy, notification is essential to the EPA's enforcement. As such, a notification violation may also warrant a high gravity component. Asbestos Penalty Policy at 2. The violation here may not be categorized as a minor violation because in addition to the notification violation there was no compliance with the attendant work practice requirement to adequately cover the ACWM after it was excavated.

The Asbestos Penalty Policy provides that for a first time violation in which a violator has failed to provide notice, a penalty in the amount of \$ 15,000 should be assessed. Asbestos Penalty Policy at 15. Respondent failed to notify the EPA of its excavation or disturbance of the [*104] material deposited and covered at the Landfill. Respondent therefore appropriately is assessed a penalty of \$ 15,000 for its violation of the asbestos NESHAP regulation described in Count VI of the Complaint.

Adjustment Factors

The EPA found that the gravity component should not be adjusted on the basis of any of the Clean Air Act adjustment factors under the General Penalty Policy. Complainant's Exb. at 2-3; Tr. at 355 (Mugavero). These factors are: degree of willfulness or negligence, degree of cooperation, history of noncompliance, and environmental damage. General Penalty Policy at 15. These factors, which take into account the individual facts of the case, are applied to the gravity component to achieve fair and equitable treatment.

According to the General Penalty Policy, the gravity component may be mitigated only for degree of cooperation. Otherwise, the adjustment factors require increases in the gravity component. General Penalty Policy at 15-16. The factor of degree of cooperation arises when there is prompt reporting of noncompliance or the violator institutes comprehensive corrective action after discovery of the violation. In the later circumstance of prompt reporting [*105] there must be extraordinary efforts to avoid an imminent requirement or to come into compliance. General Penalty Policy at 17. I agree with the EPA's position that such factor is not shown to be applicable in the instant case. Accordingly, no adjustments to the gravity component are warranted under the General Penalty Policy.

Additional Adjustment Factors, Including Such Other Factors as Justice May Require

As noted above, the EPA did not make any additional adjustments to the preliminary deterrence amount based on such factors as Respondent's ability to pay or Respondent's payment of offsetting penalties for the same violations. Complainant's Exbs. 17, 32. Respondent does not contest this aspect of the EPA's proposed penalty.

The statutory penalty criteria under Section 113(e) of the Clean Air Act include "such other factors as justice may require." This somewhat vague factor appears to accommodate the unique circumstances presented in this case concerning the hearing delay and additional costs claimed to have been incurred by Respondent as a result of that delay.

Respondent, in its Post-Hearing Memorandum, claims that it incurred additional expenses due to the unexpected delay [*106] in the hearing. Respondent's Post-Hearing Memorandum at 1, note 1. Based on this claim by Respondent, a Post-Hearing Order was entered on March 9, 2000, by the undersigned, affording Respondent the opportunity to

support its claim of additional costs due to the hearing delay by submitting affidavits.

In response to the March 9, 2000, Post-Hearing Order, Respondent's counsel has proffered an affidavit in support of Respondent's claim for additional costs and expenses in the amount of \$ 4,950 due to the hearing delay. Specifically, Respondent claims to have incurred additional costs for an expert witness, an attorney, and litigation support, and additional expenses for food and lodging for these three individuals.

The EPA opposes any reduction of the penalty on account of Respondent's claimed additional expenses due to the hearing delay. The EPA's opposition is based on several grounds. First, the EPA contends that Respondent has not filed a motion for costs and expenses and has not stated a legal basis for its claim. Second, the EPA maintains that the hearing was completed within the time originally scheduled for the hearing and that the parties utilized the extra time to conduct settlement [*107] discussions. Third, the EPA asserts that Respondent has not submitted any documentation to support its claim. Finally, the EPA contends that the claimed costs are excessive. In this regard, the EPA notes that the implementing regulations for the Equal Access to Justice Act at 40 C.F.R. § 17.7 restrict compensation for an expert to \$ 24.09 per hour and attorney or agent fees to \$ 75 per hour. Also, the EPA points out that Respondent's claimed expenses for food and lodging exceed the per diem rates set by the Government.

Most of the EPA's arguments are found to be without merit. First, there is no requirement that Respondent file a motion to claim costs and expenses due to the delay in the hearing. Consideration is being given to Respondent's claim because Respondent raised this issue in its Post-Hearing Memorandum. I find that Respondent's claim is appropriately addressed under the statutory penalty criterion of "such other factors as justice may require." In connection with the EPA's contention that the hearing was scheduled to continue until June 4, 1998, it is noted that the hearing was scheduled to commence on June 2, 1998, and continue if necessary on June 3, and 4, 1998. The [*108] hearing did conclude as initially scheduled on June 4, 1998, but only because an evening session was held on June 3, 1998. The fact that settlement discussions were held to best utilize the "downtime" does not justify the time lost by Respondent's counsel, litigation support, and expert witness.

Although Respondent did not submit documentation to support its claim, I find that under the circumstances presented here such documentation is not necessary. I agree, however, that some of the claimed costs and expenses appear somewhat excessive. Upon review, it is determined that the amount of \$ 4,950 should be reduced by \$ 1,100 for attorney and litigation support costs claimed beyond 8 hours and for lodging and meal costs claimed beyond \$ 100 per day per person. As such, the claimed amount is reduced to \$ 3,700.

In determining that an adjustment to the penalty is warranted within the purview of "such other factors as justice may require", I emphasize that the hearing was delayed one day because of fault on the part of the EPA. This was not a situation where the court reporter failed to appear because of fault on the part of the court reporter. Rather, the court reporter did not appear because [*109] no court reporter services were obtained by the EPA. Accordingly, Respondent's penalty is reduced from \$ 49,500 to \$ 45,800.

ORDER

1. Respondent, Lyon County, is assessed a civil administrative penalty in the amount of \$ 45,800.
2. Payment of the full amount of this civil penalty shall be made within sixty (60) days of the service date of the final order by submitting a certified or cashier's check in the amount of \$ 45,800, payable to the Treasurer, United States of America, and mailed to:

Regional Hearing Clerk
EPA - Region V
P.O. Box 70753
Chicago, IL 60673

3. A transmittal letter identifying the subject case and EPA docket number, and Respondent's name and address, must accompany the check.

4. If Respondent fails to pay the penalty within the prescribed statutory period after entry of the Order, interest on the civil penalty may be assessed. *31 U.S.C. § 3717*; 40 C.F.R. § 102.13(b), (c), (e).

Appeal Rights

Pursuant to 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency, unless an appeal is filed with the Environmental Appeals Board within thirty (30) days of service of this Order, [*110] or the Environmental Appeals Board elects to review this decision *sua sponte*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Air Quality Emission Standards Stationary Sources Hazardous Pollutants Environmental
Law Hazardous Wastes & Toxic Substances Asbestos Work Practice Standards Real Property Law Environmental
Regulation Indoor Air & Water Quality