LATHAM & WATKINS LLP
Robert M. Howard (Bar No. 145870)
Patricia Guerrero (Bar No. 190834)
Jason M. Ohta (Bar No. 211107)
600 West Broadway, Suite 1800
San Diego, California 92101-3375
Telephone: (619) 236-1234
Facsimile: (619) 696-7419

Attorneys for Plaintiff
LATHAM & WATKINS LLP

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LATHAM & WATKINS LLP,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
75 Hawthorne Street
San Francisco, CA 94105

Defendant.

CASE NO. '07 CV 0245 DMS LSP

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF UNDER FREEDOM OF INFORMATION ACT

Plaintiff Latham & Watkins LLP ("Plaintiff") hereby brings this action pursuant to the provisions of the Freedom of Information Act, 5 U.S.C. § 552 et seq., as amended ("FOIA"). Plaintiff seeks an order declaring that Defendant United States Environmental Protection Agency ("EPA") is in violation of FOIA, and requiring EPA to produce improperly withheld agency records. In particular, Plaintiff seeks an order from the Court requiring EPA to release documents relating to an EPA inspector's observations and determinations made in connection with pipe cleaning operations that took place more than six years ago, from September 2000-January 2001, at a former natural gas holder facility located at 1350 San Altos Place, in Lemon Grove, California (the "Encanto site").

By this Complaint, Plaintiff alleges as follows:

THE PARTIES

1. Plaintiff is a limited liability partnership under Delaware law, having its principal place of business at 633 West Fifth Street, Suite 400, Los Angeles, California 90071.

2. Defendant EPA is an agency of the United States within the meaning of 5 U.S.C. § 552(f). EPA has possession of and control over the records that Plaintiff seeks.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1346 (United States as a defendant).

4. Plaintiff resides in this judicial district within the meaning of 28 U.S.C. § 1391(e)(3), and venue in this Court is therefore proper pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

STATUTORY FRAMEWORK

5. The FOIA, 5 U.S.C. § 552, requires agencies of the federal government to release requested documents to the public unless one or more specific statutory exemptions apply.

6. An agency must respond to a party making a FOIA request within twenty (20) working days, notifying the party of its determination whether or not to fulfill the request,

and of the requester's right to appeal the agency's determination to the agency head. 5 U.S.C. § 552(a)(6)(A)(i).

7. An agency must respond to a FOIA appeal within twenty (20) working days, notifying that party of its determination to either release the withheld documents or uphold the denial. 5 U.S.C. § 552(a)(6)(A)(ii).

8. In "unusual circumstances," an agency may delay its response to a FOIA request or appeal, but must provide notice and "the date on which a determination is expected to be dispatched." 5 U.S.C. § 552(a)(6)(B).

9. The Court has jurisdiction, upon receipt of a complaint, "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

10. The FOIA provides a mechanism for disciplinary action against agency officials who have acted inappropriately in withholding records. Specifically, when requiring the release of improperly withheld records, if the Court makes a written finding that "the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously," a disciplinary investigation is triggered. 5 U.S.C. § 552(a)(4)(F).

11. Although there are certain exemptions under FOIA that allow agencies to withhold records, all exemptions are construed narrowly in keeping with FOIA's policy favoring disclosure. The agency bears the burden of demonstrating that a claimed exemption applies, which requires the agency to provide a particularized and detailed justification to enable a reasoned determination of the validity of the claimed exemption. Conclusory or vague invocations of FOIA exemptions are insufficient.

12. EPA relied upon two exemptions to withhold documents from Plaintiff, i.e., the "deliberative process privilege" (5 U.S.C. § 552(b)(5)), and the "law enforcement privilege" (5 U.S.C. § 552(b)(7)(A)).

13. FOIA exemption (b)(5) exempts from disclosure certain inter- and intra-agency communications protected by the "deliberative process" privilege. 5 U.S.C. § 552(b)(5). In order to qualify for the "deliberative process" exemption, a document must be both

predecisional in the sense that it is actually antecedent to the adoption of an agency policy, and deliberative in the sense that it is actually related to the process by which an agency's high-level policies are formulated.

14. The "deliberative process" exemption does not apply to records that concern factual or investigative matters; the protected communications must bear on the formulation or exercise of agency policy-oriented judgment. The agency invoking the "deliberative process" exemption must specify what deliberative process the requested record was involved in, and must further show that the record was a direct part of the deliberative process in that it makes recommendations or expresses opinions on governmental policy-making decisions.

15. FOIA exemption (b)(7)(A) exempts from disclosure records that have been compiled for "law enforcement" purposes and could reasonably be expected to interfere with an enforcement proceeding. 5 U.S.C. § 552(b)(7)(A).

16. An agency invoking the "law enforcement" exemption must satisfy a two-part test. First, as a threshold matter, the agency must show that there is an actual law enforcement proceeding that is pending or prospective. Second, the agency must specifically articulate a distinct harm that is likely to result to the pending or prospective law enforcement proceeding if the requested records are disclosed.

17. For an enforcement action to be pending or prospective for purposes of the "law enforcement" exemption, the agency cannot merely suggest that proceedings may happen at some unspecified future date. Instead, the agency must demonstrate a concrete expectation of a law enforcement action. The "law enforcement" exemption under 5 U.S.C. § 552(b)(7)(A) is not available where there is no longer a prospect of enforcement proceedings, such as where the statute of limitations has expired.

18. If an exemption under FOIA applies, any reasonably segregable portion of the record still must be provided after the exempt portions have been removed. 5 U.S.C. § 552(b). The non-exempt portions must be disclosed unless they are inextricably intertwined such that redacting the exempt potion would produce a document with little informational value.

The agency bears the burden of demonstrating that a record with portions that are exempt from disclosure cannot be segregated. This burden can only be met by providing reasonable specificity as to why the record in question cannot be segregated. Merely stating that the record is not segregable is insufficient.

STATEMENT OF FACTS

19. Plaintiff seeks information regarding EPA's inspection of pipe cleaning operations that occurred at the Encanto site in 2000-2001.

20. On January 23, 2001, EPA Inspector Robert Trotter inspected the Encanto site at the request of the San Diego Air Pollution Control District ("APCD"). Inspector Trotter observed the site and expressed opinions and conclusions regarding the nature of the asbestos operations. Inspector Trotter concluded and publicly advised third parties such as San Diego Gas & Electric Company ("SDG&E") and third-party contractors (approximately 6-10 people) that pipe wrap that coated the Encanto pipes was "nonfriable" while on the pipes, but that the machine used to remove the coating rendered the pipe coating material "regulated." Plaintiff is entitled to review all documents and information upon which Inspector Trotter's opinions and conclusions are based and articulated to all third parties.

21. On February 7, 2001, approximately two weeks after the January 23, 2001 Encanto site inspection, Inspector Trotter prepared a memorandum regarding his inspection. Inspector Trotter distributed his February 7, 2001 memorandum outside the federal government, by providing a copy to San Diego APCD Inspector Jim Cooksey. Plaintiff is entitled to review this February 7, 2001 memorandum, and all documents and information upon which Inspector Trotter's memorandum is based.

22. On November 19, 2003, Inspector Trotter prepared a nine-page written statement that was provided to SDG&E, stating that in his view the Encanto site allegedly involved the "worst" asbestos violations he had ever seen. Inspector Trotter provided his November 19, 2003 statement to San Diego County. Plaintiff received a copy of Inspector Trotter's November 19, 2003 statement from San Diego County Counsel on or about December 2, 2003. Plaintiff also received a copy of Inspector Trotter's November 19, 2003

statement from EPA on or about August 31, 2005. The nine-page written statement was written by Inspector Trotter for purposes of public dissemination. A copy of Inspector Trotter's November 19, 2003 written statement is attached hereto as Exhibit 1. Plaintiff is entitled to review all documents and information upon which Inspector Trotter's November 19, 2003 written statement is based.

23. From 2002-2004, Inspector Trotter engaged in various communications with the County of San Diego relating to his opinions and conclusions regarding the Encanto site. Plaintiff is entitled to review these communications regarding the Encanto operations, and all documents and information upon which these communications are based.

24. EPA never took any enforcement action regarding the Encanto site, before or after Inspector Trotter's January 23, 2001 inspection. The statute of limitations for EPA to bring an enforcement action has run.

25. There are no pending or prospective enforcement proceedings relating to Encanto. On August 6, 2002, the San Diego District Attorney's Office declined prosecution with respect to the Encanto site.

26. On March 28, 2006, the County of San Diego voluntarily dismissed a civil lawsuit it had filed on August 31, 2005 against Sempra Energy, SDG&E, and three individuals for alleged asbestos violations at the Encanto site, entitled *People of the State of California, et al. v. Sempra Energy, et al.*, Case No. GIE028660. Plaintiff represented the defendants in this state action. The statute of limitations for filing state law claims relating to the Encanto operations has expired.

27. On November 21, 2006, United States District Court Judge Dana M. Sabraw dismissed a case that had been filed by the United States Attorney's Office for the Southern District of California on January 11, 2006 relating to the Encanto site. Plaintiff represented defendant SDG&E in this federal action. The Government alleged criminal violations of the Clean Air Act stemming from the Encanto operations. The Government did not appeal Judge Sabraw's order dismissing the asbestos violations, and the time to appeal has expired.

PLAINTIFF'S FOIA REQUEST

28. On June 17, 2005, Plaintiff submitted a request to EPA pursuant to FOIA for copies of all records relating to Inspector Trotter's involvement with Encanto. A copy of the June 17, 2005 FOIA request is attached hereto as Exhibit 2 (hereinafter "FOIA Request"). Specifically, Plaintiff requested the following information:

> (1) All of EPA Chief Enforcement Officer and Asbestos [National Emissions Standards for Hazardous Air Pollutants ("NESHAP")] Coordinator Robert Trotter's documents, records, reports, files, e-mails and notes related to alleged asbestos and asbestos containing materials at the "Encanto Site". . ., including but not limited to, communications with the San Diego County Department of Environmental Health ("DEH"), the County of San Diego, the San Diego District Attorney's Office, the San Diego Air Pollution Control District ("APCD") and the California Air Resources Board ("CARB").
>
> (2) All of EPA Chief Enforcement Officer and Asbestos NESHAP Coordinator Robert Trotter's documents, records, reports, files, e-mails and notes related to NESHAP inspections on or about January 23, 2001 at the "Encanto Site". . ., including but not limited to, communications with the San Diego County DEH, the County of San Diego, the San Diego District Attorney's Office, the San Diego APCD and CARB.

29. The FOIA Request was made in compliance with EPA's published rules, 40 C.F.R. §§ 2.101, 2.102, as required by 5 U.S.C. § 552 (a)(3)(A)(ii).

30. On August 31, 2005, after three requests for an extension to respond, Deborah Jordan, Director of the EPA's Air Division for Region IX, denied in part and granted in part the FOIA Request. A copy of the denial letter and EPA's requests for extension are attached hereto as Exhibits 3 and 4, respectively.

31. In its August 31, 2005 response, EPA provided one set of exhibits that were already in Plaintiff's possession and withheld eleven (11) documents on the grounds that the documents were exempt from production pursuant to (i) the exemption for certain inter- and intra-agency communications protected by the "deliberative process privilege" (5 U.S.C. § 552(b)(5)); and (ii) the exemption for records compiled for law enforcement purposes that could reasonably be expected to interfere with enforcement proceedings (5 U.S.C. § 552(b)(7)(A)). Specifically:

a. Categories of documents withheld on the basis of an alleged "deliberative process privilege" consist of (1) a February 7, 2001 memorandum written by Inspector Trotter to San Diego APCD Inspector Jim Cooksey (approximately 2 weeks after the joint inspection at the Encanto site); (2) correspondence in October and November 2003 between Inspector Trotter and San Diego County Counsel, in part in connection with the preparation of Inspector Trotter's November 19, 2003 public written statement; and (3) correspondence between Inspector Trotter and San Diego County Counsel in February and March 2004.

b. Documents withheld on the ground that they were allegedly prepared for law enforcement purposes include (1) an August 5, 2003 letter from San Diego County Counsel to Inspector Trotter; and (2) interview notes taken by San Diego County District Attorney Investigator Tom Basinki, which San Diego County Counsel sent via facsimile to Inspector Trotter.

c. One document was withheld on the ground that it was protected by the "deliberative process privilege" and that it was compiled for law enforcement purposes: interview notes from San Diego County District Attorney Investigator Tom Basinki's interview of Inspector Trotter on July 29, 2002.

32. On September 16, 2005, pursuant to 5 U.S.C. § 552(a)(6)(A)(i), Plaintiff filed a timely appeal of EPA's partial denial of the FOIA Request. A copy of Plaintiff's appeal letter is attached hereto as Exhibit 5.

33. On January 16, 2007, EPA responded to Plaintiff's FOIA appeal, over one year after the deadline to respond required both by FOIA (5 U.S.C. § 552(a)(6)(A)(ii)) and by EPA's published rules (40 C.F.R. § 2.104(k)). A copy of EPA's January 16, 2007 response is attached hereto as Exhibit 6.

34. In its January 16, 2007 response, EPA reaffirmed its refusal to provide the eleven (11) withheld documents based on the same "deliberative process" and "law enforcement" exemptions cited in EPA's initial August 31, 2005 response. Although EPA stated that it was partially granting Plaintiff's appeal, EPA only provided an administrative decision

that was attached to an email authored by Inspector Trotter that EPA continues to withhold, and seven (7) emails that are heavily redacted and contain no substantive information whatsoever.

35. Plaintiff has exhausted its administrative remedies, as required by FOIA and by EPA's internal regulations. 5 U.S.C. § 552; 40 C.F.R. § 2.104(l).

CAUSE OF ACTION

(Violations of the Freedom of Information Act)

36. Plaintiff realleges and incorporates paragraphs 1 through __ above, as though set forth in full herein.

37. FOIA Section 552(a)(3), 5 U.S.C. § 552(a)(3), and 40 C.F.R. § 2.100 et seq., require EPA to make agency records available upon request for public inspection and copying.

38. Plaintiff is entitled to request and receive records under FOIA § 552(a)(3).

39. The withheld documents are records within the meaning of FOIA § 552(a)(3).

40. The withheld documents are not exempt from production under the "deliberative process" exemption of FOIA § 552(b)(5). The withheld documents contain information that forms the basis for opinions and conclusions contained in verbal January 23, 2001 opinions by an EPA inspector and that same inspector's nine-page written statement that already was shared outside the federal government, with members of the San Diego APCD, San Diego County Counsel, SDG&E, outside project contractors and Plaintiff. Plaintiff is entitled to review all of the documents that form the basis for the opinions expressed by the EPA inspector in a document that was calculated to be distributed outside the agency to certain third parties. The withheld documents do not relate to any governmental policy-making decision, and the disclosure of the documents would not interfere with or impede any agency policy-oriented decision-making.

41. The withheld documents are not exempt from production under the "law enforcement" exemption of FOIA § 552(b)(7)(A). No law enforcement proceeding is pending or prospective. The state District Attorney declined prosecution in August 2002; the County of San

Diego dismissed its lawsuit in March 2006; and United States District Court Judge Sabraw dismissed the federal government's lawsuit in November 2006. The statute of limitations for filing claims has run, as has the federal government's period for appealing Judge Sabraw's order of dismissal. Moreover, EPA has not demonstrated, and cannot demonstrate, any distinct harm is likely to result if the information and documents requested are disclosed.

42. In withholding the documents, EPA has violated and continues to violate FOIA and EPA's regulations.

43. EPA has acted arbitrarily and capriciously in withholding the requested documents.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the following relief:

1. Expedited consideration of this action pursuant to 28 U.S.C. § 1657(a);

2. A declaration that EPA has violated FOIA by failing to provide the requested documents to Plaintiff;

3. An order to enjoin EPA from withholding the requested documents;

4. An order mandating EPA to provide the requested documents to Plaintiff;

5. A declaration that EPA has acted arbitrarily and capriciously by withholding the requested documents, 5 U.S.C. § 552(a)(4)(F);

6. An award to Plaintiff of reasonable attorneys' fees and other costs of litigation pursuant to 5 U.S.C. § 552(a)(4)(E); and

7. Grant such other and further relief as the Court may deem just and proper.

Dated: February 6, 2007

Respectfully submitted,

LATHAM & WATKINS LLP
Robert M. Howard
Patricia Guerrero

By _____
Robert M. Howard
Attorneys for Plaintiff Latham & Watkins LLP

Latham & Watkins LLP v. U.S. EPA

Complaint for Declaratory and Injunctive Relief Under Freedom of Information Act

Index of Exhibits

Statement of Robert S. Trotter

1. I am the Chief Enforcement Officer/Asbestos NESHAP Coordinator, Air Division, for Region 9 of the United States Environmental Protection Agency. As such, I have enforcement duties over projects involving asbestos in Arizona, California, Hawaii, Nevada, the Pacific Islands, and the Tribal Nations.

2. I have been employed at the US EPA since 1984. In my position I am responsible for writing applicability determinations submitted by sources and the public regarding Asbestos NESHAP requirements. Some of these determinations have national implications. I also conduct Asbestos NESHAP inspections. As the Region 9 Asbestos NESHAP coordinator and enforcement officer I have conducted well over one hundred Asbestos NESHAP inspections, often with state or local inspectors.

3. Part of my job includes training state and local inspectors on proper NESHAP inspections and health and safety techniques. I speak at a variety of Asbestos NESHAP outreach seminars, including for industry, public, and government representatives. I also regularly teach EPA Course 350 (Asbestos NESHAP Inspection and Safety Procedures) throughout Region 9.

4. My job also calls for me to assist state and local enforcement on Asbestos NESHAP violations. I have qualified as an expert regarding the Asbestos NESHAP on numerous occasions.

5. As the Chief Enforcement Officer and NESHAP Coordinator for Region 9, US EPA, I am very familiar with the NESHAP and the work practice standards set forth in the Asbestos NESHAP.

6. The NESHAP requires all owners or operators of a demolition activity to notify the Administrator, in writing, of all demolition activities. An Administrator is anyone with delegated authority within the EPA asbestos NESHAP program. In San Diego County, authority to enforce the Asbestos NESHAP program is delegated to the San Diego County Air Pollution Control District, and Jim Cooksey is the NESHAP Program Manager at the San Diego APCD. The NESHAP and the EPA require owners and operators to deliver notifications to the Administrator at least 10 working days before any demolition – regardless of whether asbestos is present in the building. In addition, for renovations in which an applicable amount of asbestos (260 linear feet on pipes, 160 square feet on other facility components or 35 cubic feet off facility components) will be disturbed, written notification of the renovation must be given to the Administrator at least 10 working days before the renovation starts. Further, if start dates for the renovation or demolition work change, or the amount of RACM on site is increased, revised notifications must be submitted to the Administrator.

7. The NESHAP defines Regulated Asbestos Containing Materials (RACM) as follows: 1) friable asbestos-containing material; (2) Category I nonfriable ACM that has become friable; (3) Category I nonfriable ACM that has been or will be sanded, ground, cut, or abraded; or (4) Category II nonfriable ACM that has already been or is likely to become crumbled, pulverized, or reduced to powder. Category I nonfriable

asbestos-containing material (ACM) generally refers to ACM with a bituminous or asphaltic base, and includes asbestos-containing packings, gaskets, reslient floor covering, and asphalt roofing products containing more than 1 percent asbetos.

8. On June 17, 1994 the EPA added Appendix A to the NESHAP, entitled "Interpretive Rule for Roof Removal Operations Under the Asbestos NESHAP." This Appendix considers the use of a rotating blade cutter of equipment that damages Category I nonfriable asbestos containing material. The Appendix states:

> "For the purposes of this interpretive rule, 'RB roof cutter' means an engine-powered roof cutting machine with one or more rotating cutting blades the edges of which are blunt. (Equipment with blades having sharp or tapered edges, and/or which does not use a rotating blade, is used for ``slicing" rather than ``cutting" the roofing material; such equipment is not included in the term ``RB roof cutter".) Therefore, it is EPA's interpretation that when an RB roof cutter or equipment that similarly damages the roofing material is used to remove Category I nonfriable asbestos-containing roofing material, any project that is 5580 ft or greater is subject to the NESHAP; conversely, it is EPA's interpretation that when an RB roof cutter or equipment that similarly damages the roofing material is used to remove Category I nonfriable asbestos-containing roofing material in a roof removal project that is less than 5580 ft, the project is not subject to the NESHAP, except that notification is always required for demolitions. EPA further construes the NESHAP to mean that if slicing or other methods that do not sand, grind, cut

or abrade will be used on Category I nonfriable ACM, the NESHAP does not apply, regardless of the area of roof to be removed."

9. The Student Manual for EPA Course 350, as revised in 1999, states this: "When ... removing ... intact pipeline asphaltic wrap... which contain asbestos encapsulated or coated by bituminous or resinous compounds: ... the material shall not be sanded, abraded, or ground – manual methods are required; ... all removal or disturbance of pipeline asphaltic wrap must be done using wet methods." The Manual also states, in a section regarding Mechanical Methods to remove asphaltic roof materials containing Asbestos Containing Material: "*Note*: Rotating blade cutters render the asbestos roofing friable."

10. Methods of removal that destroy the structural matrix or integrity of the material such that the material is crumbled, pulverized or reduced to powder, renders Category I ACM friable. Removal by a rotating blade-cutting machine destroys the structural matrix of ACM, and renders it regulated.

11. I am aware of a number of decisions stating the same instructions regarding use of a RB roof cutter or other equipment that sands, grinds, cuts or abrades ACM. For example, in the US EPA Decision of LVI Environmental Services, Inc., Docket No. CAA-09-97-10, issued June 28, 2000 in Washington D.C., found that use of a blade to remove ACM, even though the blade was sharpened and did not reduce the ACM to powder, did subject it to "sanding, grinding, cutting or abrading," and rendered it RACM. See also, US EPA, Washington D.C. Asbestos NESHAP Demolition Decision Tree Guidance Document, issued June 29, 1994 (Category I nonfriable material that has been

or will be subjected to sanding, cutting or abrading during removal is subject to NESHAP); EPA Determination Letter dated June 12, 1990 (if asbestos-containing roofing felt is removed by cutting or sawing it is subject to the Asbetos NESHAP; if friable material not adequately wetted the entire area becomes contaminated and considered friable); US EPA Determination Letter dated February 23, 1990, dated February 23, 1990 (if nonfriable ACM is subjected to sanding, grinding or abrading as part of demolition or renovation, than it must be handled in accordance with the NESHAP); US EPA Determination Letter dated January 1, 1991 (nonfriable ACM that is subjected to sanding, grinding, or abrading as part of the demolition or renovation becomes RACM and must be handled in accordance with the Asbetos NESHAP).

12. On January 23, 2001 I conducted an inspection of the asbetos removal operations conducted by Sempra Energy/SDG&E at 1350 San Altos Place, Lemon Grove, California, also referred to as the Encanto site. I conducted this inspection at the request of the San Diego APCD, which had explained to me that Sempra/SDG&E was not accepting its determination that a rotating blade cutter being used to remove asphaltic wrap containing asbestos was turning the material friable. Also present during the January 23, 2001 inspection was Ahmad Najjar, Asbestos Program Director for California Air Resources Board (CARB), Jim Cooksey, Asbetos Program Manager for San Diego APCD, Penny Weir, Inspector for San Diego APCD, Kyle Rheubottom, Project Manager for IT Corporation, Jackie McHugh and Willie Williamson of Sempra, James Dodson, Attorney for Sempra, and a supervisor from Tri-State.

13. When I arrived Sempra staff told me that they were conducting air monitoring at the site and that the monitoring had not shown any emission of asbestos. I told the Sempra staff that they had confused OSHA and NESHAP requirements, and that air monitoring is not relevant under NESHAP. I told Sempra that the NESHAP is a work practice standard that applies strict liability when the standards are not followed. I also told Sempra there is no safe exposure level to asbestos.

14. The rotating blade-cutting machine was not in operation when I inspected the site. I did see pipe wrap on the pipes before it was removed. While the pipe wrap was on the pipe and left intact, it was not regulated and not friable.

15. I went to the area where the pipe wrap removal was being conducted, and saw a plastic structure with slits in it. Ms. Weir, Mr. Najjar and I put on protective gear, and entered the plastic structure. I observed the rotating blade cutter that was being used to grind the wrap from the pipe. The machine is a rotating blade cutter like those described in Appendix A to the NESHAP and the EPA materials. Its blades were blunt. I saw debris all over the plastic structure. The debris was dry. I took samples of the material while Ms. Weir photographed the sample locations. We also went outside and found debris on the dumpster and on the ground below it. The debris was dry. I took samples from these areas as well, and Ms. Weir photographed the sample locations.

16. It was very obvious that the rotating blade cutter had destroyed the matrix of the pipe wrap. The material was different after it was ground off by the cutter from before – the pipe wrap turned crumbly and powdery. The grinding action turned the pipe wrap into regulated asbestos containing material.

17. I told the Sempra and IT Corporation staff that the waste debris on the site was RACM. I also held up a bag of the waste I had collected in front of Sempra, and shook it. I said, "if I show this to a judge, I think he will agree it is pretty crumbly." James Dodson, attorney for Sempra, said he "would agree it is pretty crumbly."

18. I hand-carried the samples collected at the Encanto site by the San Diego Air pollution Control District to the Bay Area where an NVLAP-accredited Lab analyzed the samples. In so doing, I took care to keep record of the chain of custody. The lab found the samples from the Encanto site to contain friable asbestos, ranging from 8 – 11 % in the waste debris. One debris sample taken by a stockpile of pipe contained 57% friable asbestos.

19. I saw numerous work practice violations at the Encanto site. Once Sempra and IT Corporation ground the wrap from the pipe, it became regulated and had to be treated in accordance with NESHAP. This was not done. I saw numerous examples of dry, friable asbestos laying on the ground or otherwise uncontained. I told Sempra and IT Corporation that they had rendered the ACM regulated, and that it had to be handled in accordance with NESHAP – which required that the RACM be contained adequately wet, labeled, and sealed until proper disposal.

20. In my opinion, the pipe wrap constitutes Category I ACM. However, even if the pipe wrap is Category II ACM, the process by which it was removed pulverized the material and ground it into powder. Whether the ACM was Category I or Category II does not matter, as either way the ACM was pulverized and ground into powder by the rotating blade cutter Sempra used to grind the wrap off the pipe.

21. I did not issue a Notice of Violation to Sempra or IT Corporation for the Encanto site. This is because authority to enforce the NESHAP has been delegated to the San Diego APCD, and I know Mr. Cooksey properly arranged to issue NOVs.

22. Since my inspection at the Encanto site, I have used examples of the debris collected after being ground off the pipe by the rotating blade cutter in training workshops in Region 9. I am not aware of any regulator or consultant that has had any doubt that this debris was rendered RACM after being ground off the pipe at Encanto.

23. I am very surprised that Sempra or IT Corporation would claim that the pipe wrap did not become regulated when it was ground off the pipe by the rotating blade machine. The EPA has long held the position that when this material is removed in a manner that changes it to powder, or grinds it up, all the ACM becomes regulated. The EPA's rule on this is well known in the industry, and is something I have consistently taught in my workshops and classes. I cannot understand why Sempra chose to grind this pipe wrap off the pipe, since by doing so they rendered all of the ACM regulated – as I told Sempra and IT Corporation at Encanto on January 23, 2001.

24. Sempra moved the pipe from Encanto to Bakersfield in the spring of 2001 to continue the removal of the pipe wrap in Bakersfield. I inspected those operations in April of 2001, and observed that the same rotating blade-cutting machine was being used. The San Joaquin Valley Air Pollution Control District carefully observed the pipe wrap abatement project to make sure that there were no additional work practice violations to those committed in Encanto. When I inspected the site, I confirmed that use of the rotating blade cutter was rendering the pipe wrap into friable asbestos.

25. The work practice violations I observed by Sempra and IT Corporation at the Encanto site are the worst I have seen in my experience with Asbestos removal. By this I mean it was the worst in terms of amount of friable asbestos released into the atmosphere and the knowledge of the consultants and employees who allowed the removal to occur. It is clear to me that if the consultants for Sempra and IT Corporation or their employees were trained regarding asbestos abatement techniques, they would have known that use of this rotating blade cutter would make the pipe wrap regulated.

Dated: November 19, 2003

Robert S. Trotter

600 [redacted] roadway, Suite 1800
San Diego, California 92101-3375
Tel: (619) 236-1234 Fax: (619) 696-7419
www.lw.com

LATHAM & WATKINS LLP

FIRM / AFFILIATE OFFICES

Boston	New York
Brussels	Northern Virginia
Chicago	Orange County
Frankfurt	Paris
Hamburg	San Diego
Hong Kong	San Francisco
London	Shanghai
Los Angeles	Silicon Valley
Milan	Singapore
Moscow	Tokyo
New Jersey	Washington, D.C.

File No. 026877-21

June 17, 2005

VIA FACSIMILE (415) 947-3591

U.S. EPA Region 9
Attention: Ms. Ivry Johnson, FOIA Officer
75 Hawthorne Street
San Francisco, California 94105

Re: Freedom of Information Act Request

Dear Ms. Johnson:

Pursuant to the provisions of the Freedom of Information Act, 5 U.S.C. § 552 and the regulations promulgated thereunder, we respectfully request copies of the following records in the EPA's possession, custody or control covering the years 2000 through 2005:

(1) All of EPA Chief Enforcement Officer and Asbestos NESHAP Coordinator Robert Trotter's documents, records, reports, files, e-mails and notes related to alleged asbestos and asbestos containing materials at the "Encanto Site," located at 1350 San Altos Place, Lemon Grove, California (County of San Diego), including but not limited to, communications with the San Diego County Department of Environmental Health ("DEH"), the County of San Diego, the San Diego District Attorney's Office, the San Diego Air Pollution Control District ("APCD") and the California Air Resources Board ("CARB").

(2) All of EPA Chief Enforcement Officer and Asbestos NESHAP Coordinator Robert Trotter's documents, records, reports, files, e-mails and notes related to NESHAP inspections on or about January 23, 2001 at the "Encanto Site" located at 1350 San Altos Place, Lemon Grove, California (County of San Diego), including but not limited to, communications with the San Diego County DEH, the County of San Diego, the San Diego District Attorney's Office, the San Diego APCD and CARB.

I would appreciate your communicating with me by telephone, rather than by mail, if you have questions regarding this request. I can be reached at (619) 236-1234. I can also be reached via e-mail at robert.howard@lw.com.

We look forward to your reply within ten (10) days (excluding Saturdays, Sundays, and legal holidays), as the statute requires. We understand that in order to fulfill this request there may be fees associated with duplication and research. Please contact me to make arrangements for payment, or if these costs will exceed $200.00. Thank you in advance for your assistance.

Very truly yours,

Robert Howard
of LATHAM & WATKINS

TRANSMISSION REPORT

(FRI) JUN 17 2005 15:43
LATHAM & WATKINS LLP

DOCUMENT #	TIME STORED	TIME SENT	DURATION	PAGE(S)	MODE	RESULT
4861460-609	6. 17 15:41	6. 17 15:41	45"	3	ECM	OK

DESTINATION	DST. TEL #
#083614159473591	#083614159473591

LATHAM & WATKINS LLP

600 West Broadway, Suite 1800
San Diego, California 92101-3375

Telephone: (619) 236-1234
Facsimile: (619) 696-7419

www.lw.com

FACSIMILE TRANSMISSION

To: Ms. Ivry Johnson, PO a officer

Fax: (415) 947-3591 **Tel:**

From: Robert Howard **Tel:**

User No: 01492 **Client No:** 026877-0021

No. of Pages: (Including Cover) 3 **Date:** 06/17/05

Message:

Exhibit 2
Page 12

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

AUG 31 2005

Robert Howard, Esquire
Latham & Watkins
600 West Broadway, Suite 1800
San Diego, CA 92101

Re: Freedom of Information Act Request 09-RIN-00431-05

Dear Mr. Howard:

This is in response to your Freedom of Information Act ("FOIA") request dated June 17, 2005, in which you requested all documents held by EPA Region IX Asbestos NESHAP Coordinator Robert Trotter involving the "Encanto Site."

Please find enclosed copies of some of the documents that are responsive to your request. An itemized invoice covering the charges for processing your request is enclosed.

We are unable to provide you with some of the requested documents because they are exempt from mandatory disclosure under 5 U.S.C. §§552(b) (5) and (7)(A), which pertain to certain inter- and intra-agency communications protected by the deliberative process privilege; and records or information compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement proceedings, respectively. An itemized list of the withheld material by categories along with the basis for withholding is provided as an enclosure to this letter.

Under the FOIA, you have the right to appeal this partial denial of your request to EPA, Office of Environmental Information, Records, Privacy, and FOIA Branch (2822T), 1200 Pennsylvania Avenue, N.W.,Washington, DC 20460. The appeal must be made in writing, and it must be received at this address no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30-day limit. The appeal may include as much or as little related information as you wish, as long as it clearly identifies the determination being appealed (including the assigned FOIA request number - 09-RIN-00431-05). For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

Please contact Duane James, Air Enforcement Chief at (415) 972-3988, if you have any questions concerning this matter.

Sincerely,

Deborah Jordan
Director, Air Division

Enclosures

Exhibit 3
Page 13

LIST OF WITHHELD DOCUMENTS- FOIA REQUEST 09-RIN-00431-05

The following documents have been withheld under 5 U.S.C. §552(b)(5), which pertains to certain inter- and intra-agency communications protected by the deliberative process privilege:

1. Memorandum from Bob Trotter, EPA Region IX Asbestos NESHAP Coordinator to Jim Cooksey, San Diego Air Pollution Control District dated February 7, 2001 re: Violations of the Asbestos NESHAP with attachments

2. Email from Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator to Laurie Orange, San Diego County Senior Deputy County Counsel dated March 1, 2004 re: Sempra with attachment

3. Email from Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator to Laurie J. Orange, San Diego County Senior Deputy County Counsel dated February 25, 2004 re: Sempra Letter

4. Email from Laurie Orange, San Diego County Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator dated February 25, 2004 re: Sempra

5. Email from Laurie Orange, San Diego County Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator dated November 24, 2003 re: Trotter Statement

6. Email from Laurie Orange, San Diego County Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator dated November 20, 2003 re: Trotter Statement

7. Email from Laurie Orange, San Diego County Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator dated November 17, 2003 re: Sempra with attachment

8. Email from Laurie Orange, San Diego County Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator dated October 23, 2003 re: Trotter Statement with attachment

The following documents have been withheld under 5 U.S.C. §552(b) (7)(A), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement proceedings:

1. Letter from Laurie Orange, San Diego County Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator dated August 5, 2002 re: Sempra Energy and IT Group with attachments

2. Facsimile of Interview Notes taken by San Diego County District Attorney Investigator Tom Basinski from Laurie Orange, San Diego County Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator dated July 29, 2003 re: Sempra

The following document has been withheld under 5 U.S.C. §§552(b)(5) and (7)(A), which pertain to certain inter- and intra-agency communications protected by the deliberative process privilege; and records or information compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement proceedings, respectively:

1. Interview Notes from Interview of Bob Trotter, EPA Region IX Asbestos NESHAP Coordinator dated July 29, 2002 taken by San Diego County District Attorney Investigator Tom Basinski

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region IX
75 Hawthorne Street (OPPA-2)
San Francisco, CA 94105

June 21, 2005

Mr. Robert Howard
Latham & Watkins
600 West Broadway
Suite 1800
San Diego, CA, 92101

Freedom of Information Act (FOIA), 5 U.S.C. 552
Request #: 09-RIN-00431-05

Dear Mr. Howard:

Thank you for your FOIA request dated June 17, 2005 and received in this office on June 21, 2005, for records related to:

> Encanto Site, 1350 San Altos, Place, Lemon Grove, CA (Robert Trotter's [Asbestos NESHAP Coordinator] documents covering years 2000 AIR - 2005.

The Agency has twenty (20) working days to respond to your request, except when you have agreed to an alternate due date or unusual circumstances exist that would require an extension of time under 5 U.S.C. 552 (a) (6) (B).

We hope to respond to you soon. In the interim, please contact us if you have any questions about your request. Please cite your FOIA request number in all communications.

Sincerely,

Ivry Johnson

Ivry Johnson
Freedom of Information Officer
Office of Planning & Public Affairs
(415) 947-4251
(415) 947-3591 Fax

-----Original Message-----
From: Wilder.Ceciley@epamail.epa.gov [mailto:Wilder.Ceciley@epamail.epa.gov]
Sent: Thursday, July 28, 2005 9:21 AM
To: Howard, Robert (SD)
Subject: 2nd Extension on Freedom of Information Act Request

Information you requested has been compiled, Unfortunately, it is going to take approximately another several weeks to be distributed. We expect to mail out your response by August 15, 2005. Thank you.

Ceciley Wilder, Air Division
US EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105
(415) 947-4143 PHONE
(415) 947-3581 FAX

-----Original Message-----
From: Wilder.Ceciley@epamail.epa.gov [mailto:Wilder.Ceciley@epamail.epa.gov]
Sent: Wednesday, August 10, 2005 4:44 PM
To: Howard, Robert (SD)
Subject: 3rd Extension Request

Mr. Howard: The information you requested has been gathered. It is currently being reviewed for distribution. We expect to finish the review by September 15. Thank you.

Ceciley Wilder, Air Division
US EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105
(415) 947-4143 PHONE
(415) 947-3581 FAX

600 Broadway, Suite 1800
San Diego, California 92101-3375
Tel: (619) 236-1234 Fax: (619) 696-7419
www.lw.com

LATHAM & WATKINS LLP

FIRM / AFFILIATE OFFICES

Boston	New York
Brussels	Northern Virginia
Chicago	Orange County
Frankfurt	Paris
Hamburg	San Diego
Hong Kong	San Francisco
London	Shanghai
Los Angeles	Silicon Valley
Milan	Singapore
Moscow	Tokyo
New Jersey	Washington, D.C.

File No. 026877-0024

September 16, 2005

VIA CERTIFIED MAIL; RETURN RECEIPT REQUESTED

U.S. Environmental Protection Agency
Office of Environmental Information, Records,
Privacy and FOIA Branch (2822T)
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Administrative Appeal from Denial of Freedom of Information Act Request "Encanto Site," 1350 San Altos Place, Lemon Grove, California (County of San Diego), Case No. 09-RIN-00431-05

Dear Sir or Madam:

This is an appeal made under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(6), from a partial denial of information requested from the U.S. Environmental Protection Agency ("EPA") by Latham & Watkins on June 17, 2005. A copy of the June 17, 2005 FOIA request is attached hereto as Exhibit 1. The FOIA request was denied, in part, by Deborah Jordan, Director of the EPA's Air Division for Region IX on August 31, 2005, after three requests for an extension to respond to the FOIA request. A copy of the denial letter and the EPA's requests for extension are attached hereto as Exhibits 2 and 3, respectively. Pursuant to 40 C.F.R., § 2.104(j), this protest is timely filed within 30 calendar days from the date of EPA's denial letter.

After multiple requests for extensions, EPA provided one set of exhibits that were already in our possession and withheld eleven documents on the grounds that the materials were exempt from production under the deliberative process and law enforcement exceptions to FOIA's disclosure requirements. As set forth below, the identified documents clearly do not fall within the scope of the limited exemptions to FOIA's general policy favoring full disclosure. With respect to the deliberative process privilege, it is completely inapposite as EPA is unable to point to any EPA policy-related judgment in the withheld documents giving rise to the privilege. Similarly, there is no EPA enforcement proceeding, pending or prospective, that might give rise to the law enforcement exemption. Indeed, EPA is invoking the privilege to withhold two documents that were prepared by a state investigator where the applicable statute of limitations has expired. Even if there were an enforcement action, EPA has not met its burden of establishing that the release of the requested information will result in any distinct harm. We

therefore respectfully ask that EPA comply with its obligations and disclose the information requested. To the extent any information must be redacted, EPA should produce the remainder non-exempt portions.

I. Factual Background

A. Nature of FOIA Request

Latham & Watkins submitted a request for a limited set of records from 2000-2005 relating generally to asbestos abatement activities that occurred in 2000 and 2001 at a former natural gas holder facility located at 1350 San Altos Place, Lemon Grove, California (County of San Diego), referred to as the "Encanto Site." Specifically, Latham & Watkins requested the following information:

> (1) All of EPA Chief Enforcement Officer and Asbestos NESHAP Coordinator Robert Trotter's documents, records, reports, files, e-mails and notes related to alleged asbestos and asbestos containing materials at the "Encanto Site". . ., including but not limited to, communications with the San Diego County Department of Environmental Health ("DEH"), the County of San Diego, the San Diego District Attorney's Office, the San Diego Air Pollution Control District ("APCD") and the California Air Resources Board ("CARB").
>
> (2) All of EPA Chief Enforcement Officer and Asbestos NESHAP Coordinator Robert Trotter's documents, records, reports, files, e-mails and notes related to NESHAP inspections on or about January 23, 2001 at the "Encanto Site". . ., including but not limited to, communications with the San Diego County DEH, the County of San Diego, the San Diego District Attorney's Office, the San Diego APCD and CARB.

EPA was asked by the APCD to inspect the Site to make a determination regarding the nature of material that coated approximately 9.23 miles of steel pipes at the property, and the mechanical method that was used to remove some of the coating. The pipes were coated with a multi-layered anti-corrosive material, one layer of which contained asbestos-containing material embedded within coal tar. EPA Chief Enforcement Officer and Asbestos NESHAP Coordinator Robert Trotter inspected the Site along with APCD and a representative from CARB on January 23, 2001. Mr. Trotter determined that the pipe wrap material was nonfriable while intact on the pipes, but that the mechanical abatement of the material rendered it friable. All operations using the mechanical rotary abatement machine had ceased as of January 17, 2001, and the material was treated as if regulated asbestos-containing material immediately following the joint inspection on January 23, 2001.

EPA never took any enforcement action following the January 23, 2001 inspection. The County of San Diego, however, sent a letter to San Diego Gas & Electric Co. ("SDG&E") and

Sempra Energy ("Sempra") demanding $1.5 million in civil penalties for alleged violations of the asbestos National Emission Standards for Hazardous Air Pollutants ("NESHAP"). During settlement negotiations, the County provided a written statement from Mr. Trotter on December 2, 2003 in which Mr. Trotter alleged that "[t]he work practice violations [he] observed by Sempra and IT Corporation at the Encanto site are the worst [he has] seen in [his] experience with Asbestos removal."[1] A copy of Mr. Trotter's statement is attached as Exhibit 4. Latham & Watkins, like all members of the public, is entitled to know the basis for Mr. Trotter's statement that the alleged asbestos violations were the worst Mr. Trotter has seen in his 20 years of experience with EPA.

As discussed in detail below, there is no basis for EPA to withhold the requested information under well-established judicial precedent favoring disclosure under FOIA.

B. EPA's Partial Denial of June 17, 2005 FOIA Request

By letter dated August 31, 2005, EPA Region IX refused to disclose eleven documents responsive to Latham & Watkins' FOIA request.[2] EPA invoked 5 U.S.C. § 552 exemptions (b)(5) (deliberative process privilege) and (b)(7)(A) (records compiled for law enforcement purposes) as grounds for refusing to release the requested documents.

Categories of documents withheld on the basis of a deliberative process privilege consist of (1) a memorandum written by Mr. Trotter to San Diego Asbestos NESHAP Coordinator Jim Cooksey on February 7, 2001 (approximately 2 weeks after the joint inspection at the Encanto Site); (2) correspondence in October and November 2003 between Mr. Trotter and County Counsel Laurie Orange, apparently in connection with the preparation of Mr. Trotter's 2003 statement; and (3) correspondence between Mr. Trotter and County Counsel Laurie Orange in February and March 2004.

Documents withheld on the ground that they were prepared for law enforcement purposes include (1) a letter from County Counsel Laurie Orange to Mr. Trotter dated August 5, 2003 (i.e., before the County sent its $1.5 million demand letter on August 25, 2003); and (2) interview notes taken by San Diego County District Attorney Investigator Tom Basinki, which County Counsel Laurie Orange sent via facsimile to Mr. Trotter. The District Attorney's Office investigated the abatement operations and decided not to take any action, and the statute of limitations for any claims the office could have asserted has long-since expired.

One document was withheld on the ground that it was protected by the deliberative process privilege and that it was compiled for law enforcement purposes: interview notes from

---

1 IT Corporation was the contractor for the asbestos abatement project.

2 EPA produced a compilation of 40 exhibits that the County of San Diego had previously provided to Latham & Watkins during the course of settlement negotiations. See "Documents in Support of County of San Diego Air Pollution control District and Department of Environmental Health Letter Dated December 2, 2003." Mr. Trotter's statement is included as Exhibit 36 of the County exhibits.

San Diego County District Attorney Investigator Tom Basinki's interview of Mr. Trotter on July 29, 2002.

II. Argument

A. Sweeping and Generalized Claims of Exemption Are an Inadequate Basis for Nondisclosure

It is well-established that sweeping and conclusory invocations of FOIA exemptions are an inadequate basis for an agency's refusal to disclose documents. See, e.g., EPA v. Mink, 410 U.S. 73, 93 (1973) (an agency should provide "detailed affidavits or oral testimony to establish . . . that the documents sought fall clearly beyond the range of material [subject to disclosure]"), superseded on other grounds by statute; Scheer v. Department of Justice, 35 F. Supp. 2d 9, 13 (D.C. Cir. 1999) (agencies cannot justify their burden of showing that a FOIA exemption applies to withhold documents by being "conclusory or vague").

The mandate that agencies provide a detailed justification when claiming an exemption under FOIA derives from: (i) the basic policy favoring disclosure and a narrow construction of exemptions under FOIA (see United States v. Julian, 486 U.S. 1, 8 (1987); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220 (1978)); (ii) the burden placed by FOIA on the agency to justify the applicability of an exemption (see United States Dep't of State v. Ray, 502 U.S. 164, 173 (1991)); and (iii) the comparative difficulty of controverting an agency's characterization when only the agency has detailed knowledge of the nature of the documents in question. See Vaughn v. Rosen, 484 F.2d 820, 823-26 (D.C. Cir. 1973); see also Arthur Andersen & Co. v. IRS, 679 F.2d 254, 258 (D.C. Cir. 1982).

The basic procedures by which an adequate showing of exemption must be made by an agency were first defined in Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). The Court held that an agency must justify withholding documents through specific explanations such that an exhaustive in camera review of each document is not required. Vaughn, 484 F.2d at 825-27. Although a so-called Vaughn index is not always required, agencies are required to provide particularized and specific information to meet their burden of exempting documents from disclosure. See, e.g., Keys v. Department of Justice, 830 F.2d 337, 349 (D.C. Cir. 1987) ("[I]t is the function, not the form, of the index that is important."); Brinton v. Department of State, 636 F.2d 600, 606 (D.C. Cir. 1980) (affirming withholding where agency "affidavits made a detailed showing of the applicability" of the claimed exemption); Cuneo v. Schlesinger, 484 F.2d 1086, 1092 (D.C. Cir. 1973) (requiring government to "provide particularized and specific justification for exempting information from disclosure"). The agency must specifically identify the reasons why a particular exemption is relevant and correlate those claims with the particular documents or category of documents to enable a reasoned determination of the validity of the claimed exemption. Mead Data Central, Inc. v. Department of Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977). See also Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 861 (D.C. Cir. 1980) (stating that "conclusory assertions of privilege will not suffice to carry the Government's burden of proof" when withholding documents, and finding information provided by agency inadequate where agency merely identified "who wrote the memorandum, to whom it

was addressed, its date, and a brief description of the memorandum"); Parke, Davis & Co. v. Califano, 623 F.2d 1, 6 (6th Cir. 1980).

In this case, EPA has failed to provide a detailed justification for any of the exemptions relied upon, nor have the exemptions been correlated with the specific documents or categories of documents identified as within the scope of Latham & Watkins' June 17 FOIA request. EPA merely described the documents withheld by listing dates, authors and recipients, and then making a blanket assertion that the listed documents were exempt from disclosure under the identified exemptions. EPA provided no further detail to justify abrogating the general policy in favor of disclosing information to the public. Thus, EPA clearly has failed to meet its burden of justifying the claimed exemptions and has not provided sufficient detail to enable an independent and reasoned determination of the adequacy of its claims. Based on the limited information that was provided, it appears that EPA has not complied with its obligations under FOIA, or even with its own internal guidelines which require the agency "to make the fullest possible disclosure of information . . . to any requester." EPA Freedom of Information Act Manual, 1550 (May 4, 1992) (located at http://www.epa.gov/foia/docs/foiamanual.pdf) at 1-1 (hereinafter, "FOIA Manual").

B. Based on the Limited Information Provided, the Exemptions Invoked by EPA Do Not Apply

The lack of adequate justification provided by EPA in this case impedes our ability to respond to the denial on a document-by-document basis. Despite this fact and recognizing that the burden of justification lies with EPA and not with a party submitting a FOIA request, the claimed exemptions do not appear to apply to any of the documents identified as within the scope of Latham & Watkins' request.

1. Deliberative Process Privilege -- Exemption (b)(5)

The deliberative process privilege applies in limited cases to protect communications regarding agency policy-making functions and the exercise of policy-oriented judgment. Greenpeace v. National Marine Fisheries Service, 198 F.R.D. 540, 543 (D. Utah 2001) (privilege only extends to information that "must actually be related to the process by which policies are formulated"); Hopkins v. Department of Housing & Urban Development, 929 F.2d 81, 84 (2d Cir. 1991) (a document is "deliberative" if it is "actually . . . related to the process by which policies are formulated") (internal quotations and citation omitted). It does not apply to the type of information EPA has refused to disclose here, i.e., notes from a site inspection that occurred nearly five years ago. Information relating to EPA's inspection of the Encanto Site does not implicate any policy-making process by EPA in any way, and the privilege therefore is inapposite.

FOIA Exemption (b)(5) allows agencies to withhold from disclosure "inter-agency or intra-agency memorandums or letters" which fall under certain enumerated privileges, including the deliberative process privilege upon which EPA relies to justify withholding documents in this case. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). The deliberative process privilege is narrowly construed. Redland Soccer Club v. Department of Army, 55 F.3d 827, 856

(3d Cir. 1995); Mobil Oil Corp. v. Department of Energy, 102 F.R.D. 1, 5 (N.D.N.Y. 1983). EPA relies on this privilege to withhold a total of nine documents (one of which is also withheld under Exemption (b)(7)(A)).

As an initial matter, EPA has failed to show that the documents it withheld even qualify as "inter-agency or intra-agency" records as defined under the FOIA Manual. "Inter-agency" records include "only those transmitted between Federal agencies, but generally not those transmitted between Federal and State agencies," like the documents withheld in this case. FOIA Manual, at 7-4. The documents here were not exchanged between two federal agencies. Instead, EPA is withholding:

- Seven documents between EPA and San Diego County Counsel Laurie Orange;
- One document between EPA and San Diego APCD NESHAP Coordinator Jimmie Cooksey; and
- One document that contains notes taken by an investigator in the San Diego District Attorney's office who interviewed Mr. Trotter.[3]

Similarly, none of the documents appears to fall within the scope of records considered to be "intra-agency" records. EPA's FOIA Manual provides that "[r]ecommendations from State officials to EPA may be considered intra-agency records" only in "*limited* circumstances when EPA has solicited State comments, has a formal relationship with the State, and *the records concern a specific deliberative process*." FOIA Manual, at 7-4 (emphasis added). Again, the records withheld here do not appear to fall within this limited category of exempt records. EPA has not even attempted to point to any specific deliberative process to which the withheld documents relate, nor to any process for which EPA has solicited state comment. For example, a memorandum sent from Mr. Trotter to Mr. Cooksey regarding alleged "violations of the asbestos NESHAP" at the Encanto Site along with attachments, on its face fails to qualify as a record concerning a specific deliberative process of EPA's.

An agency relying on the deliberative process privilege must demonstrate that the withheld document is both "predecisional" and "deliberative," "meaning it must actually be related to the process by which policies are formulated." Greenpeace, 198 F.R.D. at 543 (D. Utah 2001). See also Hopkins, 929 F.2d at 84. Applying this requirement, courts have held that the deliberative process privilege protects "*only* those materials that bear on the formulation or exercise of agency *policy-oriented judgment*." Greenpeace, 198 F.R.D. at 543 (emphasis added). Accordingly, "when material could not reasonably be said to reveal an agency's or official's mode of formulating or exercising *policy-implicating judgment*, the deliberative process privilege is inapplicable." Petroleum Information Corp. v. Department of Interior, 976 F.2d 1429, 1435 (D.C. Cir. 1992) (emphasis added). Further, the privilege does not protect "a document which is merely peripheral to actual policy formation." Grand Central Partnership,

---

3 This document is also being withheld pursuant to Exemption (b)(7)(A), documents prepared for law enforcement purposes.

Inc. v. Cuomo, 166 F.3d 473, 482 (2d Cir. 1999) (quoting Ethyl Corp. v. USEPA, 25 F.3d 1241, 1248 (4th Cir. 1994)).

As with all exemptions, EPA has the burden of demonstrating that the deliberative process privilege applies to exempt the withheld documents from disclosure. Greenpeace, 198 F.R.D. at 543. EPA must also establish "what deliberative process is involved, and the role played by the documents in issue in the course of that process." Coastal States Gas Corp., 617 F.2d at 868 (citations omitted); Hinckley v. United States, 140 F.3d 277, 284 (D.C. Cir. 1998) (same). See also Cobell v. Norton, 213 F.R.D. 1, 5 (D.C. Cir. 2003) ("It is not enough to show that the information was conveyed during the deliberative process; instead, the statement or document must have been a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.") (internal quotations and citations omitted).

EPA cannot demonstrate that the documents it withheld in this case have anything to do with any governmental policy-making decision. The documents appear to relate to observations and determinations made in connection with Mr. Trotter's inspection of the Encanto Site in January 2001 and subsequent communications with APCD and the County Counsel's office on these issues, not any discretionary governmental policy-making. Accordingly, the "deliberative process" privilege cannot be used to prevent disclosure in this case. See, e.g., Women's InterArt Center, Inc. v. N.Y.C. Economic Dev., 223 F.R.D. 156, 161 (S.D.N.Y. 2004) (deliberative process privilege could not be invoked to withhold documents which addressed various contractual and property disputes which "do not evidence any policy-oriented discussion"); Greenpeace, 198 F.RD. at 544-45 (requiring agency to disclose information relating to determination of jeopardy and adverse modification under the Endangered Species Act because "the process as a whole is not 'deliberative' within the meaning of the privilege" where it involved "objective fact-based scientific conclusions" rather than "discretionary policy-making"); Petroleum Information Corp., 976 F.2d at 1437 (material not associated with significant policy decision was not "deliberative").

Given Mr. Trotter's role as the NESHAP Coordinator for EPA Region IX, and the fact that local regulators requested his opinion after they were unable to make a consistent determination regarding the abatement operations, the documents that have been withheld are more analogous to expressions of scientific opinion, unrelated to the formulation of agency policy, and are therefore not exempt from disclosure. See, e.g., Seafirst Corp. v. Jenkins, 644 F. Supp. 1160, 1163 (W.D. Wash. 1986) (expressions of expert opinion and interpretation of fact unrelated to policy-oriented process not protected); Parke, Davis & Co., 623 F.2d at 6 (expert opinions of agency scientists and medical personnel applying FDA regulations were unconnected to deliberative process of decision or policy making of agency and not protected); Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Baltimore, 508 F.2d 945, 948-49 (4th Cir. 1974) (under FOIA, conclusion of investigator as to cause of accident not protected).

The documents also likely contain purely factual information, which cannot be withheld pursuant to the deliberative process privilege unless it is inextricably intertwined with deliberative information. See, e.g., EPA v. Mink, 410 U.S. at 89 (deliberative process privilege does not extend to "purely factual, investigative matters"); City of Virginia Beach v. Department

of Commerce, 995 F.2d 1247, 1253 (4th Cir. 1993) (factual material need not be disclosed if "it is inextricably intertwined with policymaking processes such that revelation of the factual material would simultaneously expose protected deliberation") (internal quotations and citation omitted); Petroleum Information Corp., 976 F.2d at 1437-38 (government file which "reorganize[d] and repackage[d]" a mass of factual information and "lack[ed] association with a significant policy decision" not subject to privilege); Playboy Enterprises, Inc. v. Department of Justice, 677 F.2d 931, 935 (D.C. Cir. 1982) (factual report not within privilege because compilers' mission was simply "to investigate the facts" and because the report was not "intertwined with the policy-making process"; "a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material"); Coastal States Gas Corp., 617 F.2d at 869 (resting conclusion that documents were not within Exemption 5 in part on ground that the documents did not "discuss the wisdom or merits of a particular agency policy, or recommend new agency policy"). Here, where there is no deliberative process as a threshold matter, the entire documents must be produced.

2. Records Compiled for Law Enforcement Purposes -- Exemption 7(A)

Exemption (7)(A) exempts from disclosure records or information compiled for law enforcement purposes but only to the extent such disclosure "could reasonably be expected to interfere with enforcement proceedings." Like other FOIA exemptions, it is to be "narrowly construed," and applies only when release of requested information "would produce the undesirable results specified." FBI v. Abramson, 456 U.S. 615, 630 (1982). In this instance, three documents are being withheld under Exemption (b)(7)(A) (one was withheld in combination with Exemption (b)(5)).

Exemption 7(A) applies where the agency can meet a two-part test. First, as a threshold matter, the agency must establish that a law enforcement proceeding is pending or prospective. Second, the agency must show that some distinct harm is likely to result if the record or information requested is disclosed. Crooker v. Bureau of Alcohol, Tobacco & Firearms, 789 F.2d 64, 65-67 (D.C. Cir. 1986).

In order to justify a decision to withhold information, the agency must establish, by more than conclusory allegations, how particular kinds of records requested would interfere with a pending enforcement proceeding. See, e.g., Scheer, 35 F. Supp. 2d at 13 ("The government may not . . . be conclusory or vague in stating how the release of the information would interfere with the prospective law enforcement proceeding."). An agency cannot prevail by simply assigning a protective label to information it wishes to withhold. For example, in Bristol Myers Co. v. Federal Trade Commission, 424 F.2d 935, 939-40 (D.C. Cir. 1970), the court, commenting upon the 5 U.S.C. § 552(b)(7) exemption, stated:

> [T]he agency cannot, consistent with the broad disclosure mandate of the Act, protect all its files with the label "investigatory" and a suggestion that enforcement proceedings may be launched at some unspecified future date. Thus, the District Court must determine whether the prospect of enforcement proceedings is concrete

> enough to bring into operation the exemption for investigatory files, and if so whether the particular documents sought by the company are nevertheless discoverable.

This principle has been specifically recognized by EPA in its FOIA Manual. As set forth in the manual, "Exemption 7(A) can be invoked *only as long as the enforcement proceeding is in progress, pending or anticipated.*" FOIA Manual, at 7-12 (emphasis added). Further, EPA "must be able to *specifically articulate* the kind of harm that would affect its case." Id. (emphasis added).

In the present case, EPA cannot even make the threshold showing to justify withholding documents under Exemption 7(A). EPA does not have a current action pending, nor a concrete expectation of any prospective action, as admitted by Mr. Trotter. See Exhibit 4, ¶ 21 ("I did not issue a Notice of Violation to Sempra or IT Corporation for the Encanto site. This is because authority to enforce the NESHAP has been delegated to the San Diego APCD, and I know Mr. Cooksey properly arranged to issue NOVs."). The asbestos abatement operations at the Encanto Site took place five years ago, and the statute of limitations has run on any claims EPA may have asserted even if it had planned to initiate an enforcement action. Because there is no ongoing action, EPA cannot rely on Exemption 7(A) to continue to withhold the requested information. See, e.g., Center for Auto Safety v. Department of Justice, 576 F. Supp. 739, 751-53 (D.C. Cir. 1983) (documents not protected where agency "ha[d] not met its burden of showing that the documents were collected or are being used in an ongoing investigation"); Philadelphia Newspapers, Inc. v. Department of Health & Human Services, 69 F. Supp. 2d 63, 67 (D.C. Cir. 1999) ("Because the documents at issue in this case cannot reasonably be expected to interfere with law enforcement proceedings in an ongoing case, they may not be withheld under Exemption 7(A).").

Even if EPA could overcome the hurdle of pointing to a pending or prospective law enforcement action (which it cannot do), EPA would still need to meet its burden of showing some distinct harm that would result if the information requested is disclosed. EPA has not even attempted to justify its actions by pointing to any specific harm occasioned by producing information responsive to the June 17 FOIA request. Conclusory allegations contained in EPA's FOIA response that the release of the documents requested "could reasonably be expected to interfere with enforcement proceedings" are completely inadequate. Cuneo, 484 F.2d at 1092 ("justification [for nondisclosure] must not consist of 'conclusory and generalized allegations of exemptions'"). To the contrary, a claimed exemption must be supported by substantial justification and explanation of the basis for the claim. Vaughn, 484 F.2d at 826-28; Mead Data, 566 F.2d at 251 (agency must provide detailed justification, "specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply"). Because EPA has failed to describe with any specificity how disclosure of the documents in question would cause specific harm to a specific law enforcement proceeding, EPA has failed to meet its burden of proof and the documents therefore must be disclosed. See, e.g., Tri-Star Airlines, Inc. v. Willis Careen Corp. of Los Angeles, 75 F. Supp. 2d 835, 837, 840 (W.D. Tenn. 1999) (law enforcement privilege was inapplicable to documents requested from FBI where FBI had over one year to perform investigation and documents were important to requester's defense of a civil action in

California); Scheer, 35 F. Supp. 2d at 12-13 (reports were not exempt from disclosure where agency "failed to meet its burden of proving that the release of the requested information would have resulted in distinct harm to prospective enforcement proceedings").

C. EPA Must Disclose the Non-Exempt Portions of Any Properly Withheld Documents

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt...." 5 U.S.C. § 552(b). An agency cannot justify withholding an entire document simply by showing that it contains some exempt material; the non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions such that redacting exempt information would produce an edited document with little informational value. Willamette Industries, Inc. v. United States, 689 F.2d 865, 867-68 (9th Cir. 1982) (citations omitted). The burden is on the agency to show that a document is incapable of being segregated. See, e.g., United States Dep't of State v. Ray, 502 U.S. at 173 (the burden is on the agency to "justify the withholding of any requested documents" and "remains with the agency when it seeks to justify the redaction of identifying information in a particular document"). As noted above, this burden can be met only by providing a declaration that identifies the documents at issue and is sufficiently detailed to establish why the documents fall within a claimed exemption category. Armstrong v. Executive Office of the President, 97 F.3d 575, 578 (D.C. Cir. 1996) (affidavits show with "reasonable specificity" why documents cannot be further segregated). See also Olglesby v. Department of the Army, 79 F.3d 1172, 1180-81 (where agency withheld 9 out of 264 pages, affidavit merely averring that the withheld pages were "not segregable" held insufficient to warrant non-disclosure).

As set forth above, it is evident that neither the deliberative process privilege nor the law enforcement privilege applies at all in this case. The requested records must be produced. Even if the exemptions are found to apply in part, they likely do not apply to all of the documents withheld or to all portions of the documents withheld. Accordingly, EPA must demonstrate it is entitled to exclude or redact exempt portions of records, and must produce non-exempt portions.

III. Conclusion

EPA has failed to establish an adequate basis for withholding the requested documents. Further, EPA has made no attempt to release those documents which, after redaction of allegedly protected information, could be released without compromising such information. For these reasons, Latham & Watkins requests that EPA reverse its denial and disclose all documents within the scope of the June 17 FOIA request. If any documents or portions of documents continue to be withheld, Latham & Watkins requests an index or similar statement of the scope of the material withheld and a citation to the specific FOIA exemption section upon which the nondisclosure is based *with an adequate explanation for why the exemption is applicable.* A reply is requested within 20 working days as prescribed under 5 U.S.C. § 552(a)(6)(A)(ii) and 40 C.F.R. § 2.104(a).

LATHAM & WATKINS LLP

Please notify me of the appeals determination at the following address:

Patricia Guerrero
Latham & Watkins LLP
600 West Broadway, Suite 1800
San Diego, CA 92101

Please do not hesitate to contact me at (619) 236-1234 if you have any questions. Thank you for your consideration of this appeal.

Very truly yours,

Patricia Guerrero
of LATHAM & WATKINS LLP

Enclosures

cc: Robert M. Howard
Gregory A. Vega, Esq.
David A. Barrett, Esq.

EXHIBIT 1

600 W. Broadway, Suite 1800
San Diego, California 92101-3375
Tel: (619) 236-1234 Fax: (619) 696-7419
www.lw.com

LATHAM & WATKINS LLP

FIRM / AFFILIATE OFFICES

Boston	New York
Brussels	Northern Virginia
Chicago	Orange County
Frankfurt	Paris
Hamburg	San Diego
Hong Kong	San Francisco
London	Shanghai
Los Angeles	Silicon Valley
Milan	Singapore
Moscow	Tokyo
New Jersey	Washington, D.C.

File No. 026877-21

June 17, 2005

VIA FACSIMILE (415) 947-3591

U.S. EPA Region 9
Attention: Ms. Ivry Johnson, FOIA Officer
75 Hawthorne Street
San Francisco, California 94105

Re: Freedom of Information Act Request

Dear Ms. Johnson:

Pursuant to the provisions of the Freedom of Information Act, 5 U.S.C. § 552 and the regulations promulgated thereunder, we respectfully request copies of the following records in the EPA's possession, custody or control covering the years 2000 through 2005:

(1) All of EPA Chief Enforcement Officer and Asbestos NESHAP Coordinator Robert Trotter's documents, records, reports, files, e-mails and notes related to alleged asbestos and asbestos containing materials at the "Encanto Site," located at 1350 San Altos Place, Lemon Grove, California (County of San Diego), including but not limited to, communications with the San Diego County Department of Environmental Health ("DEH"), the County of San Diego, the San Diego District Attorney's Office, the San Diego Air Pollution Control District ("APCD") and the California Air Resources Board ("CARB").

(2) All of EPA Chief Enforcement Officer and Asbestos NESHAP Coordinator Robert Trotter's documents, records, reports, files, e-mails and notes related to NESHAP inspections on or about January 23, 2001 at the "Encanto Site" located at 1350 San Altos Place, Lemon Grove, California (County of San Diego), including but not limited to, communications with the San Diego County DEH, the County of San Diego, the San Diego District Attorney's Office, the San Diego APCD and CARB.

I would appreciate your communicating with me by telephone, rather than by mail, if you have questions regarding this request. I can be reached at (619) 236-1234. I can also be reached via e-mail at robert.howard@lw.com.

LATHAM & WATKINS LLP

We look forward to your reply within ten (10) days (excluding Saturdays, Sundays, and legal holidays), as the statute requires. We understand that in order to fulfill this request there may be fees associated with duplication and research. Please contact me to make arrangements for payment, or if these costs will exceed $200.00. Thank you in advance for your assistance.

Very truly yours,

Robert Howard
of LATHAM & WATKINS

TRANSMISSION REPORT

(FRI) JUN 17 2005 15:43
LATHAM & WATKINS LLP

DOCUMENT #	TIME STORED	TIME SENT	DURATION	PAGE(S)	MODE	RESULT
4861460-609	6.17 15:41	6.17 15:41	45"	3	ECM	OK

DESTINATION	DST. TEL #
#083614159473591	#083614159473591

LATHAM&WAT

600 West Broadway, Suite 1800
San Diego, California 92101-3375

Telephone: (619) 236-1234
Facsimile: (619) 696-7419

www.lw.com

FACSIMILE TRANSMISSION

To: Ms. Ivry Johnson, PO 3 officer

Fax: (415) 947-3591 **Tel:**

From: Robert Howard **Tel:**

User No: 01493 **Client No:** 026877-0021

No. of Pages: (Including Cover) 3 **Date:** 06/17/05

Message:

Exhibit 5
– Page 33

EXHIBIT 2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

AUG 31 2005

Robert Howard, Esquire
Latham & Watkins
600 West Broadway, Suite 1800
San Diego, CA 92101

Re: Freedom of Information Act Request 09-RIN-00431-05

Dear Mr. Howard:

This is in response to your Freedom of Information Act ("FOIA") request dated June 17, 2005, in which you requested all documents held by EPA Region IX Asbestos NESHAP Coordinator Robert Trotter involving the "Encanto Site."

Please find enclosed copies of some of the documents that are responsive to your request. An itemized invoice covering the charges for processing your request is enclosed.

We are unable to provide you with some of the requested documents because they are exempt from mandatory disclosure under 5 U.S.C. §§552(b) (5) and (7)(A), which pertain to certain inter- and intra-agency communications protected by the deliberative process privilege; and records or information compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement proceedings, respectively. An itemized list of the withheld material by categories along with the basis for withholding is provided as an enclosure to this letter.

Under the FOIA, you have the right to appeal this partial denial of your request to EPA, Office of Environmental Information, Records, Privacy, and FOIA Branch (2822T), 1200 Pennsylvania Avenue, N.W.,Washington, DC 20460. The appeal must be made in writing, and it must be received at this address no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30-day limit. The appeal may include as much or as little related information as you wish, as long as it clearly identifies the determination being appealed (including the assigned FOIA request number - 09-RIN-00431-05). For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

Please contact Duane James, Air Enforcement Chief at (415) 972-3988, if you have any questions concerning this matter.

Sincerely,

Deborah Jordan
Director, Air Division

Enclosures

Printed on Recycled Paper

LIST OF WITHHELD DOCUMENTS- FOIA REQUEST 09-RIN-00431-05

The following documents have been withheld under 5 U.S.C. §552(b)(5), which pertains to certain inter- and intra-agency communications protected by the deliberative process privilege:

1. Memorandum from Bob Trotter, EPA Region IX Asbestos NESHAP Coordinator to Jim Cooksey, San Diego Air Pollution Control District dated February 7, 2001 re: Violations of the Asbestos NESHAP with attachments

2. Email from Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator to Laurie Orange, San Diego County Senior Deputy County Counsel dated March 1, 2004 re: Sempra with attachment

3. Email from Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator to Laurie J. Orange, San Diego County Senior Deputy County Counsel dated February 25, 2004 re: Sempra Letter

4. Email from Laurie Orange, San Diego County Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator dated February 25, 2004 re: Sempra

5. Email from Laurie Orange, San Diego County Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator dated November 24, 2003 re: Trotter Statement

6. Email from Laurie Orange, San Diego County Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator dated November 20, 2003 re: Trotter Statement

7. Email from Laurie Orange, San Diego County Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator dated November 17, 2003 re: Sempra with attachment

8. Email from Laurie Orange, San Diego County Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator dated October 23, 2003 re: Trotter Statement with attachment

The following documents have been withheld under 5 U.S.C. §552(b) (7)(A), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement proceedings:

1. Letter from Laurie Orange, San Diego County Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator dated August 5, 2002 re: Sempra Energy and IT Group with attachments

2. Facsimile of Interview Notes taken by San Diego County District Attorney Investigator Tom Basinski from Laurie Orange, San Diego County Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator dated July 29, 2003 re: Sempra

The following document has been withheld under 5 U.S.C. §§552(b)(5) and (7)(A), which pertain to certain inter- and intra-agency communications protected by the deliberative process privilege; and records or information compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement proceedings, respectively:

1. Interview Notes from Interview of Bob Trotter, EPA Region IX Asbestos NESHAP Coordinator dated July 29, 2002 taken by San Diego County District Attorney Investigator Tom Basinski

EXHIBIT 3

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region IX
75 Hawthorne Street (OPPA-2)
San Francisco, CA 94105

June 21, 2005

Mr. Robert Howard
Latham & Watkins
600 West Broadway
Suite 1800
San Diego, CA, 92101

Freedom of Information Act (FOIA), 5 U.S.C. 552
Request #: 09-RIN-00431-05

Dear Mr. Howard:

Thank you for your FOIA request dated June 17, 2005 and received in this office on June 21, 2005, for records related to:

> Encanto Site, 1350 San Altos, Place, Lemon Grove, CA (Robert Trotter's [Asbestos NESHAP Coordinator] documents covering years 2000 AIR - 2005.

The Agency has twenty (20) working days to respond to your request, except when you have agreed to an alternate due date or unusual circumstances exist that would require an extension of time under 5 U.S.C. 552 (a) (6) (B).

We hope to respond to you soon. In the interim, please contact us if you have any questions about your request. Please cite your FOIA request number in all communications.

Sincerely,

Ivry Johnson

Ivry Johnson
Freedom of Information Officer
Office of Planning & Public Affairs
(415) 947-4251
(415) 947-3591 Fax

-----Original Message-----
From: Wilder.Ceciley@epamail.epa.gov [mailto:Wilder.Ceciley@epamail.epa.gov]
Sent: Thursday, July 28, 2005 9:21 AM
To: Howard, Robert (SD)
Subject: 2nd Extension on Freedom of Information Act Request

Information you requested has been compiled, Unfortunately, it is going to take approximately another several weeks to be distributed. We expect to mail out your response by August 15, 2005. Thank you.

Ceciley Wilder, Air Division
US EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105
(415) 947-4143 PHONE
(415) 947-3581 FAX

-----Original Message-----
From: Wilder.Ceciley@epamail.epa.gov [mailto:Wilder.Ceciley@epamail.epa.gov]
Sent: Wednesday, August 10, 2005 4:44 PM
To: Howard, Robert (SD)
Subject: 3rd Extension Request

Mr. Howard: The information you requested has been gathered. It is currently being reviewed for distribution. We expect to finish the review by September 15. Thank you.

Ceciley Wilder, Air Division
US EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105
(415) 947-4143 PHONE
(415) 947-3581 FAX

EXHIBIT 4

Statement of Robert S. Trotter

1. I am the Chief Enforcement Officer/Asbestos NESHAP Coordinator, Air Division, for Region 9 of the United States Environmental Protection Agency. As such, I have enforcement duties over projects involving asbestos in Arizona, California, Hawaii, Nevada, the Pacific Islands, and the Tribal Nations.

2. I have been employed at the US EPA since 1984. In my position I am responsible for writing applicability determinations submitted by sources and the public regarding Asbestos NESHAP requirements. Some of these determinations have national implications. I also conduct Asbestos NESHAP inspections. As the Region 9 Asbestos NESHAP coordinator and enforcement officer I have conducted well over one hundred Asbestos NESHAP inspections, often with state or local inspectors.

3. Part of my job includes training state and local inspectors on proper NESHAP inspections and health and safety techniques. I speak at a variety of Asbestos NESHAP outreach seminars, including for industry, public, and government representatives. I also regularly teach EPA Course 350 (Asbestos NESHAP Inspection and Safety Procedures) throughout Region 9.

4. My job also calls for me to assist state and local enforcement on Asbestos NESHAP violations. I have qualified as an expert regarding the Asbestos NESHAP on numerous occasions.

5. As the Chief Enforcement Officer and NESHAP Coordinator for Region 9, US EPA, I am very familiar with the NESHAP and the work practice standards set forth in the Asbestos NESHAP.

6. The NESHAP requires all owners or operators of a demolition activity to notify the Administrator, in writing, of all demolition activities. An Administrator is anyone with delegated authority within the EPA asbestos NESHAP program. In San Diego County, authority to enforce the Asbestos NESHAP program is delegated to the San Diego County Air Pollution Control District, and Jim Cooksey is the NESHAP Program Manager at the San Diego APCD. The NESHAP and the EPA require owners and operators to deliver notifications to the Administrator at least 10 working days before any demolition – regardless of whether asbestos is present in the building. In addition, for renovations in which an applicable amount of asbestos (260 linear feet on pipes, 160 square feet on other facility components or 35 cubic feet off facility components) will be disturbed, written notification of the renovation must be given to the Administrator at least 10 working days before the renovation starts. Further, if start dates for the renovation or demolition work change, or the amount of RACM on site is increased, revised notifications must be submitted to the Administrator.

7. The NESHAP defines Regulated Asbestos Containing Materials (RACM) as follows: 1) friable asbestos-containing material; (2) Category I nonfriable ACM that has become friable; (3) Category I nonfriable ACM that has been or will be sanded, ground, cut, or abraded; or (4) Category II nonfriable ACM that has already been or is likely to become crumbled, pulverized, or reduced to powder. Category I nonfriable

asbestos-containing material (ACM) generally refers to ACM with a bituminous or asphaltic base, and includes asbestos-containing packings, gaskets, reslient floor covering, and asphalt roofing products containing more than 1 percent asbetos.

8. On June 17, 1994 the EPA added Appendix A to the NESHAP, entitled "Interpretive Rule for Roof Removal Operations Under the Asbestos NESHAP." This Appendix considers the use of a rotating blade cutter of equipment that damages Category I nonfriable asbestos containing material. The Appendix states:

> "For the purposes of this interpretive rule, 'RB roof cutter' means an engine-powered roof cutting machine with one or more rotating cutting blades the edges of which are blunt. (Equipment with blades having sharp or tapered edges, and/or which does not use a rotating blade, is used for ``slicing" rather than ``cutting" the roofing material; such equipment is not included in the term ``RB roof cutter".) Therefore, it is EPA's interpretation that when an RB roof cutter or equipment that similarly damages the roofing material is used to remove Category I nonfriable asbestos-containing roofing material, any project that is 5580 ft or greater is subject to the NESHAP; conversely, it is EPA's interpretation that when an RB roof cutter or equipment that similarly damages the roofing material is used to remove Category I nonfriable asbestos-containing roofing material in a roof removal project that is less than 5580 ft, the project is not subject to the NESHAP, except that notification is always required for demolitions. EPA further construes the NESHAP to mean that if slicing or other methods that do not sand, grind, cut

or abrade will be used on Category I nonfriable ACM, the NESHAP does not apply, regardless of the area of roof to be removed."

9. The Student Manual for EPA Course 350, as revised in 1999, states this: "When ... removing ... intact pipeline asphaltic wrap... which contain asbestos encapsulated or coated by bituminous or resinous compounds: ... the material shall not be sanded, abraded, or ground – manual methods are required; ... all removal or disturbance of pipeline asphaltic wrap must be done using wet methods." The Manual also states, in a section regarding Mechanical Methods to remove asphaltic roof materials containing Asbestos Containing Material: "*Note*: Rotating blade cutters render the asbestos roofing friable."

10. Methods of removal that destroy the structural matrix or integrity of the material such that the material is crumbled, pulverized or reduced to powder, renders Category I ACM friable. Removal by a rotating blade-cutting machine destroys the structural matrix of ACM, and renders it regulated.

11. I am aware of a number of decisions stating the same instructions regarding use of a RB roof cutter or other equipment that sands, grinds, cuts or abrades ACM. For example, in the US EPA Decision of LVI Environmental Services, Inc., Docket No. CAA-09-97-10, issued June 28, 2000 in Washington D.C., found that use of a blade to remove ACM, even though the blade was sharpened and did not reduce the ACM to powder, did subject it to "sanding, grinding, cutting or abrading," and rendered it RACM. See also, US EPA, Washington D.C. Asbestos NESHAP Demolition Decision Tree Guidance Document, issued June 29, 1994 (Category I nonfriable material that has been

or will be subjected to sanding, cutting or abrading during removal is subject to NESHAP); EPA Determination Letter dated June 12, 1990 (if asbestos-containing roofing felt is removed by cutting or sawing it is subject to the Asbetos NESHAP; if friable material not adequately wetted the entire area becomes contaminated and considered friable); US EPA Determination Letter dated February 23, 1990, dated February 23, 1990 (if nonfriable ACM is subjected to sanding, grinding or abrading as part of demolition or renovation, than it must be handled in accordance with the NESHAP); US EPA Determination Letter dated January 1, 1991 (nonfriable ACM that is subjected to sanding, grinding, or abrading as part of the demolition or renovation becomes RACM and must be handled in accordance with the Asbetos NESHAP).

12. On January 23, 2001 I conducted an inspection of the asbetos removal operations conducted by Sempra Energy/SDG&E at 1350 San Altos Place, Lemon Grove, California, also referred to as the Encanto site. I conducted this inspection at the request of the San Diego APCD, which had explained to me that Sempra/SDG&E was not accepting its determination that a rotating blade cutter being used to remove asphaltic wrap containing asbestos was turning the material friable. Also present during the January 23, 2001 inspection was Ahmad Najjar, Asbestos Program Director for California Air Resources Board (CARB), Jim Cooksey, Asbetos Program Manager for San Diego APCD, Penny Weir, Inspector for San Diego APCD, Kyle Rheubottom, Project Manager for IT Corporation, Jackie McHugh and Willie Williamson of Sempra, James Dodson, Attorney for Sempra, and a supervisor from Tri-State.

13. When I arrived Sempra staff told me that they were conducting air monitoring at the site and that the monitoring had not shown any emission of asbestos. I told the Sempra staff that they had confused OSHA and NESHAP requirements, and that air monitoring is not relevant under NESHAP. I told Sempra that the NESHAP is a work practice standard that applies strict liability when the standards are not followed. I also told Sempra there is no safe exposure level to asbestos.

14. The rotating blade-cutting machine was not in operation when I inspected the site. I did see pipe wrap on the pipes before it was removed. While the pipe wrap was on the pipe and left intact, it was not regulated and not friable.

15. I went to the area where the pipe wrap removal was being conducted, and saw a plastic structure with slits in it. Ms. Weir, Mr. Najjar and I put on protective gear, and entered the plastic structure. I observed the rotating blade cutter that was being used to grind the wrap from the pipe. The machine is a rotating blade cutter like those described in Appendix A to the NESHAP and the EPA materials. Its blades were blunt. I saw debris all over the plastic structure. The debris was dry. I took samples of the material while Ms. Weir photographed the sample locations. We also went outside and found debris on the dumpster and on the ground below it. The debris was dry. I took samples from these areas as well, and Ms. Weir photographed the sample locations.

16. It was very obvious that the rotating blade cutter had destroyed the matrix of the pipe wrap. The material was different after it was ground off by the cutter from before – the pipe wrap turned crumbly and powdery. The grinding action turned the pipe wrap into regulated asbestos containing material.

17. I told the Sempra and IT Corporation staff that the waste debris on the site was RACM. I also held up a bag of the waste I had collected in front of Sempra, and shook it. I said, "if I show this to a judge, I think he will agree it is pretty crumbly." James Dodson, attorney for Sempra, said he "would agree it is pretty crumbly."

18. I hand-carried the samples collected at the Encanto site by the San Diego Air pollution Control District to the Bay Area where an NVLAP-accredited Lab analyzed the samples. In so doing, I took care to keep record of the chain of custody. The lab found the samples from the Encanto site to contain friable asbestos, ranging from 8 – 11 % in the waste debris. One debris sample taken by a stockpile of pipe contained 57% friable asbestos.

19. I saw numerous work practice violations at the Encanto site. Once Sempra and IT Corporation ground the wrap from the pipe, it became regulated and had to be treated in accordance with NESHAP. This was not done. I saw numerous examples of dry, friable asbestos laying on the ground or otherwise uncontained. I told Sempra and IT Corporation that they had rendered the ACM regulated, and that it had to be handled in accordance with NESHAP – which required that the RACM be contained adequately wet, labeled, and sealed until proper disposal.

20. In my opinion, the pipe wrap constitutes Category I ACM. However, even if the pipe wrap is Category II ACM, the process by which it was removed pulverized the material and ground it into powder. Whether the ACM was Category I or Category II does not matter, as either way the ACM was pulverized and ground into powder by the rotating blade cutter Sempra used to grind the wrap off the pipe.

21. I did not issue a Notice of Violation to Sempra or IT Corporation for the Encanto site. This is because authority to enforce the NESHAP has been delegated to the San Diego APCD, and I know Mr. Cooksey properly arranged to issue NOVs.

22. Since my inspection at the Encanto site, I have used examples of the debris collected after being ground off the pipe by the rotating blade cutter in training workshops in Region 9. I am not aware of any regulator or consultant that has had any doubt that this debris was rendered RACM after being ground off the pipe at Encanto.

23. I am very surprised that Sempra or IT Corporation would claim that the pipe wrap did not become regulated when it was ground off the pipe by the rotating blade machine. The EPA has long held the position that when this material is removed in a manner that changes it to powder, or grinds it up, all the ACM becomes regulated. The EPA's rule on this is well known in the industry, and is something I have consistently taught in my workshops and classes. I cannot understand why Sempra chose to grind this pipe wrap off the pipe, since by doing so they rendered all of the ACM regulated – as I told Sempra and IT Corporation at Encanto on January 23, 2001.

24. Sempra moved the pipe from Encanto to Bakersfield in the spring of 2001 to continue the removal of the pipe wrap in Bakersfield. I inspected those operations in April of 2001, and observed that the same rotating blade-cutting machine was being used. The San Joaquin Valley Air Pollution Control District carefully observed the pipe wrap abatement project to make sure that there were no additional work practice violations to those committed in Encanto. When I inspected the site, I confirmed that use of the rotating blade cutter was rendering the pipe wrap into friable asbestos.

25. The work practice violations I observed by Sempra and IT Corporation at the Encanto site are the worst I have seen in my experience with Asbestos removal. By this I mean it was the worst in terms of amount of friable asbestos released into the atmosphere and the knowledge of the consultants and employees who allowed the removal to occur. It is clear to me that if the consultants for Sempra and IT Corporation or their employees were trained regarding asbestos abatement techniques, they would have known that use of this rotating blade cutter would make the pipe wrap regulated.

Dated: November 19, 2003

Robert S. Trotter

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

JAN 16 2007

Mr. Robert Howard
Latham & Watkins, LLP
600 West Broadway, Suite 1800
San Diego, CA 92101-3375

Re: Freedom of Information Act Appeal HQ-RIN-00431-05-A

Dear Mr. Howard:

I am responding to your September 16, 2005 Freedom of Information Act ("FOIA") appeal. You appealed the August 31, 2005 decision of Deborah Jordan, Director, Air Divison Region IX ("decision") of the U.S. Environmental Protection Agency ("EPA" or "Agency"), to deny in part the request you submitted to EPA on June 17, 2005. Your request sought all documents held by EPA Region IX National Emission Standards for Hazardous Air Pollutants for asbestos ("Asbestos NESHAP") Coordinator Robert Trotter involving the "Encanto Site." The decision stated that your request was denied in part because the documents were exempt from disclosure under Exemptions 5 and 7(A) of the FOIA, 5 U.S.C. §§ 552(b)(5) and (7)(A).

I have carefully considered your request, EPA's decision, and your appeal. For the reasons set forth below, I have determined that your appeal should be, and is, granted in part and denied in part.

Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The documents that were withheld under Exemption 5 of the FOIA are exempt from disclosure because they are inter-agency or intra-agency memoranda or letters generated by EPA employees and employees of the San Diego County[1] and because the

[1] The Asbestos NESHAP are regulations promulgated under Sections 112 and 114 of the Clean Air Act. In California, EPA has delegated primary enforcement responsibility for the Asbestos NESHAP to various local air districts, including San Diego County. See Citizens for Pa.'s Future v. United States Dep't of the Interior, 218 F.R.D. 441, 446-47 (M.D. Pa. 2003) (protecting documents exchanged between the Department of the Interior and the Pennsylvania

documents contain information that is protected by the deliberative process privilege.

Exemption 5 of the FOIA protects from disclosure a record, or portion of a record, that is subject to the deliberative process privilege. The deliberative process privilege protects documents that are both predecisional and deliberative. EPA withheld:

1. Memorandum from Bob Trotter, EPA Region IX Asbestos NESHAP Coordinator to Jim Cooksey, San Diego Air Pollution Control District, dated February 7, 2001, re: Violations of the Asbestos NESHAP with attachments;

2. Email from Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator to Laurie Orange, San Diego County, Senior Deputy County Counsel, dated March 1, 2004, re: Sempra with attachment;

3. Email from Robert Trotter, EPA Region IX Asbestos NESAHP Coordinator to Laurie J. Orange, San Diego County, Senior Deputy County Counsel, dated February 25, 2004, re: Sempra;

4. Email from Laurie Orange, San Diego County, Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator, dated February 25, 2004, re: Sempra;

5. Email from Laurie Orange, San Diego County, Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator, dated November 24, 2003, re: Trotter Statement;

6. Email from Laurie Orange, San Diego County, Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator, dated November 20, 2003, re: Trotter Statement;

7. Email from Laurie Orange, San Diego County, Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator, dated November 17, 2003, re : Sempra with attachment; and

8. Email from Laurie Orange, San Diego County, Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator, dated October

---

department of Environmental Protection pursuant to a joint regulatory mandate (vacated on other grounds); United States v. Allsteel, Inc., No. 87-C-4638, 1988 WL 139361, at *2 (N.D. Ill. Dec. 21, 1988) (non-FOIA case protecting documents exchanged between federal and state co-regulators).

23, 2003, re: Trotter Statement with attachments.

These withheld documents are protected by the deliberative process privilege because they reflect the internal discussions, opinions, advice, analysis and recommendations being considered during EPA's decision-making process. Release of the withheld material would prematurely disclose proposed policies before they are finally adopted and cause public confusion by disclosing reasons and rationales that were not in fact ultimately the grounds for EPA's action. Therefore, I have determined that the withheld material is exempt from disclosure under Exemption 5 of the FOIA.

Exemption 7(A) of the FOIA, 5 U.S.C. § 552(b)(7)(A), protects from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." EPA withheld:

1. Letter from Laura Orange, San Diego County Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator, dated August 5, 2002, re: Sempra Energy and IT Group with attachments;

2. Facsimile of Interview Notes taken by San Diego County District Attorney Investigator Tom Basinski from Laurie Orange, San Diego County Senior Deputy County Counsel to Robert Trotter, EPA Region IX Asbestos NESHAP Coordinator, dated July 29, 2003, re: Sempra; and

3. Interview Notes from Interview of Bob Trotter, EPA Region IX Asbestos NESHAP Coordinator, dated July 29, 2002, taken by San Diego County District Attorney Investigator Tom Basinski.

These withheld documents are records compiled for law enforcement purposes. The documents were compiled by EPA for the purpose of enforcing the Clean Air Act and the Asbestos NESHAP regulations Further, the production of these materials could reasonably be expected to interfere with ongoing enforcement proceedings, because it would prematurely reveal the government's evidence or strategy. Therefore, I have determined that the withheld material is exempt from disclosure under Exemption 7(A) of the FOIA.

I have determined that the withheld documents contain some reasonably segregable information that may be released. A copy of that material is enclosed.

You also argue that EPA's response is inadequate because it has not provided an index pursuant to Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied sub nom. Rosen v. Vaughn, 415 U.S. 977 (1974). I find this argument to be without merit. Vaughn held that in

litigation, the Agency must provide information for each withheld document about the author, the date of the document, a description of the subject matter of the document, and an explanation as to why the document falls within the scope of the exemption that is claimed and the harm that would arise from its disclosure. EPA is not required to provide the same documentation in administrative responses as is necessary in the litigation context. See Crooker v. CIA, No. 83-1426, 1984 U.S. Dist. LEXIS 23177, at *3-*4 (D.D.C. Sept. 28, 1984). The court in Safecard Services, Inc. v. SEC, No. 84-3073, 1986 U.S. Dist. LEXIS 26467 at *5 (D.D.C. Apr. 21, 1986) states that "[n]o court has held that a requesting party may compel production of a Vaughn [sic] index before completing its administrative appeal . . . ."

The Agency is not required to provide a Vaughn index until ordered by the court in any judicial action you may bring after you have exhausted all available administrative remedies. See Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 11 (D.D.C. 1995), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996). By statute, the denial of an initial FOIA request must inform the requester of the reasons for the denial, the right to appeal, and the name and title of each person responsible for the denial. 5 U.S.C. §§ 552(a)(6)(A)(i) and 552(a)(6)(C)(i). See also 40 C.F.R. § 2.104(h) (EPA FOIA regulations also require an estimate of the volume of material denied).

This letter constitutes EPA's final determination on your appeal. In accordance with 5 U.S.C. § 552(a)(4)(B), you have the right to seek judicial review of this determination by instituting an action in the district court of the United States in the district in which you reside, or have your principal place of business, or in which the Agency records are situated, or in the District of Columbia.

Should you have any questions concerning this matter, please call Sara E. McGraw, at (202) 564-2565.

Sincerely,

Ariadne Goerke

Ariadne Goerke
Acting Assistant General Counsel
General Law Office

Enclosures

cc: HQ FOI Office
Region 9 FOIA Officer

Robert Trotter
03/01/2004 04:51 PM

To: "Orange, Laurie J" <Laurie.Orange@sdcounty.ca.gov>
cc:
Subject: Sempra

Hi Laurie,

appeal with the Environmental Appeals Board on a failure to keep wet and notification case (no VE was charged). It's attached, hope this helps. We just one an

[redacted]
friedman.pdf

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the Environmental Administrative Decisions (E.A.D.). Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, of any typographical or other formal errors, in order that corrections may be made before publication.

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	
Morton L. Friedman and Schmitt Construction Company	CAA Appeal No. 02-07
Docket No. CAA-09-99-004	

[Decided February 18, 2004]

FINAL DECISION AND ORDER

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein.

MORTON L. FRIEDMAN AND SCHMITT CONSTRUCTION COMPANY

CAA Appeal No. 02-07

FINAL DECISION AND ORDER

Decided February 18, 2004

Syllabus

The U.S. EPA Region IX (the "Region") filed an administrative complaint against Morton L. Friedman ("Mr. Friedman") and Richard Schmitt ("Mr. Schmitt") (collectively, "Friedman & Schmitt"). The complaint requested a civil administrative penalty of $134,500 for three alleged violations of sections 112 and 114 of the Clean Air Act ("CAA") and the notice and work practice requirements of the National Emissions Standards for Hazardous Air Pollutants for asbestos, 40 C.F.R. Part 61, subpart M (the "Asbestos NESHAP"). The alleged violations concerned Mr. Schmitt's removal of regulated asbestos-containing material ("RACM") from several buildings during redevelopment of a shopping center owned by Mr. Friedman. Administrative Law Judge William B. Moran (the "ALJ") found that Friedman & Schmitt were not liable for the alleged violations on the grounds that they did not have fair notice that applicability of the notice and work practice requirements would be determined under the federal Asbestos NESHAP's provisions, rather than under the provisions of a local rule.

The Asbestos NESHAP provides that the notice and work practice requirements are applicable if a renovation will disturb at least 260 linear feet of RACM on pipes or at least 160 square feet of RACM on other facility components, or at least 35 cubic feet of RACM taken from facility components that cannot be readily measured. 40 C.F.R. § 61.145(a)(4)(i), (ii) (1996). The evidence in the record showed that Friedman & Schmitt's activity involved removal of 1600 square feet of RACM from a location known as Building #2, and a total of 264 square feet of asbestos-containing linoleum from three other buildings known as the Calderwood Apartments. The ALJ, however, held that Friedman & Schmitt did not have fair notice that they were required to measure the RACM as square feet on the facility components because a rule promulgated by the local government would have allowed the RACM to be measured as cubic feet. The 1600 square feet of acoustic ceiling material removed from Building #2 consisted of less than 14 cubic feet after it was removed.

The ALJ also held that, because the local government required a demolition permit for each separately addressed building, Friedman & Schmitt did not have fair notice that the "facility" for which the combined amount of RACM must be measured was the whole redevelopment project, rather than the individual buildings to be

demolished in that project. For this reason, the ALJ concluded that the RACM removed from the Calderwood Apartments fell outside the reach of regulatory coverage because the amount of linoleum removed did not exceed the threshold of 160 square feet. The ALJ also concluded that the record did not establish that the linoleum was RACM and that the Region failed to effectively plead its claims regarding the Calderwood Apartments.

The Region requested that the Board reverse the ALJ and assess a significant penalty.

HELD: The Board reverses the ALJ's finding of no liability and assesses a penalty of $30,980 for Friedman & Schmitt's three violations of the CAA and Asbestos NESHAP:

1. *Fair Notice – Measurement Method.* The Asbestos NESHAP provides fair notice, in plain unambiguous language, that RACM must be measured in linear feet "on pipes" or square feet "on other facility components" and may only be measured in cubic feet "off facility components, *where the length or area could not be measured previously.*" While a parallel local rule may be ambiguous in how it frames the regulatory threshold, Friedman & Schmitt have not cited any cases where a court looked to ambiguity in a *state or local rule* as evidence that a *federal regulation* is ambiguous or otherwise fails to give fair notice of its requirements. The federal regulations governing delegation and approval of local rules, 40 C.F.R. §§ 63.90-.93, do not support Friedman & Schmitt's lack of fair notice argument. The regulatory text of 40 C.F.R. § 63.90(c) (1996) and the statutory text of CAA § 112(*l*) provided Friedman & Schmitt fair notice that the Region may enforce the Asbestos NESHAP's requirements notwithstanding any delegation of authority to the local government. Furthermore, Friedman & Schmitt had fair notice that the Agency had not approved the local rules in any event.

2. *RACM in the Calderwood Apartments:*

a. *Fair Notice – Scope of Facility.* By including "installation" within the definition of "facility" and by defining an installation as "any group of buildings," the regulations found at 40 C.F.R. § 61.141 specifically contemplated that a group of buildings may be a single facility. The regulatory text therefore provided fair notice that a group of buildings, such as the "major renovation project" at issue in the present case, may be treated as a single facility. The project at issue, which included the removal of 264 square feet of linoleum from the Calderwood Apartments – apartments that were subsequently demolished to allow Mr. Friedman to construct a grocery store as an anchor tenant – was a single "installation" and therefore a "facility" within the meaning of the Asbestos NESHAP, 40 C.F.R. § 61.141. These conclusions flow fairly and proximately from the plain language of the regulatory definition, as supported by examples EPA provided in the 1990 Preamble.

b. *Evidence that Linoleum was RACM.* The ALJ erred in holding that "EPA did not establish that the material removed [from the Calderwood Apartments] was regulated asbestos." Parts (a) and (b) of the definition of RACM provides that asbestos containing material that has become friable prior to the renovation or demolition activity is RACM, without regard for how it is handled during the renovation. 40 C.F.R. § 61.141. There is ample evidence in the record showing that the linoleum removed from the three Calderwood Apartments contained asbestos and had become friable prior to the removal.

c. *Pleading of the Complaint.* The ALJ erred in holding that the Region failed to "charge or pursue" its claim that Friedman & Schmitt's removal of RACM from the Calderwood Apartments exceeded the 160 square foot threshold under 40 C.F.R. § 61.145(a)(i). The Region's Complaint was more than adequate to provide notice to Friedman & Schmitt that the Region intended to introduce evidence regarding the Calderwood Apartments, and the record shows that Friedman & Schmitt were not surprised at trial by the Region's effort to introduce this evidence. The Board also rejects the ALJ's suggestion that RACM may not be counted towards the applicability threshold under 40 C.F.R. § 61.145(a)(i) where the Region has not expressly identified such RACM as the basis for an upward adjustment of the proposed penalty. The question of NESHAP applicability logically arises prior to, and independent of any penalty determination.

3. *Finding of Violations.* The record shows that Friedman & Schmitt committed three violations of the Asbestos NESHAP's notice and work practice requirements: (1) Friedman & Schmitt admitted in their Answer that they did not provide the notice required by 40 C.F.R. § 61.145(b) prior to removing RACM from both the Calderwood Apartments and Building #2; (2) the evidence shows that Friedman & Schmitt failed to keep RACM adequately wet after removal from facility components in Building #2 in violation of 40 C.F.R. §§ 61.145(c)(3), (6)(i), 61.141 (1996); and (3) the evidence shows that Friedman & Schmitt did not maintain waste shipment records for the RACM stripped from Building #2 as required by 40 C.F.R. §§ 61.145(c)(6)(i), 61.150(d)(1) (1996).

4. *Penalty.* The Board adopts certain aspects of a penalty analysis offered, in the alternative, by the ALJ and rejects other aspects of that analysis. The Board assesses a penalty of $30,980 for Friedman & Schmitt's three violations of the Asbestos NESHAP.

MORTON L. FRIEDMAN AND SCHMITT CONSTRUCTION COMPANY

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

This is an appeal by the Director, Air Division, U.S. EPA Region IX (the "Region") from an Initial Decision, dated August 28, 2002, by Administrative Law Judge William B. Moran (the "ALJ"). This matter arises out of an administrative enforcement action by the Region against Morton L. Friedman ("Mr. Friedman"), the owner of the property at issue in this case, and Richard Schmitt, owner of the Schmitt Construction Company ("Mr. Schmitt") (hereinafter Mr. Friedman and Mr. Schmitt are referred to collectively as "Friedman & Schmitt").

The Region brought this administrative enforcement action against Friedman & Schmitt for three alleged violations of sections 112 and 114 of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7412, 7414, and the notice and work practice requirements of the National Emissions Standards for Hazardous Air Pollutants for asbestos, 40 C.F.R. Part 61, subpart M (the "Asbestos NESHAP"). The Region requested a civil administrative penalty of $134,500 for the three alleged violations of the CAA.

In his Initial Decision, the ALJ found that Friedman & Schmitt were not liable for violating the CAA and Asbestos NESHAP. The ALJ based this determination on his conclusions that Friedman & Schmitt did not have fair notice that the federal Asbestos NESHAP's applicability provisions would govern their CAA obligations and that they thus reasonably relied on the applicability provisions of a local rule in determining that they were not required to follow the Asbestos NESHAP's notice and work practice requirements. The ALJ held that, because the local rule did not specify when regulated asbestos containing material at the site must be measured in square feet and when it may be measured in cubic feet, Friedman & Schmitt were not given fair notice that applicability would be determined based on the square foot measurement as required by the Asbestos NESHAP. Initial Decision at 17-18. The ALJ held that this lack of fair notice prevented a finding

that Friedman & Schmitt are liable for the three alleged violations. Although the ALJ held that Friedman & Schmitt are not liable, he nevertheless provided in the alternative a penalty analysis to be used in the event his liability determination is reversed on appeal. The Region timely appealed from the ALJ's Initial Decision, requesting that we reverse the ALJ, find Friedman & Schmitt liable, and assess a penalty significantly greater than the alternative penalty recommended by the ALJ.

For the following reasons, we find Friedman & Schmitt liable for three violations of the Asbestos NESHAP and CAA sections 112 and 114. Pursuant to CAA section 113, we impose a civil administrative penalty of $30,980 for these violations.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

Section 112(b)(1) of the CAA identifies pollutants that Congress determined present, or may present, a threat of adverse human health or environmental effects. CAA § 112(b)(1), 42 U.S.C. § 7412(b)(1). Asbestos is one of those pollutants. *Id.* Section 112 authorizes the Administrator of the United States Environmental Protection Agency (hereinafter, "EPA") to adopt emission standards and, in some circumstances, work practice standards for the listed pollutants. *Id.; see also In re Echevarria*, 5 E.A.D. 626, 631-32 (EAB 1994). Pursuant to this authority, EPA promulgated the Asbestos NESHAP. *Echevarria*, 5 E.A.D. at 632.

In past decisions, we have recognized that proof of liability under the Asbestos NESHAP requires a "two-fold showing: first, the Agency must show that the NESHAP requirements apply, and second, that the work practice standards of the NESHAP have not been satisfied." *Id.* at 63 (citing *United States v. MPM Contractors, Inc.*, 767 F.Supp. 231, 233 (D. Kan. 1990)). Applicability of the Asbestos NESHAP's various notice and work practice requirements is governed by 40 C.F.R. § 61.145(a). In circumstances in which the Asbestos NESHAP applies,

section 61.145(b), (c), and (d) sets forth, respectively, notice requirements, work practice requirements, and record-keeping requirements.

As will be discussed in greater detail below, the Asbestos NESHAP notice and work practice provisions at issue in this case apply where a renovation involves removal of at least 260 linear feet of regulated asbestos containing material ("RACM")[1] on pipes, or at least 160 square feet of RACM on other facility[2] components, or 35 cubic feet of RACM if it is not otherwise measurable in lineal feet on pipes or square feet on other facility components. 40 C.F.R. § 61.145(a)(4). One of the central issues in this case concerns whether Friedman & Schmitt had fair notice that the federal Asbestos NESHAP's applicability provisions would be looked to as controlling in the circumstances at hand. Friedman & Schmitt contend that they did not receive fair notice that this provision would govern their CAA obligations and that they had therefore appropriately looked to the applicability provisions of a local rule promulgated by the Sacramento Metropolitan Air Quality

---

[1] The Asbestos NESHAP defines the term RACM as follows:

> Regulated asbestos-containing material (RACM) means (a) Friable asbestos material, (b) Category I nonfriable ACM [asbestos containing material] 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.

[2] The Asbestos NESHAP defines the term "facility" in 40 C.F.R. § 61.141. As discussed below in part II.B.3.a, Friedman & Schmitt argue that the activities at issue in this case involved several, rather than one, "facility."

Management District ("SMAQMD") to determine what notice they were required to give and what work practice standards they were required to follow. Friedman & Schmitt state that they "reasonably believed they were exempt from notice and filing requirements because the amount of material removed fell below the threshold amount as defined in SMAQMD rule 110.2." Appellee's Brief in Opposition to EPA's Appeal at 1 (Jan. 6, 2004) (herinafter "Friedman and Schmitt's Brief").

This "fair notice" issue will be discussed below in part II.B.2, and another related "fair notice" issue concerning the meaning of the term "facility" will be discussed in part II.B.3.a. In part II.B below, we conclude that Friedman & Schmitt's activities in this case disturbed more RACM than the 160 square foot threshold for application of the Asbestos NESHAP, and further that Friedman & Schmitt had fair notice that the Asbestos NESHAP's applicability provisions would govern whether they were required to follow the notice and work practice standards. As explained below in part II.C, we find that the Region proved that Friedman & Schmitt are liable for three violations of the Asbestos NESHAP and CAA § 113. Finally, in part II.D, we explain our reasons for assessing a civil penalty of $30,980 for these violations.

B. *Factual Background*

This proceeding arises out of Mr. Friedman's redevelopment of the Town & Country Village shopping complex in Sacramento California. In the summer of 1997, Mr. Friedman owned or controlled[3] the various parcels of property and buildings that formed the Town & Country Village. Answer to Complaint and Request for Hearing at 2

[3] The Answer states that Mr. Friedman was the owner of the property forming the Town & Country Village. Answer at 2. At the evidentiary hearing, Mr. Friedman's son, Mark Friedman, testified that the Town & Country Village "was comprised of separate – several separate legal parcels that were acquired over time by my father or by partnerships that he controlled." Evidentiary Tr. at 295. The precise legal ownership of each of the parcels need not be determined since this evidence establishes that Mr. Friedman had control over all of the parcels. *See* below part II.B.3.a (discussing definition of "facility," which includes separate buildings under a common ownership or control).

(hereinafter "Answer"). At the time, the Town & Country Village was approximately 50 years old and consisted of specialty retail shops and one larger store of approximately 20,000 square feet. Transcript of Evidentiary Hearing at 295-96 (Oct. 26-27, 2000) (hereinafter "Evidentiary Tr. at __"). The Town & Country Village is located on Marconi Avenue in Sacramento, immediately adjacent to a complex of apartment buildings known as the Calderwood Apartments. *Id.* at 297-98. Prior to summer 1997, there was a road, known as Calderwood Lane, that ran from Marconi Avenue through the Calderwood Apartments. *Id.* at 298-99, Resp. Ex. 5; *see also* Answer, Ex. A.

The alleged violations of the Asbestos NESHAP arise out of Mr. Friedman's redevelopment of the Town & Country Village. Evidentiary Tr. at 296. In 1994, Mr. Friedman began the redevelopment in order to bring "a large anchor grocery store" to the Town & Country Village. *id.* The term "anchor" store is used to describe a major retailer that is prominently located in a shopping mall to attract customers who are then expected to patronize the other shops in the mall.[4] By 1997, Mr. Friedman had obtained necessary zoning changes to move forward with the project. *Id.* The zoning changes allowed Mr. Friedman to combine a portion of the Calderwood Apartment complex with the Town & Country Village, *Id.* at 298, and to demolish the Calderwood Apartment buildings that were located on the side of Calderwood Lane adjacent to the Town & Country Village, *id.* at 300.

In total, "there were 11 separate buildings that were demolished to make way for the new site plan." *Id.* at 299.[5] In the Calderwood Apartment complex, three apartment buildings with separate addresses were demolished as part of the project. *Id.* at 300. The addresses of the demolished apartment buildings included 2805 Calderwood Lane, 2911

---

[4] Merriam-Webster's Collegiate Dictionary 43 (10th ed. 1999).

[5] Friedman & Schmitt's Answer indicated that the project affected ten buildings. Answer at 2. Friedman & Schmitt also state in their appellate brief that there were 12 buildings affected by the project. Friedman & Schmitt's Brief at 4. These discrepancies are not material to our decision.

Calderwood Lane, and 2931 Calderwood Lane. *Compare id. with* Resp. Ex. 5; *see also* Resp. Ex. 6 at 1.[6] Another building located at the Town & Country Village that was demolished contained a number of retail suites with addresses of 2640 to 2650 Marconi Avenue, one of which had been a Tuxedo Rental Shop. Gov't Ex. 6 at 1. We will refer to this building as "Building #2."[7] The demolition efforts at the Calderwood Apartments and the renovation of Building #2 are the activities of primary focus in this case.

Friedman & Schmitt's counsel succinctly described the redevelopment project as follows: "Back in the summer of 1997, there was a major renovation project that was going on at the Town & Country Village. * * * There were * * * either 10 or 12 buildings, actually, that were going through renovation or demolition stage to make way for some larger buildings." Evidentiary Tr. at 38.

Mr. Friedman hired Mr. Schmitt to perform certain renovation and demolition services in connection with the project. Answer at 2. In particular, Mr. Friedman hired Mr. Schmitt to do "some of the tenant renovation work and some of the demolition jobs." Evidentiary Tr. at 303. Mr. Friedman hired another company, Sunsuri Construction, to "do the site work and build a new building * * * to relocate several of the tenants in." *Id.* "[T]here was a third general contractor that built a new 60,000-foot grocery store that these buildings were demolished to accomplish." *Id.* Mr. Friedman also hired Valley Demolition as another demolition contractor. *Id.* at 302.

---

[6] In their Answer, Friedman & Schmitt refer to these buildings as 2805, 2911, and 2931 Marconi Avenue. Answer at 3; *see also* Friedman & Schmitt's Brief at 12-16. Nevertheless, it is evident that Friedman & Schmitt's reference to 2805, 2911, and 2931 Marconi Avenue is intended to refer to the same buildings that the Region refers to as 2805, 2911 and 2931 Calderwood Lane. *Compare* Answer, Exs. A, D *with* Evidentiary Tr. at 173-74, 300 *and with* Resp. Exs. 5, 6 *and with* Gov't Ex. 5.

[7] Throughout the record of this proceeding, Friedman & Schmitt and the Region have sometimes referred to Building #2 as either the Marconi Avenue Building or the Tuxedo Building.

Mr. Friedman entrusted the management of the Town & Country Village redevelopment to his son, Mark Friedman. At the evidentiary hearing, Mark Friedman testified that he works with his father in the real estate development and management business. *Id.* at 292-93. He testified that, in connection with the renovation and redevelopment of the Town & Country Village, he "worked with the architects in terms of figuring out what the site layout for the new buildings should be." *Id.* at 297. Mark Friedman stated that he "interfaced with the general contractors to just monitor the progress of construction." *Id.* He also testified that he was aware of the requirement to check for the presence of asbestos before doing any demolition or renovation, *id.* at 302, stating that "we instructed the contractors to go out and hire consultants to determine whether or not we had asbestos containing materials in these facilities," *id.* Sunsuri Construction and Mr. Schmitt hired asbestos consultants during the course of their work. *Id.* at 303.[8]

Mr. Schmitt hired Lawrence "Mack" Hussey, an environmental consultant doing business as Action Environmental Management Services, "to conduct asbestos surveys and to advise Respondents of their responsibilities for the proper removal and transportation of regulated asbestos containing material." Answer at 2. Before the demolition and renovation of the Calderwood Apartments and Building #2, Action Environmental Management Services performed inspections and prepared reports identifying the location in those buildings of asbestos containing material, including Category I and Category II RACM. Action Environmental Management Services also inspected the Calderwood Apartments and Building #2 and prepared reports after Mr. Schmitt removed the identified RACM in those buildings.

Action Environmental Management Services' inspection report for Building #2 that was prepared before any renovation or demolition activity is dated June 13, 1997 (hereinafter the "June 1997 Report"). Resp. Ex. 10; Evidentiary Tr. 336-38 (Resp. Ex. 10 admitted into

[8] Mr. Schmitt is not himself a certified asbestos abatement contractor. Evidentiary Tr. at 403.

evidence).[9] This June 1997 Report identified asbestos containing material in the form of "spray-on acoustical ceiling materials" in a number of the retail suites in Building #2. The June 1997 Report stated that "[a]ll of the spray-on acoustical ceiling materials above the suspended ceiling panels on the north half of this structure * * * are classified as friable, regulated asbestos containing materials (RACM)." Resp. Ex. 10 at 3.

Action Environmental Management Services' inspection report for the Calderwood Apartments that was prepared before any renovation activity is dated June 19, 1996 (hereinafter the "June 1996 Report"). Gov't Ex. 5; Evidentiary Tr. 173-74 (Gov't Ex. 5 admitted into evidence). This June 1996 Report identified asbestos containing material in the form of linoleum in 2805, 2911, and 2931 Calderwood Lane. Gov't Ex. 5 at 2-3. The June 1996 Report stated "[a]ll of the asbestos containing linoleum in the designated apartments of each structure are classified as friable, regulated asbestos containing materials (RACM)." *Id.* at 3.

The June 1996 Report for the Calderwood Apartments provided Friedman & Schmitt the following advice regarding removal of the RACM:

> Action Environmental Management Services, Inc., recommends that a certified asbestos abatement contractor be retained to remove all of the linoleum in the designated apartments prior to initiating any demolition activities.

Id. The June 1997 Report for Building #2 provided the following advice:

> If the future plans involve the disturbance of the RACM, Category I, and/or Category II asbestos containing

---

[9] Another copy of the June 1997 Report was admitted as Gov't Ex. 6. Evidentiary Tr. at 174, 338.

> materials in the designated areas of this structure, a certified asbestos abatement contractor must be retained to remove these materials prior to initiating any demolition, renovation, or restoration activities.

Resp. Ex. 10 at 4.

Notwithstanding this advice from Action Environmental Management Services, Mr. Schmitt, who is not a certified asbestos abatement contractor, took it upon himself to attempt to remove the RACM from Building #2 and the Calderwood Apartments. Specifically, the SMAQMD inspector, Mr. Darrell Singleton, testified that approximately 1600 square feet of crumbly and flaky acoustic ceiling material was removed by Mr. Schmitt from Building #2 in August 1997. Evidentiary Tr. at 74-75.[10] During his inspection after Mr. Schmitt had undertaken to remove the RACM, Mr. Singleton found a small quantity of this material lying on the floor, on door frames and the door window, and on some beams in Building #2. *Id.* at 73. Mr. Singleton took samples of this acoustic ceiling material, which subsequently tested positive as ACM. *Id.* at 74. This acoustic ceiling material was dry at the time of Mr. Singleton's inspection. *Id.* Subsequently, Friedman & Schmitt submitted a form to SMAQMD verifying that Mr. Schmitt had removed the RACM in Building #2. Gov't Ex. 4; Evidentiary Tr. at 77-79 (Gov't Ex. 4 admitted into evidence). Although 1600 square feet of RACM was removed from Building #2, after removal this RACM amounted to only approximately 14 cubic feet of material. Evidentiary Tr. at 105. Mr. Schmitt transported this RACM to his place of business at 2900 Heinz Street. Evidentiary Tr. at 80. Mr. Schmitt did not provide notice of his RACM removal activities at Building #2 to the Region or SMAQMD prior to undertaking them, nor did he prepare a waste

---

[10] On August 21, 1997, SMAQMD performed a compliance inspection of the project. Mr. Darrell Singleton, an Associate Air Quality Specialist with SMAQMD, performed the inspection. Evidentiary Tr. at 52. Mr. Singleton prepared a report of his inspection, which was admitted into evidence. *Id.* at 53-55; Gov't Ex. 1. Mr. Singleton was assisted in the inspection by Mr. Ahmad Najjar. Evidentiary Tr. at 75.

shipment record for this transport of RACM from Building #2 to 2900 Heinz Street. *Id.*

Mr. Schmitt also removed asbestos containing material in the form of linoleum from the Calderwood Apartments in May or June 1997 prior to the demolition of those buildings. Evidentiary Tr. at 118-20, 399; *see also* Friedman & Schmitt's Brief at 4.[11] Mr. Schmitt removed a total of 264 square feet of linoleum from three of the Calderwood Apartment buildings (80 square feet from 2901 Calderwood Lane, 94 square feet from 2911 Calderwood Lane, and 90 square feet from 2931 Calderwood Lane). Resp. Ex. #6, Evidentiary Tr. 64, 119-20, 124; *see also* Friedman & Schmitt's Brief at 5. Here again, Mr. Schmitt did not provide notice to the Region or SMAQMD prior to removing the RACM.[12]

C. *Procedural Background*

The Region filed an administrative complaint against Friedman & Schmitt on November 4, 1999 (hereinafter, the "Complaint") alleging that Friedman & Schmitt committed three violations of the Asbestos NESHAP and sections 112 and 114 of the CAA arising out of their redevelopment of the Town & Country Village in 1997. The Complaint requested that a civil administrative penalty of $134,300 be imposed, pursuant to section 113(d) of the CAA, 42 U.S.C. § 7413(d), for the alleged violations.

The Complaint alleged that the Calderwood Apartments and Building #2 are a "facility" within the meaning of the Asbestos

[11] One of the issues Friedman & Schmitt raise in this appeal is whether the Region has sustained its burden of showing that this linoleum is in fact RACM. The ALJ held that the Region did not sustain its burden of proof on this issue. Initial Decision at 12, 24 n.21. As discussed below in part II.B.3.b, we find that the ALJ erred on this issue.

[12] It is not clear from the record what Mr. Schmitt did with the RACM removed from the Calderwood Apartment Buildings.

NESHAP. Complaint ¶ 8. The Complaint alleged in Count I that Friedman & Schmitt failed to provide 10 working days written notice of their intention to remove RACM from the facility prior to the commencement of demolition or renovation activities. *Id.* ¶ 20. The Complaint further alleged that this failure to give notice violated 40 C.F.R. § 61.145(b) and sections 112 and 114 of the CAA, 42 U.S.C. §§ 7412, 7414. *Id.* ¶ 21.

The Complaint alleged in Count II that Friedman & Schmitt did not maintain waste shipment records documenting the transportation of asbestos containing material from the facility to 2900 Heinz Street. *Id.* ¶ 23. According to the Complaint, this alleged failure to maintain waste shipment records violated 40 C.F.R. § 61.150(d) and sections 112 and 114 of the CAA, 42 U.S.C. §§ 7412, 7414. *Id.* ¶ 24.

The Complaint alleged in Count III that Friedman & Schmitt failed to keep RACM at the facility adequately wet and failed to ensure that the RACM remained adequately wet until collected and contained or treated in preparation for disposal. *Id.* ¶ 26. The Complaint alleged that this failure to adequately wet the RACM and to ensure that the RACM remained adequately wet violated 40 C.F.R. §§ 61.145(c)(6) and 61.150 of the Asbestos NESHAP and sections 112 and 114 of the CAA, 42 U.S.C. §§ 7412, 7414. *Id.* ¶ 27.

On November 4, 1999, Friedman & Schmitt filed their Answer to the Region's Complaint. In their Answer, Friedman & Schmitt requested an evidentiary hearing and argued, among other things, that they were not required to comply with the Asbestos NESHAP's notice requirements, wetting requirements, and record-keeping requirements on the grounds that the amount of RACM removed was less than the threshold amount for application of the local SMAQMD rule. Answer at 4. The ALJ held an evidentiary hearing on October 26 and 27, 2000. Five witnesses testified at the evidentiary hearing, and 17 exhibits were admitted into evidence. Evidentiary Tr. at 3-5, 236-37.

The ALJ issued his Initial Decision on August 28, 2002. The ALJ concluded that Friedman & Schmitt were not liable for violating the

Asbestos NESHAP on the grounds that they did not have fair notice that they were required to comply with the federal Asbestos NESHAP as well as the local rule. Initial Decision at 17-18. The ALJ concluded that no violation of the notice requirements, record-keeping requirements, and wetting requirements had been shown because the amount of asbestos removed did not exceed the threshold under the local rule. *Id.* at 19, 21, 23.

More specifically, the ALJ concluded that the Town & Country Village project consisted of separate facilities at each separately addressed building because, in the ALJ's view, the local requirement for obtaining demolition permits for each building address controlled the identification of the facility at issue in this case. *Id.* 12-13. With respect to Building #2, the ALJ concluded that, because the local rule did not state when RACM must be measured in square feet rather than cubic feet, Friedman & Schmitt "did not receive fair notice that it was impermissible to use cubic feet as the measure" of whether the threshold amount of RACM was exceeded. *Id.* at 12. The ALJ thus concluded that since the 1600 square feet of acoustic ceiling material was less than 35 cubic feet once removed from the ceiling, Friedman & Schmitt did not have fair notice that they were required to comply with the Asbestos NESHAP. *Id.*

With respect to the Calderwood Apartments, the ALJ concluded that the amount of linoleum removed from each of the separately addressed buildings did not exceed the threshold of 160 square feet. *Id.* The ALJ also concluded that the Region had failed to "effectively charge" and "pursue" its claims with respect to the Calderwood Apartments and that, in particular, the Region had failed to establish that the linoleum was RACM. *Id.*[13]

[13] In the course of his ruling on liability, the ALJ rejected Friedman & Schmitt's argument that the Region should be equitably estopped from enforcing the Asbestos NESHAP's applicability provisions in this case. Initial Decision at 18-20. Specifically, the ALJ held that Friedman & Schmitt had not shown the requisite misconduct by the Region or EPA necessary to sustain an equitable estoppel claim against the government. *Id.* at 20.

Although the ALJ concluded that Friedman & Schmitt were not liable for the alleged violations, the ALJ proceeded to offer his opinion as to what penalty should be imposed for the alleged violations in the event that his liability determination is reversed on appeal. *Id.* at 23-45. The ALJ stated that he would reject the Region's proposed penalty of $134,300 and instead impose a penalty of $3,500.

The Region appealed from the ALJ's Initial Decision. *See* Notice of Appeal By the Director, Air Division, United States Environmental Protection Agency, Region IX and Brief in Support of Notice of Appeal (Oct. 28, 2002) (hereinafter "Region's Brief"). The Region argues, among other things, that the ALJ erred in concluding that Friedman & Schmitt lacked fair notice of their obligation to comply with the federal Asbestos NESHAP, that Friedman & Schmitt should be found liable for three violations of the Asbestos NESHAP and the CAA, and that a substantial penalty should be imposed on Friedman & Schmitt for their violations. Friedman & Schmitt filed a brief in opposition to the Region's appeal. *See* Friedman & Schmitt's Brief. Friedman & Schmitt did not, however, file a cross-appeal.[14] The Board held oral argument in this matter on July 26, 2003. *See* Transcript of Oral Argument (July 26, 2003) (hereinafter "Oral Argument Tr. at ___").

---

[14] In their appellate brief, Friedman & Schmitt renew an argument they made before the ALJ that the ALJ rejected. They argue that the Region should be equitably estopped from enforcing the Asbestos NESHAP in this case. However, since the ALJ rejected this defense and Friedman & Schmitt did not file an appeal or cross appeal raising this issue, we will not consider it on appeal. Nevertheless, even if Friedman & Schmitt had properly filed a notice of appeal raising this issue, we would not have reversed the ALJ's decision in this regard because the ALJ correctly held that Friedman & Schmitt did not show the requisite "affirmative misconduct" necessary for finding an estoppel against the government, nor did they show that EPA intended Friedman & Schmitt to believe that the SMAQMD regulations controlled the applicability of the NESHAPs to the activities at issue here. *See* Initial Decision at 18-20 & n.22; *accord In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 196-204 (EAB 1997), *appeal dismissed as untimely*, 192 F.3d 917 (9th Cir. 1999), *dismissal as untimely vacated and dismissed as moot due to settlement*, 200 F.3d 1222 (9th Cir. 2000); *In re Newell Recycling Co.*, 8 E.A.D. 598, 631 n.24 (EAD 1999), *aff'd*, 231 F.3d 204 (5th Cir. 2000), *cert. denied*, 534 U.S. 813 (2001).

II. *DISCUSSION*

A. *Standard of Review*

We review the ALJ's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.31(f) (2002);[15] *see also In re Richner*, CWA Appeal No. 01-01, slip op. at 4 (EAB, July 22, 2002), 10 E.A.D. __; *In re LVI Envtl. Servs.*, CAA Appeal No. 00-8, slip op. at 3 (EAB, June 26, 2001), 10 E.A.D. ___; *In re City of Marshall, Minnesota*, CWA Appeal No. 00-9, slip op. at 10 (EAB, Oct. 31, 2001), 10 E.A.D. __; *In re Billy Yee*, TSCA Appeal No. 00-2, slip op. at 13 (EAB, May 29, 2001), 10 E.A.D. __, *petition dismissed*, 23 Fed. Appx. 636, 2002 WL 87636 (8th Cir. 2002).

Among other things, the applicable part 22 regulations implement the authority under section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 557(b), which provides that "[o]n appeal from or review of the initial decision, the agency has all the powers [that] it would have in making the initial decision." *See In re Coast Wood Preserving, Inc.*, EPCRA Appeal No. 02-01, slip op. at 14 (EAB, May 6, 2003), 11 E.A.D. __; *In re Chem Lab Prod. Inc.*, FIFRA Appeal No. 02-01, slip op. at 18 (EAB, Oct. 31, 2002), 10 E.A.D. ___; *In re City of Salisbury*, CWA Appeal No. 00-01, slip op. at 18 (EAB, Jan. 16, 2002), 10 E.A.D. ___; *In re Everwood Treatment Co.*, 6 E.A.D. 589, 612 n.39 (EAB 1996), *aff'd*, No. 96-1159-RV-M (S.D. Ala. Jan. 21, 1998). In issuing the Initial Decision, the ALJ was required to resolve matters in controversy based on a preponderance of the evidence in the record. 40

---

[15] The Board, however, may defer to an ALJ's factual findings where credibility of witnesses is at issue "because the presiding officer had the opportunity to observe the witnesses testify and to evaluate their credibility." *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998); *accord In re Advanced Elecs., Inc.*, CWA Appeal No. 00-5, slip op. at 10 n.17 (EAB, Mar. 11, 2002), 10 E.A.D. ___, *appeal voluntarily dismissed*, No. 02-1868 (7th Cir. May 21, 2003). The Board may also apply a deferential standard of review to the ALJ's decisions regarding discovery and certain penalty determinations. *See In re Chempace Corp.*, 9 E.A.D. 119, 133-34 (EAB 2000). The Board's standard for reviewing penalty determinations will be discussed further in part II.D below.

C.F.R. § 22.24(b); *see In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 217 (EAB 1997), *appeal dismissed as untimely*, 192 F.3d 917 (9th Cir. 1999), *dismissal as untimely vacated and dismissed as moot due to settlement*, 200 F.3d 1222 (9th Cir. 2000). Accordingly, our *de novo* review must apply this same standard.

The preponderance of the evidence standard is intended to "'instruct the fact finder concerning the degree of confidence society thinks he should have in the correctness of his factual conclusion.'" *In re Echevarria*, 5 E.A.D. 626, 638 (EAB 1994) (quoting *In re Winship*, 397 U.S. 358, 370 (1970)). This means that the ALJ in issuing the Initial Decision, and this Board in reviewing the ALJ's conclusions and issuing our decision on appeal, should conclude "'that [each] factual conclusion is more likely than not.'" *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998) (quoting *Echevarria*, 5 E.A.D. at 638); *see also In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 363 n. 20 (EAB 1994) (preponderance of the evidence means that a fact is more probably true than untrue); *In re City of Detroit Pub. Lighting Dep't*, 3 E.A.D. 514 (CJO 1991); Koch, Administrative Law and Practice at 491 (1985).

In circumstances of competing evidence, our decision is informed by the burdens of proof. "The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R. § 22.24(a); *see also, Richner*, slip op. at 4, 10 E.A.D. __; *City of Marshall*, slip op. at 11, 10 E.A.D. __. Once complainant's prima facie case has been established, "respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief." 40 C.F.R. § 22.24(a). For "affirmative defenses," the respondent bears the burdens of presentation and persuasion. *Id.*; *see also, Richner*, slip op. at 4, 10 E.A.D. __; *City of Marshall*, slip op. at 11, 10 E.A.D. __.

Where liability has been established, the statutory and regulatory provisions governing this proceeding impose additional considerations for the determination of an appropriate penalty. These additional

considerations will be discussed below in part II.D where we explain our penalty analysis.

In the present case, the Region's appeal raises issues regarding both the ALJ's conclusion that Friedman & Schmitt are not liable for the three alleged violations and the ALJ's analysis, offered in dicta, regarding the penalty in the event his liability finding is reversed on appeal. For the following reasons, we overrule the ALJ's Initial Decision on the liability issue, finding that Friedman & Schmitt are liable for three violations of the CAA and Asbestos NESHAP. As we explain below in part II.D, we further reject portions of the ALJ's penalty analysis and defer to other portions of that analysis. We assess a penalty of $30,980 for Friedman & Schmitt's three violations of the CAA and Asbestos NESHAP.

B. *Liability Issues: Applicability of the Asbestos NESHAP*

In its Complaint, the Region alleged that Friedman & Schmitt are liable for three violations of the Asbestos NESHAP and sections 112 and 114 of the CAA. As noted above in part I.A, we have held that proof of liability under the Asbestos NESHAP requires a "two-fold showing: first, the Agency must show that the NESHAP requirements apply, and second, that the work practice standards of the NESHAP have not been satisfied." *Echevarria*, 5 E.A.D. at 633 (citing *United States v. MPM Contractors, Inc.*, 767 F. Supp. 231, 233 (D. Kan. 1990)). In this part, we will discuss the Asbestos NESHAP's applicability requirements and Friedman & Schmitt's related affirmative defense that they did not have fair notice that applicability would be governed by the terms of the Asbestos NESHAP.

1. *Background: Criteria for Federal Asbestos NESHAP Applicability and Friedman & Schmitt's "Fair Notice" Argument*

The Asbestos NESHAP imposes different requirements depending on whether an activity is a renovation or a demolition and depending on the amount of regulated asbestos containing material, or

RACM, the activity disturbed. *See* 40 C.F.R. § 61.145(a) (1996). The ALJ determined that the regulations applicable to renovations, rather than demolitions, govern the activity at issue in this case. Initial Decision at 11-12. This distinction is not material to our decision since we find that the threshold amount of RACM was exceeded in this case (as we explain in part II.B.2 below) and the notice requirements for demolitions that exceed this threshold are the same as the notice requirements for renovations that exceed the threshold. 40 C.F.R. § 61.145(a)(1), (4).[16]

For renovation activities, the Asbestos NESHAP states in relevant part as follows:

> (4) In a facility being renovated, * * * all the requirements of (b) and (c) of this section apply if the combined amount of RACM to be stripped, removed, dislodged, cut, drilled, or similarly 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

---

[16] Friedman & Schmitt argue that the Region's frequent references to renovation in its filings before the ALJ show that the Region's cause of action was limited to the activities at Building #2, which they contend was the only building being "renovated." Friedman & Schmitt's Brief at 11. The ALJ appears to have based his decision in part on this wording choice as reflected by those portions of the Region's post-hearing brief the ALJ identified. Initial Decision at 11. However, contrary to Friedman & Schmitt's suggestion, the Complaint in count I expressly alleges that Friedman & Schmitt failed to provide the required notice "prior to the commencement of *demolition* or renovation activities." Complaint at 5 ¶ 20 (emphasis added). Thus, the Complaint clearly was not limited to renovation activities. Moreover, in view of the absence of any material distinction between characterizing the activity as renovation or demolition for purposes of the notice obligation (when the threshold amount of RACM is exceeded), we find that the ALJ read more into the Region's use of the term "renovation" in certain portions of its brief than the terms themselves bear in this context, particularly in light of the Region's express statements elsewhere in its briefs clearly indicating that it viewed the Calderwood related activities as relevant to its cause of action. *See, e.g.*, Complainant's Post Hearing Brief at 6, 8-9, 10-11, 12, 14, 23 (Jan. 8, 2001).

(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)(4)(i), (ii) (1996).

In the present case, the evidence in the record shows that Friedman & Schmitt's renovation activity disturbed more than 160 square feet of RACM on facility components. In particular, Mr. Schmitt removed 1600 square feet of RACM in the form of acoustic ceiling material from Building #2 in August 1997. Evidentiary Tr. at 73-75, 77-78; Gov't Ex. 4.[17] The evidence in the record also shows that Mr. Schmitt removed a total of 264 square feet of asbestos containing linoleum from three of the Calderwood Apartment buildings in June 1997 (80 square feet from 2901 Calderwood Lane, 94 square feet from 2911 Calderwood Lane, and 90 square feet from 2931 Calderwood Lane). Resp. Ex. 6; Evidentiary Tr. at 64, 119-20, 124, 399. Although these amounts greatly exceed the above-referenced square footage threshold for application of the Asbestos NESHAP's notice and work practice standards, the ALJ nevertheless held that he would not apply the Asbestos NESHAP's requirements to establish liability in this case because Friedman & Schmitt did not have fair notice that applicability would be determined based on the provisions of the federal Asbestos NESHAP. Initial Decision at 12, 15-18.[18]

---

[17] Government Exhibit 3 identifies the amount of removed acoustic ceiling material as 3200 square feet, rather than the 1600 square feet that appears to be the correct figure. This discrepancy is not material for the applicability question, since 1600 square feet still greatly exceeds the threshold of 160 square feet. We note as well that the Region used the 1600 square feet measurement to calculate the penalty that it requested.

[18] The ALJ specifically held that "absent the imposition of other defenses, EPA is not bound by less stringent state or local standards and may proceed to enforce the NESHAP regulations. However, such other defenses include whether a regulated party has been given 'fair warning.'" Initial Decision at 15.

Specifically, the ALJ concluded that the provisions of a local rule SMAQMD promulgated made ambiguous the notice that Friedman & Schmitt would otherwise have received from the Asbestos NESHAP. At the time of the violations, the applicability provision of the local SMAQMD rule, Rule 902-3 § 110.10(b),[19] provided that notice and compliance with the work practice standards is not required for:

> renovations where the combined amount of RACM is less than 260 lineal feet or less than 160 square feet, or less than 35 cubic feet.

See Resp. Ex. 1. The ALJ held that this SMAQMD rule did not provide any express priority among the three ways to measure RACM. Initial Decision at 13. The ALJ therefore held that, because the local rule did not specify when RACM must be measured in square feet and when it may be measured in cubic feet, Friedman & Schmitt were not given fair notice that applicability would be determined based on the square feet of RACM on the components of Building #2, rather than the cubic feet of the material after it was removed. *Id.* at 17-18. The record shows that the 1600 square feet of acoustic ceiling material removed from Building #2, consisted of less than 14 cubic feet after it was removed. Evidentiary Tr. at 105. Thus, in this case, the choice of measurement method determines whether or not the threshold was exceeded.

The ALJ also held that, because SMAQMD required a demolition permit for each separately addressed building, Friedman & Schmitt did not have fair notice that the "facility" for which the combined amount of RACM must be measured was the whole Town and Country Village redevelopment project, rather than the individual buildings to be demolished in that project. Initial Decision at 14-15. For this reason, the ALJ concluded that he would look to the local demolition permit requirements, rather than the Asbestos NESHAP's, to define the relevant facility in this case. He therefore concluded that the RACM removed from the Calderwood Apartments fell outside the reach of

[19] *See* Resp. Ex. 1.

regulatory coverage because the amount of linoleum removed from each of the separately addressed buildings did not exceed the threshold of 160 square feet at any one address. *Id.*[20]

Upon review, we conclude, as explained below, that the ALJ erred in relying on the local rule as undercutting the notice given the regulatory community regarding the requirements of the federal Asbestos NESHAP both with respect to whether RACM must be measured as square feet on facility components and as to the identification of the facility at issue.

2. *Fair Notice Regarding Method for Measuring the RACM in Building #2*

Generally, the fair notice doctrine may in some circumstances provide a defense where a regulation "fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986).[21] Although this principle arises most often in the criminal context, the fair notice concept has been recognized in the civil administrative context as well. *See, e.g., Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987); *see also Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000); *United States v. Chrysler Corp.*, 158 F.3d 1350 (D.C. Cir. 1998); *United States v. Hoechst Celanese Corp.*, 128 F.3d 216 (4th Cir. 1997), *cert. den.*, 524 U.S. 952 (1998); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995); *Beazer East, Inc. v. EPA*, 963 F.2d 603 (3rd Cir. 1992); *Rollins Envtl. Serv., Inc. v. EPA*, 937 F.2d 649 (D.C. Cir. 1991); *Fluor Constructors, Inc. v. OSHRC*, 861 F.2d 936 (6th Cir. 1988); *Tex.*

---

[20] As noted, the aggregate amount of linoleum removed from the Calderwood Apartments was 264 square feet, with 80 square feet removed from 2901 Calderwood Lane, 94 square feet from 2911 Calderwood Lane, and 90 square feet from 2931 Calderwood Lane. Resp. Ex. 6.

[21] The U.S. Supreme Court has explained that regulations must be sufficiently definite so that ordinary people exercising common sense know what they mean. *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952).

E. Prods. Pipeline Co. v. OSHRC, 827 F.2d 46 (7th Cir. 1987); *In re Metro-East Mfg. Co.*, 655 F.2d 805 (7th Cir. 1981); *Kropp Forge Co. v. Sec'y of Labor*, 657 F.2d 119 (7th Cir. 1981); *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645 (5th Cir. 1976).

In one of the earliest cases to recognize the fair notice doctrine in the administrative context, the Fifth Circuit stated, "[i]f a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express * * *. [The agency] has the responsibility to state with ascertainable certainty what is meant by the standards [the Agency] has promulgated." *Diamond Roofing*, 528 F.2d at 649 (citations omitted). The phrase "ascertainable certainty" is often quoted as expressing the underlying standard of what degree of notice must be given to be fair. For example, the D.C. Circuit described the test as follows:

> [W]e must ask ourselves 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. If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainable certainty," the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.

Gen. Elec., 53 F.3d at 1329.

Courts often consider a number of factors when evaluating whether a regulation provides fair notice. In some cases, the plain language of the regulation may suffice to show fair notice. *See, e.g., Gates*, 790 F.2d at 156 (focusing on the actual language of the regulation at issue to conclude that defendant did not have fair notice of OHSA's interpretation). The agency's other public statements also bear on the fair notice inquiry. *See Gen. Elec.*, 53 F.3d at 1329 (stating that notice can come from "regulations and *other public statements* issued by the agency") (emphasis added); *Sekula v. FDIC*, 39 F.3d 448, 457 (3rd Cir.

1994) (concluding that agency's long-standing, consistent, public interpretation of regulation provided fair notice); *Fed. Election Comm'n v. Arlen Specter '96*, 150 F. Supp. 2d 797, 814 (E.D. Pa. 2001) (reasoning that although actual language of regulation was ambiguous, numerous public statements that clearly and consistently stated agency's interpretation provided fair notice). Likewise, an "agency's pre-enforcement efforts to bring about compliance * * * [may also] provide adequate notice." *Gen. Elec.*, 53 F.3d at 1329. Significant difference of opinion within the agency as to the proper interpretation of the agency's regulation may also be considered in evaluating whether the regulatory text provides fair notice. *See id.* at 1332; *see also Rollins*, 937 F.2d at 653.

In addition, courts often consider whether or not an allegedly confused defendant inquires about the meaning of the regulation at issue. *See, e.g., Tex. E. Prods. Pipeline Co.*, 827 F.2d at 50 (finding fault with company's failure to make any inquiry of the administrative agency responsible for the regulations at issue); *In re Tenn. Valley Auth.*, 9 E.A.D. 357, 411-16 (EAB 2000), *appeals dismissed for lack of jurisdiction*, 336 F.3d 1236 (11th Cir. 2003). Friedman & Schmitt bear the burden of establishing a lack of notice, as the issue is raised as an affirmative defense to liability. *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 886 (S.D. Ohio. 2003).

In the present case, there is nothing ambiguous or unascertainable in the federal regulations regarding when the threshold amount of RACM must be measured in square feet and when the RACM may be measured in cubic feet. The Asbestos NESHAP, in plain unambiguous language, states that RACM must be measured in linear feet "on pipes" or square feet "on other facility components" and may be measured in cubic feet "off facility components *where the length or area could not be measured previously.*" 40 C.F.R. § 61.145(a)(1)(i), (ii) (1996) (emphasis added). The italicized text makes clear that the cubic foot measurement may be used only where RACM cannot be measured in linear or square feet. Indeed, Friedman & Schmitt acknowledge in their brief on appeal that "40 C.F.R. § 61.145(a)(i) specifically indicates that cubic foot measurement should be used when the material cannot be

measured in square feet or lineal feet." Friedman & Schmitt's Brief at 16.

Ordinarily, this would end the fair notice inquiry since the text of the regulation provides notice of the relevant standard. Indeed, Friedman & Schmitt's concession regarding the clarity of the Asbestos NESHAP takes out of play the following cases they cite to support their contention that they were not given fair notice: *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986); *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1 (D.C. Cir. 1987); and *Rollins Environmental Services, Inc. v. EPA*, 937 F.2d 649 (D.C. Cir. 1991). These cases are plainly distinguishable from the present case because the federal regulations at issue in these cases were facially ambiguous. Friedman & Schmitt argue that "SMAQMD rule 110.2 was unclear and ambiguous." Friedman & Schmitt's Brief at 23. However, none of the cases Friedman & Schmitt cite show a court looking to ambiguity in a *state or local rule* as evidence that a *federal regulation* is ambiguous or otherwise fails to give fair notice of its requirements.

Although not so clearly articulated by Friedman & Schmitt, their arguments appear to contend, in essence, that the alleged lack of fair notice does not arise from the regulatory text of the Asbestos NESHAP, but instead arises from the federal regulations authorizing the Agency to approve local rules. Friedman & Schmitt's Brief at 27-28.[22] Although Friedman & Schmitt do not argue that the Agency made a specific decision to approve SMAQMD's local rule 902-3 § 110.10(b), they do argue that "[b]y turning a blind eye to the implementation of non-conforming local rules, the EPA ratified and accepted the local standards." *Id.* at 29. In this sense, Friedman & Schmitt's fair notice argument invites us to consider not only the clarity of the Asbestos NESHAP's applicability provisions, but also the clarity of the federal regulations governing delegation and approval of local rules, namely 40 C.F.R. §§ 63.90-.93 (1996).

---

[22] Friedman & Schmitt do, for example, specifically refer to the regulations that implement the CAA's authorization for the Agency to delegate enforcement to state and local governments and to approve local regulations.

Friedman & Schmitt contend that 40 C.F.R. §§ 63.91-.92 (1996) impose a duty on the Agency to disapprove any local rule that does not comply with federal standards. Friedman & Schmitt's Brief at 28. They argue that a failure to disapprove the local regulation has the effect of delegating authority to implement and enforce the local rule in lieu of the otherwise applicable federal rules. Friedman & Schmitt's Brief at 28. Viewed in this light, according to Friedman & Schmitt, the lack of clarity reflected in the local rule also infects the meaning of the federal regulation. *Id.*[23] As explained below, this lack-of-fair-notice argument fails for two independent reasons: (1) Friedman & Schmitt were provided fair notice that EPA retains authority to enforce the federal Asbestos NESHAP even where enforcement authority has been delegated to a state or local government or a local rule has been approved; and (2) Friedman & Schmitt were provided fair notice that EPA had not approved the local SMAQMD rule at issue.

As instructed by the fair notice caselaw discussed above, we begin by reviewing whether the regulatory text provides fair notice. We conclude that the text of the federal regulations provided Friedman & Schmitt fair notice that the Region retained authority to enforce the federal Asbestos NESHAP. The regulatory sections upon which Friedman & Schmitt relied, sections 63.91-.92 (1996), are part of 40 C.F.R. part 63, subpart E, which specifically provides in section 63.90(c)[24] that "[n]othing in this subpart shall prohibit the Administrator from enforcing any applicable rule, emission standard or requirement established under section 112" of the CAA. 40 C.F.R. § 63.90(c)

---

[23] Notably, Friedman & Schmitt do not contend that they were, in fact, mislead by 40 C.F.R. §§ 63.91-.92 (1996), nor do they contend that they read or were even aware of these rules prior to the violations at issue in this case.

[24] Subpart E of Part 63 sets forth the rules governing approval of state programs and delegation of federal authorities to the states, and section 63.90(c) identifies authorities that the Administrator retains and may not delegate.

(1996).[25] This regulatory reservation of the Administrator's enforcement authority derives from a comparable reservation of enforcement authority in the CAA itself. *See* CAA § 112(*l*)(7), 42 U.S.C. § 7412(*l*)(7). Thus, section 63.90(c) provided fair notice in unambiguous terms that, notwithstanding approval of a local rule or delegation of authority to enforce a local rule under sections 63.91-.92, the EPA Administrator retained authority at all times to enforce otherwise applicable federal rules, like the Asbestos NESHAP.[26]

It is important to note that the ALJ correctly held, based on the CAA's reservation of EPA's enforcement authority pursuant to sections 112(*l*) and 114, "EPA is not bound by less stringent state or local standards and may proceed to enforce the NESHAP regulations," even where some enforcement authority has been delegated to the state or locality. Initial Decision at 14-15 (citing *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1091 (W.D. Wis. 2001); *United States v. LTV Steel Co.*, 118 F. Supp. 2d 827, 832-35 (N.D. Ohio 2000); *United States v. SCM Corp.*, 615 F. Supp. 411, 418-20 (D. Md. 1985); *United States v. Harford Sands, Inc.*, 575 F. Supp. 733, 735 (D. Md. 1983)); *see also* CAA § 112(*l*)(1), 42 U.S.C. § 7412(*l*)(1). The ALJ, however, erred in failing to recognize that this reservation of authority to enforce the Asbestos NESHAP served as notice to Friedman & Schmitt that the clear and unambiguous federal regulations had continued vitality irrespective of the presence of arguably ambiguous local rules.

---

[25] The version of 40 C.F.R. part 63, subpart E applicable to this case was promulgated in 1992 and subsequently replaced by amendments published in July 1996. *See* 61 Fed. Reg. 36,245 (July 10, 1996); 57 Fed. Reg. 28,087 (June 24, 1992). After the violations at issue in this case, the part 63, subpart E rules were amended and replaced by the version currently published in the Code of Federal Regulations. *See* 65 Fed. Reg. 55,810 (Sept. 14, 2000). The language quoted above is now found at 40 C.F.R. § 63.90(d)(2) (2003).

[26] The Asbestos NESHAP is a rule established under section 112 of the CAA. *See* 49 Fed. Reg. 13,661 (Apr. 5, 1984) (stating that authority for Asbestos NESHAP regulations is 42 U.S.C. § 7412, among other sections). As discussed above, pursuant to the express terms of the Asbestos NESHAP, it is applicable to renovations that disturb 160 square feet of RACM on facility components other than pipes.

The text of the federal regulations also provided Friedman & Schmitt fair notice that the local SMAQMD rule upon which they rely had not been approved by the EPA under 40 C.F.R. §§ 63.91-.92 (1996). Sections 63.91-.92 (1996) are very specific concerning the sequence of the approval process, which is completed by notice published in the Federal Register if approval of a local rule is granted. *See* 40 C.F.R. § 63.91(a)(3) (1996). By requiring approval to be published in the Federal Register, these regulations provide a clear and ascertainably certain method for the regulated community to determine whether a state's request for approval has been granted – the regulated community need only check whether an approval has been published in the Federal Register. Moreover, publication in the Federal Register is required under the Administrative Procedure Act for amendment of a federal rule, such as the Asbestos NESHAP, 5 U.S.C. § 553, and such publication is legally sufficient notice to the regulated community. 44 U.S.C. §§ 1501-1511 (Federal Register Act).[27, 28]

---

[27] *See also Yakus v. United States*, 321 U.S. 414, 435 (1944) (Notice published in the Federal Register is sufficient, under the Federal Register Act, to afford notice to all affected persons.). Thus, we also reject Friedman & Schmitt's argument, *see, e.g.*, Oral Argument Tr. at 50-51, that they should not be charged with knowledge of the Asbestos NESHAP as a body of law separate from the local SMAQMD rules. *Id.*; *Fed. Crop Ins. v. Merrill*, 332 U.S. 380, 384-85 (1947) ("Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives notice of their contents.").

[28] The cases Friedman & Schmitt cite involving the federal prevention of significant deterioration ("PSD") program are distinguishable from the present case on this point. *See* Friedman & Schmitt's Brief at 29 (citing *In re Milford Power Plant*, 8 E.A.D. 670 (EAB 1999); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244 (EAB 1999)). In these PSD cases, EPA delegated to the particular state the authority to issue *federal* PSD *permits*. In this PSD setting, the state-issued permit is the federal permit; there is no federal permit other than the permit issued by the state under its delegated federal authority. Accordingly, these cases do not provide meaningful guidance for a circumstance like the one at hand involving parallel and independent federal and local requirements.

Likewise lacking force is Friedman & Schmitt's argument that "[w]hen the (continued...)

In the present case, Friedman & Schmitt have not identified any notice published in the Federal Register stating that the 1994 amendment to SMAQMD rule 902-3 § 110.10(b) was approved pursuant to 40 C.F.R. §§ 63.91-.92 (1996). Without any such Federal Register notice, Friedman & Schmitt's argument dissolves into the unsupportable contention that mere existence of a process under the federal regulations for the Agency to approve state regulations created ambiguity or confusion regarding whether Friedman & Schmitt could appropriately look solely to the local rules. We conclude that there is no fair notice issue, where, as here, it is readily ascertainable and certain from the unambiguous regulatory text defining the process for approving local rules and from a review of the Federal Register that the final step in the regulatory prescribed process for such approval had not been completed during the relevant time frame. In short, Friedman & Schmitt cannot argue that they reasonably believed that EPA had approved the local SMAQMD rule since there was no Federal Register notice granting such approval.

Further, even assuming arguendo that the federal regulatory text was ambiguous, Friedman & Schmitt's fair notice defense would fail on the grounds that they did not show any effort to seek clarification from either the EPA or SMAQMD. The courts and this Board have noted that a member of the regulated community, when confused by a regulatory text and confronted by a choice between alternative courses of action,

---

[28](...continued)
EPA delegated its authority to *promulgate* and enforce rules and regulations, local authorities *promulgated* them on behalf of the EPA." Friedman & Schmitt's Brief at 30 (emphasis added). Friedman & Schmitt neither cited nor introduced into the record of this case any evidence or authority showing that EPA, in fact, sought to delegate *rulemaking* authority to SMAQMD, Evidentiary Tr. at 248, and we are unaware of any authority in the CAA or its implementing regulations that would allow for such a delegation. Indeed, if we were to accept Friedman & Schmitt's argument that SMAQMD promulgated its rules on behalf of EPA, it would be tantamount to approving a process for promulgating changes to federal regulations (i.e., the Asbestos NESHAP) under procedures that violate the Administrative Procedure Act, 5 U.S.C. § 553. Central to those requirements is publication of the rule making in the Federal Register. *Id.* Such publication is also required by 40 C.F.R. §§ 63.91–.92 (1996) and is conspicuously absent in the present case for SMAQMD local rule 902-3 § 110.10(b).

assumes a calculated risk by failing to inquire about the meaning of the regulations at issue. *See, e.g., DiCola v. FDA*, 77 F.3d 504, 508 (D.C. Cir. 1996); *Tex. E. Prods. Pipeline Co.*, 827 F.2d at 50 (finding fault with company's failure to make any inquiry of the administrative agency responsible for the regulations at issue); *In re Tenn. Valley Auth.*, 9 E.A.D. 357, 411-16 (EAB 2000), *appeals dismissed for lack of jurisdiction*, 336 F.3d 1236 (11th Cir. 2003); *see also Hoechst Celanese*, 128 F.3d at 224 ("A claim of lack of notice 'may be overcome in any specific case where reasonable persons would know their conduct is at risk.'" (quoting *Maynard v. Cartwright*, 486 U.S. 356, 361, (1988))). Friedman & Schmitt provided no testimony, nor did they identify any other evidence in the record of this proceeding, showing that they had attempted to obtain clarification from SMAQMD or from the EPA regarding whether the SMAQMD rule had been approved or whether the Region may enforce the Asbestos NESHAP in any event.

Moreover, although Friedman & Schmitt elicited some testimony from the SMAQMD inspector to the effect that other members of the regulated community may have been confused by the local rule, they submitted no evidence indicating confusion by the inspector, any other SMAQMD personnel, or EPA personnel, Regional offices, or EPA's headquarters office regarding whether EPA had approved the SMAQMD rule or whether the federal Asbestos NESHAP had continuing vitality separate and apart from the local rule.

Thus, we reject as error, the ALJ's conclusion that the D.C. Circuit's holding in the *General Electric* case is analogous to the present case. Initial Decision at 17. In *General Electric*, the evidence in the record showed that EPA's Regional offices held conflicting interpretations of the regulation at issue in that case. *Gen. Elec.*, 53 F.2d at 1332. There is no similar evidence in the record of this case showing conflicting Agency opinion (or even conflicting opinion within SMAQMD) regarding the interplay between the SMAQMD local rule and the Asbestos NESHAP. Indeed, Friedman & Schmitt's own environmental consultant testified that he was not confused and knew that the local rule should be interpreted in light of the federal requirements and that the RACM threshold was to be measured in square

feet on facility components (other than pipes). Evidentiary Tr. at 373, 381.

Specifically, Friedman & Schmitt's consultant, who they hired to advise them regarding the RACM in Building #2, testified as follows regarding SMAQMD's 1994 amendments to its local rules (which changed the RACM threshold to 160 lineal feet, 260 square feet or 35 cubic feet):

> JUDGE MORAN: So in 1994, that's when you first had this confusion as to what triggers the application of the requirements?
>
> THE WITNESS: I didn't have any confusion. My clients did.
>
> JUDGE MORAN: Okay. And then you were certain – you had your own clear interpretation of it, but your clients had some confusion?
>
> THE WITNESS: That's correct.

Evidentiary Tr. at 373. Friedman & Schmitt's consultant testified further that "It's part of my inspection protocol [in] determining surface materials, floor material and the like, those areas are measured in square footage." *Id.* at 379. Thus, notwithstanding Friedman & Schmitt's failure to seek advice from the Region regarding the applicability standard, had Friedman & Schmitt merely sought the advice of their own contractor, they would have been told that RACM in the form of the acoustic ceiling material in Building #2 was required to be measured in square feet for determining whether the applicability threshold would be exceeded.

Accordingly, for the foregoing reasons, we conclude that (1) the regulatory text of 40 C.F.R. § 63.90(c) (1996) and the statutory text of CAA § 112(*l*) provided Friedman & Schmitt fair notice that the Region may enforce the Asbestos NESHAP's requirements notwithstanding any delegation of authority to SMAQMD; (2) the regulatory text of 40 C.F.R. §§ 63.91-.92 provided Friedman & Schmitt fair notice that the Agency had not approved the local SMAQMD rules and Friedman & Schmitt

have not shown any notice of approval published in the Federal Register; (3) Friedman & Schmitt failed to show that they made any effort to seek clarification from the Region regarding the applicability of the Asbestos NESHAP; and (4) Friedman & Schmitt failed to show any conflicting Agency opinion (or even conflicting opinion within SMAQMD) of whether the SMAQMD local rule had been approved or whether the Region may enforce the Asbestos NESHAP in any event, and the evidence shows that Friedman & Schmitt's own environmental consultant was not confused regarding the requirement that the material at issue in this case was to be measured in square feet. For these reasons, we reject Friedman & Schmitt's argument that they lacked fair notice of the meaning and continued vitality of the Asbestos NESHAP.

We also find, as discussed above, that Friedman & Schmitt disturbed through their activities at Building #2 more than 160 square feet of RACM in the form of acoustic ceiling material. Accordingly, we find that the Asbestos NESHAP's notice and work practice requirements for renovations disturbing more than 160 feet of RACM on facility components were applicable to Friedman & Schmitt's activities at the facility at issue in this case.[29]

3. *RACM in the Calderwood Apartments: Issues of Fair Notice, Evidence that Linoleum was RACM, and Pleading of the Complaint*

Before leaving the question of applicability, we also must consider whether evidence concerning Friedman & Schmitt's renovation activities at the Calderwood Apartments is an independent basis for finding that the Asbestos NESHAP's notice and work practice standards apply in this case. Specifically, in addition to the 1600 square feet of RACM that was removed from Building #2 in August 1997, the evidence in the record also shows that Mr. Schmitt removed a total of 264 square

[29] As discussed below in part II.B.3.a, we conclude that the "facility" in this case is the "installation" consisting of the Town & Country Village redevelopment project, which included Building #2 and the Calderwood Apartments.

feet of linoleum from three of the Calderwood Apartments in June 1997. Resp. Ex. 6, Evidentiary Tr. 64, 119-20, 124, 399.

In essence, Friedman & Schmitt argue, and the ALJ held, that the removal of this linoleum from the Calderwood Apartments should not be looked to as satisfying the applicability threshold under the federal Asbestos NESHAP for three independent reasons. Friedman & Schmitt's Brief at 9-16; Initial Decision at 12. First, Friedman & Schmitt argue that each building must be viewed as a separate facility and, since the amount of linoleum removed from each building was less than 160 square feet, that their activities did not exceed the threshold at any one facility. Friedman & Schmitt's Brief at 12-16. Second, Friedman & Schmitt argue that the record does not show that the linoleum removed from the Calderwood Apartments was RACM. *Id.* at 11-12. Third, they argue that the Region's Complaint did not effectively charge violations based on the activity at the Calderwood Apartments. *Id.* at 10-11. We reject each of these arguments for the following reasons.

a. *Scope of Facility*

Friedman & Schmitt argue that the threshold of 160 square feet of RACM was not disturbed at the Calderwood Apartments because each apartment building must be viewed as a separate "facility." Friedman and Schmitt's Brief at 12-16. They note that the 264 square feet of linoleum was removed from three separate, free-standing buildings – 80 square feet was removed from 2901 Calderwood Lane, 94 square feet was removed from 2911 Calderwood Lane, and 90 square feet was removed from 2931 Calderwood Lane. *Id.* at 12.[30]

Friedman & Schmitt argue that they were entitled to rely on SMAQMD's demolition permitting process in determining the scope of "facility" for purposes of the asbestos renovation notice requirements.

---

[30] As we observed in footnote 6 above, Friedman & Schmitt refer to these buildings as 2901, 2911, and 2931 Marconi Avenue. Nevertheless, it is evident that they are referring to the same buildings the Region identified as 2901, 2911, and 2931 Calderwood Lane.

Specifically, they argue that, under the local SMAQMD rules "[i]ndividual demolition permits were required for each [building], and separate permit fees required as well." *Id.* 12. Further, Friedman & Schmitt argue that "[b]y imposing distinct fees for each unit, SMAQMD has recognized that each unit should be regarded separately for reporting purposes." *Id.* at 14. Friedman & Schmitt maintain that treating each building as a separate facility is a more reasonable application of the regulations and that they did not have fair notice of the Region's interpretation that multiple buildings may be treated as a single facility. *Id.* Friedman & Schmitt submit that "[t]here is nothing in the definition [of facility] that indicates or suggests in any way the government may combine buildings, structures or installations when determining the amount of RACM subject to the regulation." *Id.* 13. Friedman & Schmitt's argument, however, must fail.

For determining both the appropriate application of the term "facility" in this case and whether Friedman & Schmitt received fair notice, we begin with the text of the regulations. The Asbestos NESHAP defines the term "facility" as including any "installation,"[31] which in turn is further defined as including "any group of buildings or structures at a single demolition or renovation site that are under the control of the same owner or operator (or owner or operators under common control)." 40 C.F.R. § 61.141. By including "installation" within the scope of "facility" and by defining an installation as "any group of buildings," the regulations specifically contemplated that a group of buildings may be a

---

[31] Section 61.141 provides in relevant part as follows:

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

40 C.F.R. § 61.141 (emphasis added).

single facility.[32] We therefore reject Friedman & Schmitt's general argument that the term "facility" is limited to a single building or structure. We also reject Friedman & Schmitt's argument that they did not have notice that a group of buildings may be treated as a single facility – the regulatory text provided adequate notice in plain and unambiguous language.

The regulations, however, do not allow the Agency to treat all groups of buildings as a single facility. Instead, they require that, in order to be an installation, the group of buildings must be both part of "a single renovation or demolition site" and "under the control of the same owner or operator (or owner or operators under common control)." 40 C.F.R. § 61.141 (definition of installation). The ALJ stated that the phrase "single demolition or renovation site" is not defined in Agency regulations or policy statements and, "[a]s such it was reasonable for [Friedman & Schmitt] to conclude that such demolition or renovation sites were limited by the scope of the demolition permits they applied for, which were specific to each separately addressed structure." Initial Decision at 12. On this issue the ALJ erred. Agency statements regarding the meaning of the terms "facility" and "installation" contain examples showing the Agency's intended application of those terms in contexts similar to this case.

Specifically, the preamble to the 1990 revisions of the Asbestos NESHAP provided two examples of demolition or renovation projects involving multiple buildings that the Agency intended to be treated as a single facility. *See* 55 Fed. Reg. 48,406, 48,412 (Nov. 20, 1990) (hereinafter "1990 Preamble"). Notably, the courts view a regulatory preamble as an authoritative Agency interpretation of the regulation: "'[w]hile language in the preamble of a regulation is not controlling over

---

[32] Friedman & Schmitt argue that the definitions of facility and installation are inconsistent in that, according to Friedman & Schmitt, "the definition of 'facility' clearly contemplates a building or structure, while the definition of 'installation' contemplates a group of buildings or structures." Friedman & Schmitt's Brief at 13-14. The error in this argument is that the definition of "facility" not only referred to a "building or structure," but also expressly included "installation." 40 C.F.R. § 61.141.

the language of the regulation itself * * * the preamble to a regulation is evidence of an agency's contemporaneous understanding of its proposed rules,' and therefore provides guidance in evaluating whether the agency's interpretation of its regulation is consistent with the structure and language of the rule." *HRI, Inc. v. EPA*, 198 F.3d 1224, 1244 n.13 (10th Cir. 2000) (citing *Wyoming Outdoor Council v. United States Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999)); *see also Vermont v. Thomas*, 850 F.2d 99, 103 (2nd Cir. 1988). Therefore, we look to the examples set forth in the 1990 Preamble as providing instruction regarding what may appropriately be considered within the scope of the term "facility" and as providing fair notice to Friedman & Schmitt of EPA's interpretation.

The 1990 Preamble provided this example in discussing the regulatory definition of "installation":

> As an example, several houses located on highway right-of-way that are all demolished as part of the same highway project would be considered an "installation," even when the houses are not proximate to each other. In this example, the houses are under the control of the same owner or operator, i.e., the highway agency responsible for the highway project.

55 Fed. Reg. at 48,412. In addition, in explaining the EPA's interpretation of the term "facility," which as previously noted includes "any installation," the Agency explained as follows:

> [T]he demolition of one or more houses as part of an urban renewal project, a highway construction project, or a project to develop a shopping mall, industrial facility, or other private development, would be subject to the NESHAP.

Id. The first example emphasizes that multiple buildings under the control of the same owner or operator and affected by the same project may be treated as an installation even if the buildings are not proximate

to each other. The second example shows that the development of a shopping mall is among the types of projects that should be considered a single facility even when multiple buildings are involved.

In the present case, Friedman & Schmitt's Answer states as follows:

> The allegations giving rise to this action * * * concern the renovation and/or demolition of property forming part of Town & Country Village, a shopping complex in Sacramento, California. Respondent MORTON FRIEDMAN was the owner of the property in August, 1997, when the alleged violations occurred. * * * Altogether, there were ten buildings involved in the development project in the summer and fall of 1997, as indicated on the attached map.

Answer at 2. From this statement in their Answer, Friedman & Schmitt have admitted that the work performed at the 10 to 11 buildings was part of a single construction project for the development of a shopping mall.

The record also demonstrates that Schmitt's removal of the linoleum from the Calderwood Apartments was part of Friedman & Schmitt's overall Town & Country Village redevelopment project undertaken in the summer of 1997. In particular, Mr. Friedman demolished the Calderwood Apartments on the side of Calderwood Lane adjacent to the Town & Country Village, Evidentiary Tr. at 300, and combined that portion of the Calderwood Apartments with the Town & Country Village, *id.* at 298, in order to construct a larger building to attract an anchor grocery store to the Town & Country Village, *id.* at 296. As noted in the factual background above, Friedman & Schmitt's counsel succinctly described the development project as follows: "Back in the summer of 1997, there was a major renovation project that was going on at the Town & Country Village. * * * There were * * * either 10 or 12 buildings, actually, that were going through renovation or demolition stage to make way for some larger buildings." Evidentiary Tr. at 38.

We find that Friedman & Schmitt's "major renovation project" at the Town & Country Village – which included the removal of 264 square feet of linoleum from those Calderwood Apartments subsequently demolished to allow Mr. Friedman to construct a larger building as an anchor grocery store – was a single "installation" and therefore a "facility" within the meaning of the Asbestos NESHAP, 40 C.F.R. § 61.141. In particular, the Calderwood Apartments and Building #2 were all part of a "development project," Answer at 2, at the Town & Country Village that was similar to the examples of covered projects in the 1990 Preamble. 55 Fed. Reg. 48,406, 48,412 (Nov. 20, 1990). As such, the Town & Country Village development project is appropriately regarded as a single renovation or demolition site. In addition, the Calderwood Apartments and Building #2 were under the common ownership or control of Mr. Friedman. Answer at 2; Evidentiary Tr. at 295. In particular, Mark Friedman testified that the project "was comprised of separate -- several separate legal parcels that were acquired over time by my father or by partnerships that he controlled." Evidentiary Tr. at 295. Accordingly, we find that both conditions for a group of buildings to be considered an "installation" within the Asbestos NESHAP's definition were satisfied in this case.

These conclusions flow fairly and proximately from the plain language of the regulatory definition, as supported by the examples EPA provided in the 1990 Preamble. Thus, we reject Friedman & Schmitt's argument that they did not have fair notice that the term "facility" may be applied to the Town & Country Village development project. *See Gates*, 790 F.2d at 156; *Gen. Elec.*, 53 F.3d at 1329 (stating that notice can come from "regulations and *other public statements* issued by the agency")(emphasis added). Further, Friedman & Schmitt have not identified any inconsistent interpretation or contradictory statements by the EPA or its Regional offices regarding the scope of "facility." *See Sckula v. Fed. Deposit Ins. Corp.*, 39 F.3d 448, 457 (3rd Cir. 1994) (concluding that agency's long-standing, consistent, public interpretation of regulation provided fair notice); *Fed. Election Comm'n v. Arlen Specter '96*, 150 F. Supp. 2d 797, 814 (E.D. Pa. 2001) (reasoning that although actual language of regulation was ambiguous, numerous

public statements that clearly and consistently stated agency's interpretation provided fair notice).[33]

Accordingly, for all of the foregoing reasons, we reject Friedman & Schmitt's argument that they lacked fair notice that the Calderwood Apartments and Building #2, along with the other buildings in the Town & Country Village development project, were a single "facility" within the meaning of the Asbestos NESHAP.

b. *Evidence that the Linoleum Removed from the Calderwood Apartments was RACM*

As noted above, Friedman & Schmitt argue that the record does not show that the linoleum removed from the Calderwood Apartments was RACM. *Id.* at 11-12. On this issue, the ALJ held that "EPA did not establish that the material removed [from the Calderwood Apartments] was regulated asbestos." Initial Decision at 12. We reject Friedman & Schmitt's argument and find that the ALJ erred in this holding.

The term "RACM" is defined by the Asbestos NESHAP as follows:

---

[33] We also reject Friedman & Schmitt's effort to look to the local SMAQMD permitting process as defining the scope of "facility." The record merely contains testimony that demolition permits are required for each separately addressed building. *See* Evidentiary Tr. at 126, 301. The record, however, does not contain a copy, or any citation, to the local regulations requiring such individual permits; and the record does not show whether this requirement for demolition permits is part of the same body of regulations governing notice and work practices for asbestos removal under the local regulations. There is also no information whatsoever in the record showing that the regulations governing such demolition permits were submitted to the EPA for approval under 40 C.F.R. §§ 63.91-.92, much less any evidence that EPA published notice of approval in the Federal Register. Accordingly, Friedman & Schmitt have failed to sustain their burden of showing that they reasonably relied on the local permitting practice as somehow defining the scope of "facility" for the Asbestos NESHAP's notice and work practice requirements.

> Regulated asbestos-containing material (RACM) means (a) Friable asbestos material,[34] (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. Friedman & Schmitt's Answer to the Complaint admits that the linoleum removed from the Calderwood Apartments was "linoleum containing asbestos." Answer at 3. In addition, the June 1996 Report, prepared by Friedman & Schmitt's consultant (prior to the removal of the linoleum), stated that "All of the asbestos-containing linoleum in the designated apartments of each structure are classified as friable, regulated asbestos-containing materials (RACM)." Gov't Ex. 5 at 3.[35] This report specifically referred to Units 7, 22, and 37 with addresses of 2901, 2911, and 2931 Calderwood Lane, which are the buildings referenced in the Region's Complaint, in paragraph 1. The June 1996 Report sets forth in an attachment the specific test results for the samples taken from the linoleum. Thus, there is ample evidence in the record showing that the linoleum removed from the three Calderwood Apartments was RACM.

---

[34] Under the regulations, "friable asbestos material" is material that can be "crumbled, pulverized, or reduced to powder by hand pressure." 40 C.F.R. § 61.141.

[35] Further, the Answer refers on page 5 to an inspection report dated June 11, 1997, prepared by Friedman & Schmitt's asbestos consultant (after Friedman & Schmitt removed the linoleum), which was attached to the Answer as Exhibit D. That report specifically states that "the ACM linoleum in the 3 units were the only regulated asbestos-containing materials (RACM) that was discovered in each of the units." Answer, Ex. D at 1.

Notwithstanding this evidence, Friedman & Schmitt argue that "vinyl floor is Category I ACM, but not necessarily RACM, depending upon how it is removed. * * * The EPA offered no evidence on the method of removal for the Calderwood linoleum." Friedman & Schmitt's Brief at 12. In other words, Friedman & Schmitt argue that the linoleum can fall under part (c) or (d) of the above-referenced definition of RACM only if the Region submitted evidence showing that the asbestos containing linoleum was subject to sanding, grinding, cutting or abrading, or was crumbled, pulverized or reduced to powder in the course of the renovation activity. *See* 40 C.F.R. § 61.141 (definition of RACM, parts c and d). We reject this argument, however, because parts (c) and (d) of the definition relate to "nonfriable" asbestos containing material, and the evidence in the record of this case shows that the linoleum was, in fact, "friable." In particular, as noted above, Friedman & Schmitt's consultant stated in the June 1996 Report that "[a]ll of the asbestos-containing linoleum in the designated apartments of each structure are classified as *friable*, regulated asbestos-containing materials (RACM)." Gov't Ex. 5 at 3. There is no contrary evidence in the record that would suggest that the linoleum in question had not become friable.[36]

Parts (a) and (b) of the definition of RACM provides that asbestos containing material that has become friable prior to the renovation or demolition activity is RACM, without regard for how it is handled during the renovation. 40 C.F.R. § 61.141. Accordingly, we find that the Region sustained its burden of proving that the 264 square

---

[36] The ALJ noted that the definition of "Category I nonfriable asbestos-containing material" includes "resilient floor covering," which in turn is defined as including "asbestos-containing floor tile, including * * * vinyl floor tile." Initial Decision at 21 n.24 (citing 40 C.F.R. §§ 61.141, .142). This led the ALJ to conclude that the linoleum in this case was nonfriable. The ALJ, however, apparently failed to note that the definition of RACM includes "Category I nonfriable asbestos containing material that has become friable," and, as noted, the definition of "friable asbestos material" looks to whether the material can be "crumbled, pulverized, or reduced to powder by hand pressure." 40 C.F.R. § 61.141. As noted in the text, the evidence in this case shows that Friedman & Schmitt's consultant determined that the linoleum removed from the Calderwood Apartments had become friable prior to the renovation. Gov't Ex. 5 at 3.

feet of linoleum Mr. Schmitt removed from the Calderwood Apartments was RACM. We therefore reverse the ALJ's decision on this issue.

c. *Effective Pleading of Calderwood Claims*

As noted above, Friedman & Schmitt argue that the Region's Complaint is limited to events arising from Building #2 and that they had thus objected to the introduction of any evidence concerning the Calderwood Apartments in the proceeding below. Friedman & Schmitt's Brief at 10-11. The ALJ held that "EPA did not effectively charge nor pursue its Calderwood claims." Initial Decision at 12. In a footnote, the ALJ explained further that "Although, at the hearing, Respondents' objection to receiving evidence concerning Calderwood, on the grounds that it was not part of the Complaint, was overruled, the Court advised that if EPA based its penalty only on [Building #2], [the Court] would only consider that site. Upon review of the record, the Court now agrees that EPA's penalty was derived from [Building #2] alone." *Id.* (citation omitted). By these rulings, the ALJ dismissed from further consideration evidence concerning RACM removed from the Calderwood Apartments. Thus, the ALJ did not look to whether such RACM factored into the applicability of the Asbestos NESHAP.

We, however, conclude that the ALJ erred in holding that the Region failed to "charge or pursue" its contention that Friedman & Schmitt's removal of RACM (in the form of linoleum) from the Calderwood Apartments exceeded the 160 square foot threshold under 40 C.F.R. § 61.145(a)(i), thereby triggering the notice and work practice requirements of the Asbestos NESHAP for Friedman & Schmitt's activities at the facility (i.e., the Town & Country Village redevelopment project). The Region's Complaint was in our view more than adequate to provide notice to Friedman & Schmitt that the Region intended to introduce evidence regarding the Calderwood Apartments, and the record shows that Friedman & Schmitt were not surprised at trial by the Region's effort to introduce this evidence. We also reject the ALJ's suggestion that the admissibility of evidence for determining applicability should turn on whether that evidence is also key to the proposed penalty analysis.

The Region's Complaint identified the "Facility" as consisting of both Building #2[37] and the Calderwood Apartments identified as 2901, 2911, and 2931 Calderwood Lane. Complaint ¶ 1. It stated further that the units located in Building #2 and the Calderwood Apartments were an "installation" and "facility" within the meaning of the federal Asbestos NESHAP. *Id.* ¶¶ 8, 9. The Complaint alleged that Friedman & Schmitt removed over 160 square feet of RACM from this Facility, "including floor linoleum backing and ceiling texturing." *Id.* ¶ 12. Thus, the Region clearly stated in its Complaint that the linoleum removed from the Calderwood Apartments exceeded the 160 square foot threshold for application of the Asbestos NESHAP.

In addition, the transcript of the evidentiary hearing shows that, at the commencement of the hearing, before any witnesses were called or evidence introduced, Friedman & Schmitt's attorney made an oral motion to "eliminate any testimony with respect to the Calderwood Apartments, because basically that's in the Complaint for no purpose other than prejudicial purposes." Evidentiary Tr. at 18. Friedman & Schmitt's attorney also stated that he had a meeting with the Region's attorney "back shortly after this was filed" during which they discussed Friedman & Schmitt's argument that evidence regarding the Calderwood Apartments should be excluded from consideration. *Id.* at 17. He also stated that "The way the Complaint is framed, your Honor, the Calderwood Apartments are part and parcel of the proof or evidence that the government would expect to present here." *Id.* Thus, the Region's effort to introduce evidence at trial concerning the Calderwood Apartments did not surprise Friedman & Schmitt.

We also reject any suggestion that RACM may not be counted towards the applicability threshold under 40 C.F.R. § 61.145(a)(i) in circumstances in which the Region has not expressly identify such

---

[37] In the Complaint, the Region referred to Building #2 as 2640, 2642, and 2650 Marconi Avenue (which are separate addresses of retail suites in Building #2).

RACM as the basis for an upward adjustment of the proposed penalty.[38] The question of NESHAP applicability logically arises prior to, and independent of any penalty determination. Agency guidance provides the Region discretion to propose a penalty based on the amount of RACM handled improperly, rather than the total amount of RACM handled in the project. The Agency's penalty policy for violations of the Asbestos NESHAP provides the following guidance: "Where there is evidence indicating that only part of a demolition or renovation project involved improper stripping, removal, disposal or handling, the Region may calculate the number of [asbestos] units based upon the amount of asbestos reasonably related to such improper practice." *See* CAA Stationary Source Civil Penalty Policy, app. III at 3 (Rev. May 5, 1992) (hereinafter "Asbestos Penalty Policy").[39] Notably, the Asbestos Penalty Policy uses the concept of asbestos "unit" as a basis for increases in the amount of the penalty for work practice violations, but it does not employ this concept for notice violations. *See* Asbestos Penalty Policy at 15, 17 (charts showing recommended penalties for notice violations and work practice violations). In the present case, the Region alleged both a notice violation and work practice violations, but since the work practice violations only related to work at Building #2, the Region did not include the RACM from the Calderwood Apartments when calculating the number of Asbestos Units in establishing the recommended penalty for the work practice violations. This approach was consistent with the guidance of the Agency's Asbestos Penalty Policy, and explains why the Region's penalty analysis did not focus on the RACM removed from the

---

[38] The ALJ appears to have rejected the evidence from the Calderwood Apartments on this ground. *See* Initial Decision at 12 ("the Court advised that if EPA based its penalty only on [Building #2], [the Court] would only consider that site. Upon review of the record, the Court now agrees that EPA's penalty was derived from [Building #2] alone."). Indeed, this appears to have been the basis for Friedman & Schmitt's request to exclude the Calderwood Apartment evidence at trial. *See* Evidentiary Tr. at 17("[t]he apartments, though, your Honor, do not come into play at all with respect to the penalty – the proposed penalty that EPA is seeking.").

[39] In our penalty discussion below in part II.D, we refer to the CAA Stationary Source Civil Penalty Policy as the "General CAA Penalty Policy" and we refer to Appendix III of that policy as the "Asbestos Penalty Policy."

Calderwood Apartments, even though that RACM is relevant to its claims in this case.

In summary, we conclude that the ALJ erred in holding that the Region failed to adequately plead or pursue its contention that Friedman & Schmitt's removal of RACM from the Calderwood Apartments exceeded the 160 square foot threshold under 40 C.F.R. § 61.145(a)(i), thereby triggering the notice and work practice requirements for Friedman & Schmitt's activities. We also conclude for the reasons stated above that the evidence in the record shows that this 160 square foot threshold was exceeded both with respect to RACM in the form of linoleum removed from the Calderwood Apartments and with respect to RACM in the form of acoustic ceiling material removed from Building #2. In addition, we hold that, because the applicability threshold was exceeded, Friedman & Schmitt were required to comply with the Asbestos NESHAP's notice and work practice standards for their activities in 1997 at the "Facility" – the Town & Country Village development project.

C. *Question Whether Friedman & Schmitt Violated the Asbestos NESHAP's Notice and Work Practice Standards*

In circumstances in which the Asbestos NESHAP applies (i.e., where it is shown that a renovation activity disturbed the threshold amount of RACM), the Asbestos NESHAP, at section 61.145(b), (c), and (d) sets forth notice requirements, work practice standards, and record-keeping requirements. The Region alleged in its Complaint that Friedman & Schmitt violated these notice requirements, work practice standards, and waste shipment record requirements by 1) failing to provide 10 working day written notice of their intention to remove RACM from the facility in violation of 40 C.F.R. § 61.145(b), Complaint ¶¶ 20, 21; 2) failing to maintain waste shipment records documenting the transportation of asbestos containing material from the facility to 2900 Heinz Street, in violation of 40 C.F.R. §§ 61.145(c)(6), 61.150(d), Complaint ¶¶ 23, 24; and 3) failing to keep RACM at the facility adequately wet, in violation of 40 C.F.R. §§ 61.145(c)(6), 61.150. Complaint ¶¶ 26, 27. Because the ALJ based his finding of no liability

on his conclusion that Friedman & Schmitt were not given fair notice that applicability would be determined as set forth in the Asbestos NESHAP, the ALJ did not make specific findings regarding whether Friedman & Schmitt complied with the 10-day notice requirement of 40 C.F.R. § 61.145(b). The ALJ did, however, find that Friedman & Schmitt failed to maintain waste shipment records and failed to keep RACM in Building #2 adequately wet as required by 40 C.F.R. §§ 61.145(c)(6) and 61.150. These violations are discussed below.

1. *Failure to Give Notice*

In renovations that exceed the threshold discussed in part II.B, the Asbestos NESHAP requires each owner or operator of a renovation activity to provide the Administrator written notice of the intention to renovate, with such notice postmarked or delivered "[a]t least 10 working days before asbestos stripping or removal work or any other activity begins (such as site preparation that would break up, dislodge or similarly disturb asbestos material) * * *." 40 C.F.R. § 61.145(b)(3)(i) (1996). In the present case, Friedman & Schmitt admitted in their Answer that they did not provide the notice required by 40 C.F.R. § 61.145(b) prior to removing RACM from both the Calderwood Apartments and Building #2. Answer at 3, 7. Accordingly, we find that Friedman & Schmitt violated 40 C.F.R. § 61.145(b) (1996).

2. *Failure to Keep RACM Adequately Wet*

The Asbestos NESHAP establishes the following work practice standard requiring RACM to be kept adequately wet:

> (c) *Procedures for asbestos emission control.* Each owner or operator of a demolition or renovation activity * * * shall comply with the following procedures:
>
> * * * * * * *
>
> (3) When RACM is stripped from a facility component while it remains in place in the facility,

> adequately wet the RACM during the stripping operation.
>
> * * * * * * *
>
> (6) For all RACM, including material that has been removed or stripped:
>
> (i) Adequately wet the material and ensure that it remains wet until collected or treated in preparation for disposal in accordance with § 61.150[.]

40 C.F.R. § 61.145(c)(3), (6)(i) (1996). In essence, these work practice standards require a person engaged in the removal of RACM to adequately wet the material prior to removal and then to keep the material adequately wet until it is collected for disposal. *Echevarria*, 5 E.A.D. at 633; *accord In re Lyon County Landfill*, CAA Appeal No. 00-5, slip op. at 21 n.17 (EAB, Apr. 1, 2002), 10 E.A.D. __.

The regulations define the term "adequately wet" to mean:

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

40 C.F.R. § 61.141 (1996). We have held that the uncontroverted testimony of Agency inspectors regarding their personal observations is sufficient to establish that RACM was not adequately wet at the time of the inspection. *See In re Schoolcraft Constr., Inc.*, 8 E.A.D. 476, 487 (EAB 1999)(citing *United States v. MPM Contractors, Inc.*, 767 F. Supp. 464, 469 (E.D. Ark. 1990)); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 531 (EAB 1998); *Echevarria*, 5 E.A.D. at 639-40; *see also Lyon County Landfill*, slip op. at 24-25, 28, 35-36, 10 E.A.D. __.

The record in the present case shows that Friedman & Schmitt failed to keep RACM adequately after removal from facility components in Building #2. Specifically, the Region's inspector, Mr. Darrell Singleton, inspected Building #2 on August 21, 1997. During that inspection, he observed "dry" acoustic ceiling material on a door frame and window, and small pieces of "dry," "flaky," "crumbly" acoustic ceiling material on a carpet and the top of a beam in Building #2. Evidentiary Tr. at 52, 73-74, 140; Gov't Ex. 1 at 7, 11, 12.[40] Mr. Singleton took samples of this "dry" acoustic ceiling material, and those samples tested positive for the requisite amount of asbestos. Evidentiary Tr. at 74; Gov't Ex. 1 at 8-15. Accordingly, evidence in the record shows that RACM in the form of acoustic ceiling material that had been stripped from the ceiling in Building #2 and remaining in Building #2 was not adequately wet at the time of Mr. Singleton's inspection.

Friedman & Schmitt submitted a report prepared by Friedman & Schmitt's consultant, Lawrence Hussey, which stated that as of August 6, 1997, "all * * * asbestos containing materials were properly removed from the individual suites and roof * * * no visual evidence of suspected asbestos containing debris wer [sic] observed in the areas where abatement activity occurred. All hazardous wastes were properly contained and removed from the site * * *." Resp. Ex. 11; Evidentiary Tr. at 363-64.[41] Friedman & Schmitt argue that this report shows that all

---

[40] The ALJ noted that there was some dispute as to whether the acoustic ceiling material on the floor was there when Mr. Singleton arrived or whether it was originally located on top of a beam and Mr. Singleton knocked it to the floor. Initial Decision at 10 n.8. However, the ALJ correctly held that the RACM on the beam had in any case been stripped from the facility by Mr. Schmitt and was not adequately wet at the time of the inspection. *Id.* at 22-23. These findings are sufficient to establish liability.

[41] As we note above in the summary of the factual background, Mr. Hussey prepared several reports for Friedman & Schmitt, including the June 1996 Report and the June 1997 Report discussed earlier in this decision. Both the June 1996 Report and the June 1997 Report were prepared prior to any demolition or renovation and identified the location of RACM and ACM at the Facility. Respondent's Exhibit 11, discussed in the text above, is one of the reports prepared by Mr. Hussey after Friedman & Schmitt (continued...)

RACM was properly removed from Building #2. This report, however, contains numerous errors. For example, although the evidence at the hearing established that Mr. Schmitt removed the RACM from Building #2, the report asserted that the RACM was removed by a certified asbestos abatement contractor. *Compare* Resp. Ex. 11 *with* Gov't Ex. 4; Evidentiary Tr. at 80. Mr. Schmitt is not a certified asbestos abatement contractor. Evidentiary Tr. at 403. The report also inaccurately stated that notice was given prior to the removal of the RACM and that the RACM was properly removed from the site. Resp. Ex. 11 at 1. However, as discussed above, no notice was given prior to the removal of RACM from Building #2, and as discussed below, Mr. Schmitt transported the RACM from Building #2 to 2900 Heinz Street and improperly stored the RACM in torn trash bags. Evidentiary Tr. at 80. At trial, Mr. Hussey admitted that these statements in his report were not accurate. *Id.* at 386. The ALJ held that Mr. Hussey's report should be discounted due to these errors. *See* Initial Decision at 22 n.29. We agree with the ALJ's conclusion in this regard and, accordingly, we do not find Mr. Hussey's report to be credible evidence that would overcome Mr. Singleton's testimony. Accordingly, we find that Friedman & Schmitt violated 40 C.F.R. § 61.145(c)(3) and (6)(i) (1996) by failing to keep RACM adequately wet after it was stripped from the ceiling in Building #2 and prior to disposal.

3. *Failure to Maintain Waste Shipment Records*

The Asbestos NESHAP requires all RACM stripped from a facility's components to be disposed in accordance with section 61.150. 40 C.F.R. § 61.145(c)(6)(i) (1996). Among other things, section 61.150 requires each owner or operator to maintain waste shipment records for all RACM removed from the facility, including the name and physical site location of the disposal site. 40 C.F.R. § 61.150(d)(1) (1996). The evidence in the record of this case shows that Friedman & Schmitt did not maintain waste shipment records for the RACM stripped from

---

[41](...continued)
conducted demolition or renovation activities and asserts that those activities were properly completed.

Building #2. In particular, Mr. Schmitt transported the RACM stripped from Building #2 to his place of business at 2900 Heinz Street. Evidentiary Tr. at 80. Mr. Schmitt did not prepare a waste shipment record for this transport of RACM from Building #2 to 2900 Heinz Street. *Id.*; *see also* Answer at 9. Accordingly, we find that Friedman & Schmitt violated 40 C.F.R. §§ 61.145(c)(6)(i) and 61.150(d)(1) (1996).

D. *Penalty Issues*

Although the ALJ concluded that Friedman & Schmitt were not liable for the alleged violations of the Asbestos NESHAP, the ALJ nevertheless provided an analysis of what he believed an appropriate penalty would be in the event that the Board disagreed with his liability determination. Initial Decision at 23-45. In this alternative analysis, the ALJ rejected the Region's proposed penalty of $134,300, determining instead that $3,500 would be an appropriate penalty. *Id.* at 45. For the following reasons, we adopt certain aspects of the ALJ's analysis and reject others. As explained below, we assess a penalty of $30,980 for Friedman & Schmitt's three violations of the Asbestos NESHAP.

1. *Statutory and Regulatory Penalty Criteria*

Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1), authorizes the Administrator to assess civil administrative penalties for violations of the CAA or its implementing regulations. That section provides in relevant part as follows:

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

CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1). Congress subsequently passed the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, which requires the EPA to adjust maximum civil penalties to take into account inflation. On June 27, 1997, EPA promulgated the Adjustment of Civil Monetary Penalties for Inflation Rule, 40 C.F.R. part 19, which sets the maximum allowable administrative penalty per day of violation of the CAA at $27,500. 40 C.F.R. § 19.4.

The statute also provides general criteria that the Agency must consider in assessing a civil administrative penalty. Those criteria in relevant part are as follows:

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

CAA § 113(e), 42 U.S.C. § 7413(e).

In addition, the regulations governing this proceeding impose several considerations for the determination of an appropriate penalty. In particular, the regulations provide as follows:

> Amount of civil penalty. If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty

> guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

40 C.F.R. § 22.27(b).

In implementing these requirements, the Board has noted that, while the regulations do grant the Board *de novo* review of a penalty determination, in cases where the ALJ assessed a penalty that "falls within the range of penalties provided in the penalty guidelines, the Board will generally not substitute its judgment for that of the [ALJ] absent a showing that the [ALJ] has committed an abuse of discretion or a clear error in assessing the penalty." *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994); *accord In re Chempace* Corp., 9 E.A.D. 119, 131 (EAB 2000); *In re B&R Oil Co.*, 8 E.A.D. 39, 64 (EAB 1998); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 536 (EAB 1998); *In re Pac. Ref. Co.*, 5 E.A.D. 520, 524 (EAB 1994).

However, the Board also "reserves the right to closely scrutinize substantial deviations from the relevant penalty policy and may set aside the ALJ's penalty assessment and make its own *de novo* penalty calculations where the ALJ's reasons for deviating from the penalty policy are not persuasive or convincing." *In re Capozzi*, RCRA Appeal No. 02-01, slip op. at 31-32 (EAB, Mar. 25, 2003), 11 E.A.D. ___; *see also In re CDT Landfill Corp.*, CAA Appeal No. 02-02, slip op. at 40 (EAB, June 5, 2003), 11 E.A.D.___; *In re Chem Lab Prods.*, FIFRA Appeal No. 02-01, slip op. at 19 (EAB, Oct. 31, 2002), 10 E.A.D. ___ (rejecting ALJ's penalty assessment where ALJ's reason for departure was based on an impermissible comparison of penalties derived in a settlement context with the penalty to be assessed in a fully litigated case); *In re M.A. Bruder & Sons, Inc.*, RCRA (3008) Appeal No. 01-04, slip op. at 28 (EAB, July 10, 2002), 10 E.A.D. ___ (rejecting ALJ's

penalty assessment where ALJ's departure from penalty policy was based on ALJ's misunderstanding as to how the penalty policy should be applied); *In re Carroll Oil Co.*, RCRA (9006) Appeal No. 01-02 (EAB, July 10, 2002), 10 E.A.D. ___; *Birnbaum*, 5 E.A.D. at 124.[42]

---

[42] The ALJ in the present case characterized the *Bruder* and *Carroll Oil* decisions as representing a "sharp turn" in which he contends that the Board "revoked its deference towards an ALJ's power to disregard penalty policies." Initial Decision at 34. As we have explained in other decisions more recently issued, we do not so regard the *Bruder* and *Carroll Oil* decisions. *Bruder* stated that, "in reviewing an ALJ's penalty assessment in circumstances where the ALJ has chosen not to apply the policy at all – rather than, for example, applying the policy differently than advocated by the complainant – we will closely scrutinize the ALJ's reasons for choosing not to apply the policy to determine if they are compelling." *Bruder*, slip op. at 21, 10 E.A.D. ___; *Carroll Oil Co.*, slip op. at 28, 10 E.A.D. __. As we have more recently explained, "The term 'compelling,' as used in the *Bruder* and *Carroll Oil* cases, * * * is meant to convey the seriousness of the inquiry, recognizing the value that penalty policies provide, while simultaneously protecting the ALJ's discretion to depart from penalty policy guidelines where the totality of the circumstances warrant." *Chem Lab*, slip op. at 19, 10 E.A.D. ___. This precedent is consistent with the regulatory mandate that we "conduct a *de novo* penalty determination in accordance with [our] authority under 40 C.F.R. § 22.30(f)." *Id.*; *accord CDT Landfill*, slip op. at 40, 11 E.A.D. __. As we noted in part II.A above, 40 C.F.R. § 22.30(f) implements the authority under section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 557(b), which provides that "[o]n appeal from or review of the initial decision, the agency has all the powers [that] it would have in making the initial decision." *See In re Coast Wood Preserving, Inc.*, EPCRA Appeal No. 02-01, slip op. at 14 (EAB, May 6, 2003), 11 E.A.D. __; *Chem Lab*, slip op. at 18, 10 E.A.D. ___; *In Re City of Salisbury*, CWA Appeal No. 00-01, slip op. at 18 (EAB, Jan. 16, 2002), 10 E.A.D. ___; *In re Everwood Treatment Co.*, 6 E.A.D. 589, 612 n.39 (EAB 1996), *aff'd*, No. 96-1159-RV-M (S.D. Ala. Jan. 21, 1998). Our substantial deference to an ALJ decision to assess a penalty that falls within the range of penalties provided by a penalty policy is justified in large measure by our determination "that penalty policies serve to facilitate the application of statutory penalty criteria and, accordingly, offer a useful mechanism for ensuring consistency in civil penalty assessments." *See CDT Landfill Corp.*, slip op. at 40; *see also In re House Analysis & Assoc.*, 4 E.A.D. 501, 509 n. 29 (EAB 1993) (citing *In re Alm Corp.*, 3 E.A.D. 688, 692 (CJO 1991)). Substantial deference to an ALJ's decision departing altogether from a penalty policy's systematic framework, however, cannot be justified on these grounds. Accordingly, the Board's recent precedents on this question simply recognize that Board review, without such deference, is appropriate when the ALJ rejects the penalty policy in its entirety.

As we noted above, the Agency has prepared a general penalty policy applicable to violations of the CAA, known as the Clean Air Act Stationary Source Civil Penalty Policy (October 25, 1991) (the "General CAA Penalty Policy"). Attached to the General CAA Penalty Policy as Appendix III is the Asbestos Penalty Policy, which provides specific guidance for violations of the Asbestos NESHAP. We have frequently followed the Asbestos Penalty Policy's guidance in determining the amount of penalties to assess in contested cases appealed to this Board. *See, e.g., Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 534-59 (EAB 1998).[43] We have also held that the General CAA Penalty Policy "facilitate[s] the application of the statutory penalty factors to individual cases in a systematic fashion, and thus provide[s] a sound framework for the exercise of an appellate tribunal's discretion." *In re House Analysis & Assoc.*, 4 E.A.D. 501, 509 n. 29 (EAB 1993) (citing *In re Alm Corp.*, 3 E.A.D. 688 (CJO 1991)). Moreover, in the present case, both parties have requested that we generally follow the guidance of the Asbestos Penalty Policy. *See* Friedman & Schmitt's Brief at 39 n. 5. Accordingly, our analysis in this case will generally follow the guidance of the Agency's Asbestos Penalty Policy and the General CAA Penalty Policy. However, we will also consider the ALJ's reasons for rejecting these policies' framework to determine whether we find those reasons persuasive or convincing. *Capozzi*, slip op. at 31-32, 11 E.A.D. __; *accord CDT Landfill*, slip op. at 42, 11 E.A.D. __.

2. *Region's Penalty Evidence and Friedman & Schmitt's Arguments*

At the evidentiary hearing, the Region introduced the testimony of Robert Trotter, the Region 9 Asbestos NESHAP Coordinator, to explain the Region's rationale for requesting a civil administrative penalty of $134,500. Evidentiary Tr. at 170-71, 183-95. Mr. Trotter explained that the Region's proposed penalty was calculated in accordance with the Asbestos Penalty Policy. *Id.* at 183. The Asbestos

[43] As in the present case, none of the parties in *Ocean State* disputed the applicability of the Asbestos Penalty Policy or the General CAA Penalty Policy. *Ocean State*, 7 E.A.D. at 535 n.11.

Penalty Policy recommends first calculating a "preliminary deterrence amount" by assessing an economic benefit component and a gravity component. Asbestos Penalty Policy at 1. Under the Asbestos Penalty Policy's guidance, the preliminary deterrence amount is then adjusted upwards or downwards to take into account a variety of other factors. *Id.*[44]

The Asbestos Penalty Policy contains a chart at pages 15-17 with recommended initial gravity-based penalties for different types of violations of the Asbestos NESHAP. *Id.* at 2, 15-17. The chart for work-practice violations includes adjustments for the amount of RACM involved in the violation, with higher penalties as the amount of RACM increases. *Id.* at 3, 17. The increases are based on the number of asbestos "units" involved in the project, with a "unit" being equal to the threshold for NESHAP applicability (i.e., 260 linear feet, 160 square feet or 35 cubic feet). Using these charts, Mr. Trotter calculated a recommended gravity-based penalty of $15,000 for Friedman & Schmitt's failure to provide notice prior to removal of RACM, a $2,000

---

[44] The General CAA Penalty Policy suggests that three components should be included in the penalty: (1) the violator's economic benefit of noncompliance component, (2) a gravity-based component, and (3) adjustment factors to take into account other circumstances of the case. General CAA Penalty Policy at 3. The Asbestos Penalty Policy supplements the guidance on the first two of these components to take into account unique circumstances involved in the handling of asbestos. We describe this supplemental guidance in the text.

The General CAA Penalty Policy divides the gravity component into further considerations: actual or possible harm of the violation, importance to the regulatory scheme, and size of the violator. These considerations assist in assessing a penalty that properly reflects the seriousness of the violation – one of the CAA statutory factors. *Id.* at 8. After the initial gravity component of the penalty is assigned, the General CAA Penalty Policy then calls for the Agency to adjust this initial penalty by considering certain additional factors. These factors are: degree of willfulness or negligence, degree of cooperation, history of noncompliance, and environmental damage. *Id.* at 15-19. Consideration of these factors allows the Agency to increase or decrease the gravity component of the penalty depending on the case's specific facts. In addition to these factors, the General CAA Penalty Policy also calls for the Agency to consider a respondent's ability to pay a penalty in adjusting the gravity and economic benefit components of a penalty. *Id.* at 20.

gravity-based penalty for the failure to maintain waste shipment records, and a $13,500 gravity-based penalty for the failure to keep RACM wet until collected for disposal.[45] Evidentiary Tr. at 188-89; Asbestos Penalty Policy at 15-17. Under the Asbestos Penalty Policy guidance, the initial gravity-based penalty that is derived from the charts provided in the policy is then adjusted upward to take into account the size of the violator and any economic benefit obtained from the violations. Asbestos Penalty Policy at 6-7.

Mr. Trotter calculated the economic benefit Friedman & Schmitt obtained in this case as equal to $32,000. Evidentiary Tr. at 188-189, 209-212. Mr. Trotter multiplied 1,600 square feet of RACM removed from Building #2 by $20 per square foot as recommended by the Asbestos Penalty Policy to arrive at the $32,000 economic benefit component of his proposed penalty. Evidentiary Tr. at 189, 208-09. Using a chart set forth in the General CAA Penalty Policy, Mr. Trotter calculated the penalty increase for the size-of-violator to be $62,500 to take into account Mr. Friedman's net worth. *Id.* at 189-90.

Thus, Mr. Trotter calculated the total preliminary deterrence amount of the penalty to be $125,0000. Mr. Trotter testified further that this preliminary deterrence amount should be adjusted upward by $9,300 to take into account inflation. *Id.* at 188. This inflation adjustment is calculated in accordance with a memorandum EPA issued to revise its penalty policies to take into account the increased maximum statutory penalties required by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and the adjusted penalties published in 40 C.F.R. part 19. *See* Memorandum on Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (May 9, 1997). Adding the inflation adjustment to the preliminary deterrence amount produces the $134,300 penalty proposed by the Region in this case.

---

[45] He calculated this work practice violation based on $5,000 for the first day of the violation for less than 10 asbestos units, plus $500 for each of the 17 additional days that the violation continued. Evidentiary Tr. at 188-89.

Friedman & Schmitt challenge Mr. Trotter's testimony supporting the Region's requested penalty on the following grounds: (1) that the $15,000 initial gravity-based penalty for the notice violation is high and fails to take into account that Friedman & Schmitt believed that they did not have to give notice and did not attempt to hide their removal of the RACM, Friedman & Schmitt's Brief at 40-42; (2) the $5,000 initial gravity-based penalty for the first day of the wetting violation does not take into account the small amount of RACM remaining in Building #2 and that "no one from the government ever told [them] that they had to wet the material," *id.* at 42-43; (3) the $8,500 initial gravity-based penalty for the subsequent 17 days of the continuing wetting violation fails to take into account that this was Friedman & Schmitt's first violation and that they sought guidance from SMAQMD on how to come into compliance and were told to wait for a subsequent meeting, *id.* at 43-45; (4) the $32,000 economic benefit component of the preliminary deterrence amount was erroneously based on a $20 per square foot cost of removing RACM when testimony in the record shows that the cost is between $2.50 and $4.50 per square foot, *id.* at 45-46; (5) the $64,500 size-of-violator increase based on Mr. Friedman's net worth fails to recognize that the Asbestos Penalty Policy contains an example suggesting that the size of the contractor, not the size of the property owner, should be used in circumstances similar to the present case, *id.* at 46-50; (6) the inflation adjustment of $9,300 should be reduced consistent with any reductions in the other components of the penalty, *id.* at 50; and (7) the penalty should be reduced to take into account the totality of the circumstances of this case, *id.* at 50-52.

Our analysis of each component of the Region's proposed penalty and Friedman & Schmitt's related arguments is set forth in the following parts of this decision. As noted, Friedman & Schmitt do not contend that the Asbestos Penalty Policy's structure is inappropriate; nor do they contend that a 10% inflation-based upward adjustment of the Asbestos Penalty Policy's charts is inappropriate. In addition, Friedman & Schmitt do not challenge the $2,000 initial gravity-based penalty for the record-keeping violation, except to the extent that they argue that they should not be found liable for that violation. *Id.* at 2. Since we have concluded that Friedman & Schmitt are liable for failing to maintain

waste shipment records, this $2,000 initial gravity-based penalty, along with an appropriate 10% inflation adjustment of $200, shall be assessed as part of the total penalty.

3. *Initial Gravity-Based Penalty for the Notice Violation*

Mr. Trotter testified that a $15,000 initial gravity-based penalty should be assessed for Friedman & Schmitt's violation of the requirement to give notice ten days prior to beginning a renovation that would disturb the threshold amount of RACM. Evidentiary Tr. at 188. Mr. Trotter testified that the Asbestos Penalty Policy recommends a high penalty for this type of violation because lack of notice "really makes it difficult for an inspector to make a determination if there was compliance" with the work practice standards. Id. Tr. at 192. The Asbestos Penalty Policy explains further, however, that a reduced penalty may be appropriate "only if the Agency can conclude, from its own inspection, a State inspection, or other reliable information, that the source probably achieved compliance with all substantive requirements." Asbestos Penalty Policy at 2. Mr. Trotter testified that, in the present case, it was impossible for the inspector to determine whether RACM in the Calderwood Apartments was fully and correctly removed prior to the demolition. *Id.*

Friedman & Schmitt argue that the initial gravity-based penalty for the notice violation should be adjusted to take into account Friedman & Schmitt's belief that they did not have to give notice and their contentions that they fully cooperated with the government investigators, that the amount of asbestos left in Building #2 was small, that Friedman & Schmitt had no prior violations and that the case did not involve a "significant environmental problem." Friedman & Schmitt's Brief at 40-41. We reject Friedman & Schmitt's contention that the initial gravity-based penalty for the notice violation should be reduced on these grounds at this stage of our analysis.[46]

---

[46] As discussed below, several of these considerations do factor into our decision to mitigate the aggregate gravity-based penalty for this case.

As Mr. Trotter noted, a failure to give notice significantly impairs the Agency's and states' ability to enforce the substantive requirements of the Asbestos NESHAP. Evidentiary Tr. at 192. Thus, a failure to provide notice represents harm to the regulatory scheme, and a significant penalty helps ensure that the regulated community has the proper incentive to avoid negligent or even merely mistaken notice violations. Indeed, Friedman & Schmitt's argument that they believed that they were not required to give notice highlights the need for a significant penalty for this type of violation in view of the fact that the evidence shows that Friedman & Schmitt formed their belief without seeking advice from SMAQMD or EPA and their belief conflicted with advice given to them by their consultant, who advised them to hire a licensed asbestos abatement contractor for removal of the RACM from the Calderwood Apartments. Gov't Ex. 5 at 3. A downward departure from the Asbestos Penalty Policy's recommended penalty for notice violations is, in our view, not warranted in circumstances such as these where Friedman & Schmitt have demonstrated no effort to ensure that their belief was correct.

Moreover, the allegedly small amount of RACM that Mr. Schmitt failed to remove from Building #2 does not justify a downward adjustment to the penalty under the Asbestos Penalty Policy's guidance. *See* Asbestos Penalty Policy at 2. Mr. Trotter testified that the inspectors were unable to determine whether there was compliance with the work practice standards during the demolition work at the Calderwood Apartments. Evidentiary Tr. at 192. Thus, the lack of notice, in fact, impaired the inspector's ability to monitor compliance with the work practice requirements for handling RACM removed from the Calderwood Apartments. The inspectors also were not able to inspect Mr. Schmitt's compliance with the work practice standards when he stripped RACM from Building #2. Indeed, the fact that the inspectors found dry, flaky RACM left behind at various locations in Building #2, apart from raising safety issues in its own right, also raises significant questions regarding Mr. Schmitt's handling of the RACM in Building #2 during the renovation work. Accordingly, no downward adjustment is warranted on this ground.

Friedman & Schmitt's cooperation and their lack of prior violations, however, may properly be considered as adjustments to the gravity component of *all three violations*. General CAA Penalty Policy at 15-19 (listing adjustments to the gravity component of the penalty); *see also* Asbestos Penalty Policy at 1 (referring to adjustment factors listed in the General CAA Penalty Policy). Accordingly, we will consider these issues as they bear upon the total gravity-based penalty, not as adjustments to the penalty for each violation. Our analysis of cooperation and history of violations is set forth below in part II.D.7.

Finally, we must reject the ALJ's reasons for departing from the Asbestos Penalty Policy's gravity-based penalty chart. We find the ALJ's reasons inadequate and unconvincing as they relate to the notice violation. The ALJ's explanation appears to focus exclusively on the recommended penalties for work practice violations, which includes adjustments for the amount of asbestos in three broad categories. Initial Decision at 39-40. Other than a single reference to Mr. Trotter's testimony that the Asbestos Penalty Policy recommends no downward adjustment for notice violations, the ALJ did not consider or express any reason why the policy's approach to notice violations fails to adequately take into account the seriousness of those violations. *Id.* As discussed above, we conclude that notice violations are far from inconsequential. For these reasons, we determine that Friedman & Schmitt's failure to give the required notice in this case warrants the gravity-based penalty of $15,000 that the Asbestos Penalty Policy recommends. We adjust this amount upwards by 10%, or $1,500, to take inflation into account. *See* Memorandum on Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (May 9, 1997).

4. *Initial Gravity-Based Penalty for the Wetting Violation*

Mr. Trotter calculated a recommended gravity-based penalty of $13,500 for Friedman & Schmitt's failure to keep RACM wet until collected for disposal. Evidentiary Tr. at 188-89; Asbestos Penalty Policy at 15-17. He calculated this penalty based on $5,000 for the first day of the violation for less than 10 asbestos units, plus $500 for each of 17 additional days that the violation allegedly continued. Evidentiary Tr.

at 188-89. Friedman & Schmitt argue that the $5,000 initial gravity-based penalty for the first day of the wetting violation does not take into account the small amount of RACM remaining in Building #2 and that "no one from the government ever told [them] that they had to wet the material." Friedman & Schmitt's Brief at 42-43. Friedman & Schmitt also argue that the $8,500 initial gravity-based penalty for the subsequent 17 days of the continuing wetting violation fails to take into account that this is Friedman & Schmitt's first violation and that they sought guidance from SMAQMD on how to come into compliance and were told to wait for a subsequent meeting. *Id.* at 43-45.

We reject Friedman & Schmitt's contention that the allegedly small amount of dry RACM the inspector found warrants a downward departure from the guidance for the initial gravity-based penalty for the first day of the wetting violation.

Numerous courts have recognized the seriousness of exposure to asbestos fibers. *See, e.g., Envtl. Encapsulating Corp. v. City of New York*, 855 F.2d 48 (2d Cir. 1988) ("Exposure to airborne asbestos fibers - often one thousand times thinner than a human hair – may induce several deadly diseases: asbestosis, a nonmalignant scarring of the lungs that causes extreme shortness of breath and often death; lung cancer; gastrointestinal cancer; and mesothelioma, a cancer of the lung lining or abdomen lining that develops 30 years after the first exposure to asbestos and that, once developed, invariably and rapidly causes death."); *Reserve Mining Co. v. EPA*, 514 F.2d 492, 508-09 n.26 (8th Cir. 1975); *United States v. MPM Contractors, Inc.*, 767 F. Supp. 231 (D. Kan. 1990); *United States v. Tzavah Urban Renewal Corp.*, 696 F. Supp. 1013 (D. N.J. 1988).

We have held that "Because exposure to airborne asbestos poses such a serious risk to human health, violations of the regulations set forth in the Asbestos NESHAP, which are intended to reduce the potential for such exposure, must be considered potentially serious violations of the Clean Air Act, which can warrant a substantial penalty." *In re Schoolcraft Constr., Inc.*, 8 E.A.D. 476, 492-93 (EAB 1999). We have also noted that "[w]etting to prevent the release of particulates is the

primary method of controlling asbestos emissions during demolition or renovation work." *In re Echevarria*, 5 E.A.D. 626, 633 (EAB 1994).

Accordingly, it would be inappropriate to treat a violation of the wetting requirement as less than serious[47] even where, as here, the inspectors found a relatively small amount of dry RACM at the time of the inspection.[48] In our view, a $5,000 penalty for the first day of the wetting violation, as the Asbestos Penalty Policy recommends, is appropriate for the seriousness of the violation and will provide an appropriate incentive for full compliance in the future. We adjust this amount upwards by 10%, or $500, to take into account inflation. *See*

---

[47] The Asbestos Penalty Policy recognizes the seriousness of work practice violations involving even small amounts of friable asbestos by recommending a *minimum* penalty of $5,000 for demolitions or renovations involving less than 10 units of RACM. *See* Asbestos Penalty Policy at 17.

[48] Notably, the wetting violation relates only to RACM present at the time of the inspection. Generally, RACM not only must be wetted at the time of removal; it also must be kept adequately wet until collected for disposal. *Echevarria*, 5 E.A.D. at 633. There is no proof one way or the other regarding wetting violations during the prior demolition work; indeed, the inspectors were effectively deprived of the opportunity to assess compliance with wetting requirements at that time by virtue of Friedman & Schmitt's failure to provide notice of such activity.

Although the ALJ focused exclusively on the small amount of dry RACM the inspectors identified at the time of their inspection in mid-August, the record contains additional evidence that other RACM contaminated material remained in Building #2. In particular, Mr. Singleton reported that the certified asbestos abatement contractor, who Friedman & Schmitt subsequently hired in mid-September to decontaminate Building #2, stated that there remained a lot of RACM to remove from the site, and, when inspecting the progress of the decontamination work in mid-September, Mr. Singleton observed multiple bags this contractor had marked as containing asbestos waste. Gov't Ex. 1 at 6. In short, while, as discussed in the text above, we hold that the small amount of dry RACM identified by the inspectors in mid-August, on its own, supports a nontrivial penalty, we also conclude that the ALJ's penalty reduction cannot in any event be sustained since it was based on the faulty assumption that the small amount of sampled material was the only remaining RACM at the site and the record contains other unrebutted evidence suggesting additional RACM remained at the site and was not properly handled until the certified asbestos abatement contractor started decontaminating Building #2 in September 1997.

Memorandum on Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (May 9, 1997).

We also reject Friedman & Schmitt's contention that there should be no additional penalty for the subsequent days of the continuing wetting violation. The Clean Air Act contains a specific presumption that augurs in favor of a finding of continuing violation in this case. The CAA states as follows:

> For purposes of determining the number of days of violation for which a penalty may be assessed under [section 113(d)(1)], where the Administrator or an air pollution control agency has notified the source of the violation, and the plaintiff makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice and each and every day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.

CAA § 113(e)(2), 42 U.S.C. § 7413(e)(1). This statute places the burden of achieving compliance fully and as promptly as possible on the owner or operator of the source.

The evidence in the record shows that SMAQMD acting through its inspector, Mr. Singleton, delivered two notices of violation to Mr. Schmitt on August 25, 1997 (one concerning the work at the Calderwood Apartments and one concerning Building #2). Gov't Ex. 1

at 4.[49] The record also shows that the Region established a prima facie case that Friedman & Schmitt did not correct the wetting violation until September 10, 1997, when Mr. Singleton observed a certified asbestos abatement contractor decontaminating Building #2. *Id.* at 6.[50] Friedman & Schmitt did not attempt to prove by a preponderance of the evidence that they adequately wetted RACM remaining in Building #2 prior to September 10, 1997.

Friedman & Schmitt's argument that they are somehow not responsible for any continuing violation by virtue of their asking SMAQMD for advice on how to come into compliance is not supported by a preponderance of the evidence in the record. Although the evidence does show that Friedman & Schmitt sought the advice of SMAQMD and that they were not satisfied with SMAQMD's response, the evidence also shows that Mr. Singleton advised Friedman & Schmitt that Building #2 needed to be decontaminated. Evidentiary Tr. at 306-07, 405. Ultimately, Friedman & Schmitt followed this advice and hired a certified asbestos contractor to decontaminate the building. *Id.* at 315. As noted above, the Region viewed the commencement of decontamination as ending the continuing violation. Accordingly, applying the presumption CAA § 113(e)(2) establishes, the wetting violation in this case continued for 17 days from August 25, 1997, the date of notice, to September 10, 1997, the date on which Mr. Singleton observed the certified asbestos abatement contractor decontaminating Building #2.

The Asbestos Penalty Policy (as adjusted for inflation) suggests a multi-day penalty of $550 per day in these circumstances. The ALJ,

---

[49] Subsequently, on August 27, 1997, Mr. Singleton delivered two notices of violation to Mr. Mark Friedman concerning the work at the Calderwood Apartments and Building #2. Gov't Ex. 1 at 4.

[50] We reject Friedman & Schmitt's suggestion that keeping Building #2 locked, *see* Evidentiary Tr. at 316, established compliance at an earlier date. We have previously held that keeping RACM in a "containment area" does not defeat a wetting violation. *In re Echevarria*, 5 E.A.D. 626, 644 (EAB 1994).

however, expressed concern that application of this penalty amount failed to adequately account for the relatively small quantity of RACM involved in the wetting violation. Initial Decision at 39-40, 42-43. While, as we have noted, even small amounts of dry, friable asbestos can present substantial risks, we nonetheless tend to agree with the ALJ that the multi-day penalty recommended by the policy produces a higher aggregate gravity number for this violation than may be appropriate under the circumstances. In particular, we conclude that a multi-day penalty of $100 per day will, when added to the $5,500 penalty for the first day, produce an overall gravity-based penalty for this violation that is both reflective of the seriousness of the violation and provides a meaningful deterrent. Accordingly, we add $100 for each of the 16 days that the violation continued after the first day that SMAQMD gave notice to Friedman & Schmitt of the violation (totaling $1,600), and assess an initial gravity-based penalty of $7,100 for the continuing wetting violation.

5. *Economic Benefit Component of the Penalty*

Mr. Trotter calculated the economic benefit Friedman & Schmitt obtained in this case as equal to $32,000. Evidentiary Tr. at 188-89, 209-12. Mr. Trotter based his calculations on the Asbestos Penalty Policy's guidance that, in the absence of evidence regarding the violator's actual costs of compliance, the cost of asbestos removal should be estimated at $20 per square foot of asbestos removed in violation of the Asbestos NESHAP's requirements. *Id.*; Asbestos Penalty Policy at 6, 17. Mr. Trotter multiplied 1,600 square feet of RACM removed from Building #2 by $20 per square foot to arrive at the $32,000 economic benefit component of his proposed penalty. Evidentiary Tr. at 189, 208-09. Friedman & Schmitt argue that the $20 per square foot cost of removing RACM overstates the actual economic benefit because testimony in the record shows that the actual cost of removing RACM would have been between $2.50 and $4.50 per square foot. Friedman & Schmitt's Brief at 45-46.

The Asbestos Penalty Policy specifically states that the $20 per square foot cost of removing RACM is to be used "in the absence of

reliable information regarding a defendant's actual expenses." Asbestos Penalty Policy at 7. As Friedman & Schmitt correctly note, the record contains testimony that the cost of removing RACM in Sacramento, California, at the time of these violations was between $2.50 and $4.50 per square foot. Evidentiary Tr. at 367, 410.[51] Specifically, Mr. Schmitt testified that the cost of removal would have been $2.50 to $3.50 per square foot, *id.* at 367, and Mr. Hussey testified that the cost would have been "somewhere between $3 and $4.50 a square foot." *Id.* at 410. On appeal, the Region concedes that economic benefit should be calculated based on the testimony in the record regarding local RACM removal costs. Region's Brief at 29; Oral Argument Tr. at 30. While the testimony in the record does provide the cost range of $2.50 to $4.50 per square foot, this testimony was general in nature and fell short of providing an exact price for which local removal services might have been obtained. Moreover, the price ranges cited by the witnesses are not entirely consistent. They do, however, overlap with respect to a narrower range of $3.00 to $3.50 per square foot (based on the low end of Mr. Hussey's estimate and the high end of Mr. Schmitt's estimate). Because the testimony in the record is in agreement that local removal services might have been obtained for as little as $3.00 per square foot, we will use this number for purposes of calculating economic benefit with respect to Building #2. Accordingly, we assess an economic benefit component of $4,800.[52]

---

[51] The ALJ erroneously stated that this evidence is grounds for rejecting the Asbestos Penalty Policy as resulting in an inappropriate penalty. Initial Decision at 38. To the contrary, as noted in the text, the Asbestos Penalty Policy specifically states that evidence specific to the case should be used when it is available and reliable. Accordingly, we do not reject the Asbestos Penalty Policy, but instead follow its guidance and use the evidence in the record of this case to calculate an appropriate economic benefit penalty component.

[52] The economic benefit of $4,800 is the product of 1600 square feet of RACM multiplied by $3.00 per square foot.

6. *Size-of-Violator Component of the Penalty*

Mr. Trotter calculated the penalty increase for the "size-of-violator" to be $62,500 to take into account Mr. Friedman's net worth. Evidentiary Tr. at 189-90. Mr. Trotter arrived at this increase by applying the guidance of the General CAA Penalty Policy suggesting incremental increases in the amount of the penalty based on the violator's net worth and by utilizing a discretionary limit equal to 50% of the preliminary deterrence amount of the penalty. General CAA Penalty Policy at 14-15. The preliminary deterrence amount is the sum of the gravity-based penalties for each violation, the economic benefit component, and the size-of-violator component. Where the discretionary 50% limit is applied, the size-of-violator component should not exceed one-half of this sum.

Based on Mr. Friedman's substantial net worth,[53] the Region reasoned that the General CAA Penalty Policy would ordinarily authorize a penalty increase of more than $70,000 for the "size of business" component. Evidentiary Tr. at 25, 188-190. However, since the other components of the Region's proposed preliminary deterrence penalty equaled $62,500,[54] Mr. Trotter testified that he calculated the "size of business" component as limited to $62,500 consistent with the General CAA Penalty Policy's guidance that the size-of-violator component may be limited to 50% of the preliminary deterrence amount. *Id.* at 190.

Friedman & Schmitt argue that the $62,500 size-of-violator component fails to recognize that the Asbestos Penalty Policy contains an example suggesting that the size of the contractor, not the size of the property owner, should be used in circumstances similar to the present

---

[53] The parties' stipulated that Mr. Friedman's net worth exceeded $100 million. Evidentiary Tr. at 25, 188-90.

[54] This amount is the sum of the initial gravity-based penalties of $15,000 for the notice violation, $2,000 for the record-keeping violation, and $13,500 for the wetting work practice violation, plus the economic benefit component of $32,000.

case. Friedman & Schmitt's Brief at 46-50.[55] Friedman & Schmitt specifically request that we follow the Asbestos Penalty Policy's guidance with respect to this example and use the size of Mr. Schmitt's business, rather than the size of Mr. Friedman's business, in setting this component of the penalty in this case. *Id.* at 39 n.5. The ALJ agreed with Friedman & Schmitt and, although he generally rejected the Asbestos Penalty Policy, he specifically followed the Asbestos Penalty Policy's guidance in using the size of Mr. Schmitt's business in calculating this penalty component. Initial Decision at 44. The ALJ also stated that he believed Mr. Schmitt was the more culpable respondent since Mr. Schmitt made the decision to strip the asbestos himself. *Id.*

The Region has requested that we reverse the ALJ's decision on this issue. Oral Argument Tr. at 35-38. This request, however, must fail. We have frequently stated that in cases where the ALJ assessed a penalty that "falls within the range of penalties provided in the penalty guidelines, the Board will generally not substitute its judgment for that of the [ALJ] absent a showing that the [ALJ] has committed an abuse of discretion or a clear error in assessing the penalty." *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994); *accord In re Chempace Corp.*, 9 E.A.D. 119, 131 (EAB 2000); *In re B&R Oil Co.*, 8 E.A.D. 39, 64 (EAB 1998); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 536 (EAB 1998); *In re Pac. Ref. Co.*, 5 E.A.D. 520, 524 (EAB 1994).

In the present case, the ALJ expressly followed the guidance of an example set forth in the Asbestos Penalty Policy to explain his decision to use the size of Mr. Schmitt's business in assessing the penalty in this case. The Region has not shown why that decision is an abuse of

[55] In the Asbestos Penalty Policy example, a hypothetical company, Consolidated Conglomerates, Inc., which has over $100 million in assets and annual sales in excess of $10 million, hires Bert and Ernie's Trucking Company to demolish a building. Bert and Ernie's Trucking Company owns two tow trucks and does $25,000 of business each year. In showing how the penalty would be calculated, the Asbestos Penalty Policy includes a size-of-violator component of only $2,000 "based on Bert and Ernie's size only." Asbestos Penalty Policy at 14. The policy does not explain why Bert & Ernie's size is used, rather than the size of Consolidated Conglomerates.

discretion or clear error. We also note that the ALJ's conclusion that Mr. Schmitt, not Mr. Friedman, made the decision to strip the RACM without hiring a certified asbestos abatement contractor is supported by the testimony at trial. Evidentiary Tr. at 264, 305, 325, 411. Accordingly, we decline to overturn the ALJ's conclusion that the size-of-business penalty factor in this case should be based on the size of Mr. Schmitt's business. Since the evidence shows that the value of Mr. Schmitt's business was approximately $150,000, Evidentiary Tr. at 395-96, and the General CAA Penalty Policy at page 14 recommends a $5,000 penalty increase for businesses of this size, we assess a $5,000 increase in the penalty to take into account the size of Mr. Schmitt's business. The preliminary deterrence amount of the penalty, therefore, is $35,600 (consisting of $2,200 for the record-keeping violation, $16,500 for the notice violation, $7,100 for the wetting violation, $4,800 for economic benefit, and $5,000 for the size-of-business penalty factor).

7. *Adjustments to the Preliminary Deterrence Amount*

The Asbestos Penalty Policy recommends that the penalty derived from consideration of the gravity of the violation be adjusted to the extent appropriate to take into account the additional adjustment factors discussed in the General CAA Penalty Policy. Asbestos Penalty Policy at 1. The General CAA Penalty Policy provides guidance for adjustments to take into account the violator's history of violations, degree of willfulness or negligence, degree of cooperation, and environmental damage. General CAA Penalty Policy at 15-19.

These adjustments are to be applied to the gravity component of the penalty, which includes the increase on account of the size of the violator's business, but are not intended to affect the economic benefit component of the penalty. *Id.* at 15. In the present case, we have determined to assess a gravity-based penalty of $30,800 (consisting of $16,500 for the notice violation, $2,200 for the record-keeping violation, $7,100 for the violation of the wetting requirements, and $5,000 for the size-of-business penalty factor) and a $4,800 economic benefit-based penalty. As discussed below, we reduce the gravity component by 15% to reflect Friedman & Schmitt's cooperation and good faith after the

violations were discovered, but we do not make any adjustment on account of their compliance history and pre-discovery compliance efforts.

Friedman & Schmitt argue that the penalty should be reduced to take into account the totality of the circumstances of this case, including, in particular, their lack of prior violations, their cooperation in the investigation, and their prompt efforts to correct the violations. Friedman & Schmitt's Brief at 50-52. Friedman & Schmitt also contend that the absence of a warning that their conduct violated the CAA, lack of actual environmental hazard caused by their conduct, lack of notice of EPA's interpretation of the regulations as discussed above, lack of any effort on their part to hide their violations and their good faith, all militate in favor of mitigation of the penalty. *Id.* at 51-52.

The ALJ concluded that Friedman & Schmitt acted in good faith. Initial Decision at 41-42. The ALJ also noted that Friedman & Schmitt have no prior history of violations. *Id.* at 42. The General CAA Penalty Policy, however, recommends that the violator's degree of willfulness or negligence only be used to *increase* the amount of the penalty since the CAA is a strict liability statute. General CAA Penalty Policy at 16. In other words, the statute contemplates that a significant penalty may be imposed even in the absence of any proof of intent or negligence. Thus, the penalties recommended in the General CAA Penalty Policy and the Asbestos Penalty Policy are based on the assumption that the violator acted with the best of intentions, and upward adjustments are warranted when there is appropriate proof that this is not the case. For this reason, the General CAA Penalty Policy likewise recommends that a history of violations may only be used to increase the amount of the penalty. *Id.* at 17. Consistent with this view, we have previously held that the absence of a history of prior violations and unknowing violation are not grounds for downward adjustment of penalty that is otherwise calculated in accordance with an Agency penalty policy. *See, e.g., In re Mobil Oil Corp.*, 5 E.A.D. 490 (EAB 1994). For these reasons, we reject Friedman & Schmitt's request that the penalty be reduced on these grounds.

However, the General CAA Penalty Policy does recommend that the violator's degree of cooperation in correcting the violation after

it is discovered may be an appropriate factor. In the Policy's view, the degree of cooperation may, in some cases, justify a reduction in the penalty and, in other cases, justify an increase in the penalty. General CAA Penalty Policy at 16-17. The General CAA Penalty Policy recommends that any mitigation not exceed 30% of the gravity component. It explains that "some mitigation may [] be appropriate in instances where the defendant is cooperative during EPA's pre-filing investigation of the source's compliance status or a particular incident." *Id.* at 17. Mitigation is also appropriate when the violator "makes extraordinary efforts to * * * come into compliance after learning of a violation." *Id.*

In the present case, we conclude that the cooperation and good faith the ALJ found warrants a 15% reduction in the amount of the penalty. We do not grant the full 30% penalty reduction allowable under the General CAA Penalty Policy's guidance since Friedman & Schmitt did not prove "extraordinary efforts" to come into compliance after learning of the violation.[16] *Id.* Accordingly, we reduce the $30,800 gravity-based penalty by $4,620, which produces a $26,180 adjusted gravity based penalty. We add to this the economic benefit penalty of $4,800 to arrive at the total civil administrative penalty of $30,980 for Friedman & Schmitt's three violations of CAA § 113 and the Asbestos NESHAP.

III. *CONCLUSION*

For the foregoing reasons, we find Morton Friedman and Richard Schmitt are liable for three violations of the Asbestos NESHAP, 40 C.F.R. part 61, subpart M, and Clean Air Act sections 112 and 114, 42 U.S.C. §§ 7412, 7414. Pursuant to Clean Air Act section 113, 42, U.S.C. § 7413, we impose a civil administrative penalty of $30,980 for these

[16] For example, as discussed above in part II.D.4, Friedman & Schmitt did not correct the wetting violation for 16 days after the first day on which they received formal notice of the violation. Friedman & Schmitt have not shown that they were unable to correct this violation in a more timely fashion, and they have not shown that correcting this violation in this amount of time required extraordinary efforts.

violations. Mr. Friedman and Mr. Schmitt shall pay the entire amount of this civil administrative penalty within thirty (30) days of service of this final order (unless otherwise agreed to by the parties). Payment shall be made by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

EPA, Region IX
Danielle Carr
P.O. Box 360863
Pittsburgh, PA 15251-6863

So ordered.

Robert Trotter
02/25/2004 04:30 PM

To: "Orange, Laurie J" <Laurie.Orange@sdcounty.ca.gov>
cc:
Subject: Re: Latest Sempra communication

I'd be happy to meet with you and opposing counsel or participate in a conference call.

DP

"Orange, Laurie J" <Laurie.Orange@sdcounty.ca.gov>
02/25/2004 05:02 PM

To: Robert Trotter/R9/USEPA/US@EPA
cc:
Subject: RE: Latest Sempra communication

Thanks, Bob!

Laurie Orange
Senior Deputy County Counsel

CONFIDENTIALITY NOTICE: This e-mail message, including any attachments, is for the sole use of the intended recipient and may contain information protected by the attorney-client privilege, the attorney work product doctrine or other applicable privileges or confidentiality laws or regulations. If you are not an intended recipient, you may not review, use, copy, disclose or distribute this message or any of the information contained in this message to anyone. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of this message and any attachments. Unintended transmission shall not constitute waiver of the attorney-client or any other privilege.

-----Original Message-----
From: Trotter.Robert@epamail.epa.gov
[mailto:Trotter.Robert@epamail.epa.gov]
Sent: Wednesday, February 25, 2004 4:30 PM
To: Orange, Laurie J
Subject: Re: Latest Sempra communication

be happy to meet with you and opposing counsel or participate in a conference call. I'd

"Orange, Laurie J" <Laurie.Orange@sdcounty.ca.gov>

11/20/2003 04:28 PM

To: Robert Trotter/R9/USEPA/US@EPA
cc:
Subject: RE: Hello Mr. Trotter!

Thanks!

Laurie Orange
Senior Deputy County Counsel

CONFIDENTIALITY NOTICE: This e-mail message, including any attachments, is for the sole use of the intended recipient and may contain information protected by the attorney-client privilege, the attorney work product doctrine or other applicable privileges or confidentiality laws or regulations. If you are not an intended recipient, you may not review, use, copy, disclose or distribute this message or any of the information contained in this message to anyone. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of this message and any attachments. Unintended transmission shall not constitute waiver of the attorney-client or any other privilege.

-----Original Message-----
From: Trotter.Robert@epamail.epa.gov
[mailto:Trotter.Robert@epamail.epa.gov]
Sent: Thursday, November 20, 2003 4:08 PM
To: Orange, Laurie J
Subject: Re: Hello Mr. Trotter!

Hi Laurie

"Orange, Laurie J" <Laurie.Orange@sdcounty.ca.gov>

11/20/2003 03:33 PM

To: Robert Trotter/R9/USEPA/US@EPA
cc:
Subject: Hello Mr. Trotter!

Laurie Orange

Thanks!

Exhibit 6
Page 133

Senior Deputy County Counsel

"Orange, Laurie J" <Laurie.Orange@sdcounty.ca.gov>
11/24/2003 04:09 PM

To: Robert Trotter/R9/USEPA/US@EPA
cc:
Subject: RE: Hello Mr. Trotter!

Thanks!

Laurie Orange
Senior Deputy County Counsel

CONFIDENTIALITY NOTICE: This e-mail message, including any attachments, is for the sole use of the intended recipient and may contain information protected by the attorney-client privilege, the attorney work product doctrine or other applicable privileges or confidentiality laws or regulations. If you are not an intended recipient, you may not review, use, copy, disclose or distribute this message or any of the information contained in this message to anyone. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of this message and any attachments. Unintended transmission shall not constitute waiver of the attorney-client or any other privilege.

-----Original Message-----
From: Trotter.Robert@epamail.epa.gov
[mailto:Trotter.Robert@epamail.epa.gov]
Sent: Thursday, November 20, 2003 4:08 PM
To: Orange, Laurie J
Subject: Re: Hello Mr. Trotter!

Hi Laurie,

"Orange, Laurie J" <Laurie.Orange@sdcounty.ca.gov>
11/20/2003 03:33 PM

To: Robert Trotter/R9/USEPA/US@EPA
cc:
Subject: Hello Mr. Trotter!

Laurie Orange

Thanks!

Senior Deputy County Counsel

"Orange, Laurie J" <Laurie.Orange@sdcounty.ca.gov>
11/17/2003 02:45 PM

To: Robert Trotter/R9/USEPA/US@EPA
cc:
Subject: Sempra (Confidential Investigative Information)

Bob,

Thanks very much, as always!

Laurie Orange
Senior Deputy County Counsel
<<Trotter Stmt 11-17-03.doc>>

CONFIDENTIALITY NOTICE: This e-mail message, including any attachments, is for the sole use of the intended recipient and may contain information protected by the attorney-client privilege, the attorney work product doctrine or other applicable privileges or confidentiality laws or regulations. If you are not an intended recipient, you may not review, use, copy, disclose or distribute this message or any of the information contained in this message to anyone. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of this message and any attachments. Unintended transmission shall not constitute waiver of the attorney-client or any other privilege.

Trotter Stmt 11-17-03.doc

"Orange, Laurie J" <Laurie.Orange@sdcounty.ca.gov>
10/23/2003 04:41 PM

To: Robert Trotter/R9/USEPA/US@EPA
cc:
Subject: As discussed

please review and comment, thank you.

Laurie Orange
Senior Deputy County Counsel

<<Trotter Stmt 10-23-03.doc>>
CONFIDENTIALITY NOTICE: This e-mail message, including any attachments, is for the sole use of the intended recipient and may contain information protected by the attorney-client privilege, the attorney work product doctrine or other applicable privileges or confidentiality laws or regulations. If you are not an intended recipient, you may not review, use, copy, disclose or distribute this message or any of the information contained in this message to anyone. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of this message and any attachments.

Trotter Stmt 10-23-03.doc

- Ex 6 LV WLF

JS 44
(Rev. 07/89)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
Latham & Watkins LLP

DEFENDANTS
United States Environmental Protection Agency

FILED
07 FEB -6 PM 4:27
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT San Francisco
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)
Latham & Watkins LLP
600 W. Broadway, Suite 1800
San Diego, CA 92101
(619) 236-1234
(See Attachment)

ATTORNEYS (IF KNOWN)

'07 CV 0245 DMS LSP

II. BASIS OF JURISDICTION (PLACE AN 'X' IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN 'X' IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)
(For Diversity Cases Only)

	PT	DEF		PT	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)
5 U.S.C. § 552, et seq.-Complaint for Declaratory and Injunctive Relief under Freedom of Information Act

V. NATURE OF SUIT *(PLACE AN "X" IN ONE BOX ONLY)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury - Medical Malpractice
- ☐ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motion to Vacate Sentence

HABEAS CORPUS:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Conditions

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs.
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt. Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (13958)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS - Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reappointment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce/ICC Rates/etc.
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☒ 895 Freedom of Information Act
- ☐ 900 Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes
- ☐ 890 Other Statutory Actions

VI. ORIGIN *(PLACE AN "X" IN ONE BOX ONLY)*
☒ 1 Original Proceeding ☐ 2 Removal from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A **CLASS ACTION** UNDER F.R.C.P. 23 **DEMAND $** Dec.Relief
CHECK YES only if demanded in complaint: **JURY DEMAND:** ☐ YES ☒ NO

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ Docket Number _____

DATE 2/6/07

SIGNATURE OF ATTORNEY OF RECORD Catherine Greenman

PAID $350 2/6/07 BH ~~#536~~ #134660

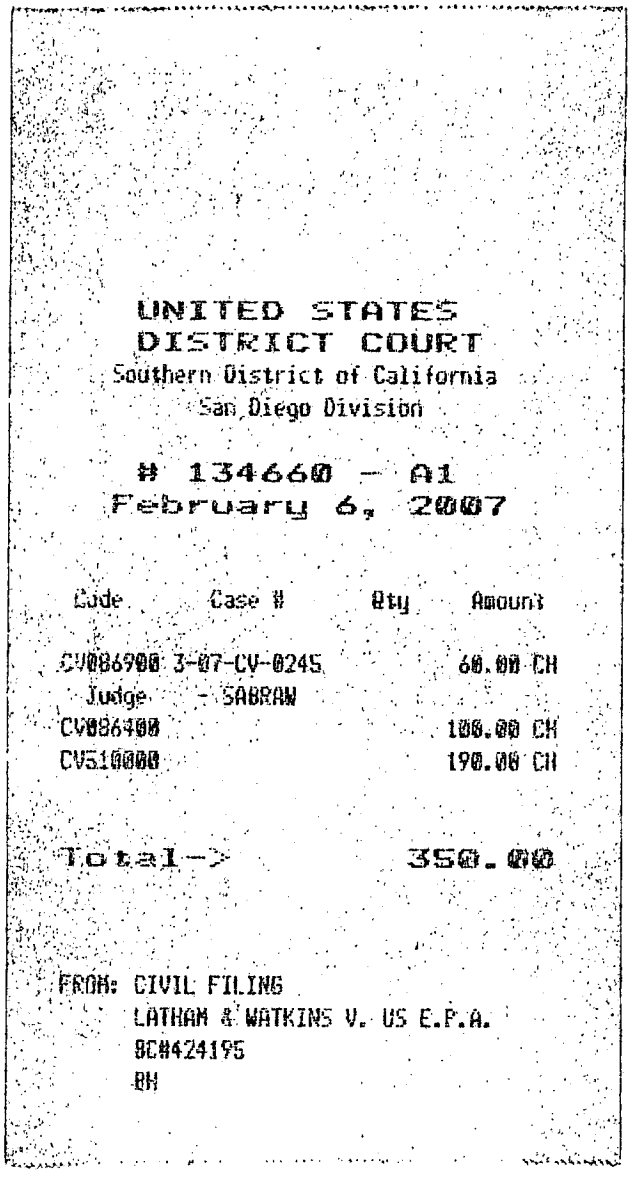
::ODMA\PCDOCS\WORDPERFECT\22816\1 January 24, 2000 (3:10pm)

Latham & Watkins LLP v. U.S. EPA

Attachment to Civil Cover Sheet

I(c) Plaintiff Latham & Watkins LLP's Attorneys of Record

Robert M. Howard (Bar No. 145870)
Patricia Guerrero (Bar No. 190834)
Jason M. Ohta (Bar No. 211107)



UNITED STATES
DISTRICT COURT
Southern District of California
San Diego Division

134660 - A1
February 6, 2007

Code	Case #	Qty	Amount
CV086900	3-07-CV-0245		60.00 CH
Judge	- SABRAW		
CV086400			100.00 CH
CV510000			190.00 CH

Total-> 350.00

FROM: CIVIL FILING
LATHAM & WATKINS V. US E.P.A.
DC#424195
BH