

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Administrative Penalty
Order (APO) Issued to Interstate Roofing and
Waterproofing, Inc.

FINDINGS OF FACT
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge (ALJ) Richard C. Luis on March 20, 1998 at the offices of the Minnesota Pollution Control Agency in St. Paul. The record in this matter closed on April 6, 1998.

Paschal O. Nwokocha, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2127 appeared on behalf of the Minnesota Pollution Control Agency ("Agency," "MPCA"). John O'Donnell, of Knutson, Flynn, Deans and Olsen, P.A., Suite 1900, Minnesota World Trade Center, 30 East Seventh Street, St. Paul, MN 55101, appeared on behalf of Interstate Roofing and Waterproofing Incorporated ("Interstate").

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 116.072, subd. 6(e), the final decision of the Commissioner of the Pollution Control Agency shall not be made until this Report has been made available to the parties to the proceeding for at least five days, and an opportunity has been afforded to each party adversely affected to comment on the recommendations. The Commissioner must consider such comments before issuing his final decision. Exceptions to this Report, if any, shall be filed with Commissioner Peder Larson, Minnesota Pollution Control Agency, 550 Lafayette Road, St. Paul, MN 55155-4194.

STATEMENT OF ISSUES

1) Whether the Administrative Penalty Order (APO) is invalid because the Rosemount Elementary School renovation project does not meet the required threshold amount of 160 square feet of asbestos under the provisions of the National Emission Standard for Hazardous Air Pollutants (NESHAP) due to the resting condition of the roofing material prior to removal and the removal procedures used by the Interstate?

2) If the NESHAP does apply, has the MPCA proven that the NESHAP regulations were violated?

3) If the asbestos provisions of NESHAP do apply and violations were committed, is the proposed nonforgivable penalty of \$8,500 for such violations appropriate?

Based on upon all the proceedings herein, the Administrative Law Judge makes the following:

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FINDINGS OF FACT

1. Interstate is the owner or operator of the renovation activity at the Rosemount Elementary School, Independent School District Number 196, 14445 Diamond Path Road, Rosemount, Minnesota. Interstate retained James Lindahl, consultant and president of Environmental Property Audits Incorporated (EPAI), to advise on the asbestos removal component of the Rosemount renovation project. Interstate is a licensed asbestos removal company.

2. Mr. Lindahl initially evaluated the portion of the Rosemount project that pertained to asbestos removal and completed a State of Minnesota standard Notification of Asbestos Related Work Form ("notice"). The Rosemount school is a one story, 45,000 square foot, 35 year old building that has and still is used for educational purposes. The project type was a renovation. (Interstate Ex. 17).

3. In section 2 of the notice, Mr. Lindahl initially estimated the amount of friable Regulated Asbestos Containing Material (RACM) at 6,200 square feet on the facility roof component, specifically the backerboard of the polyvinyl chloride (PVC) roof membrane. Although in section 4(b) of the notice, Mr. Lindahl stated that a polarized light microscopy (PLM) laboratory analysis would be used to determine the presence of RACM, friability was not tested for at any time by EPAI. Mr. Lindahl maintains he "overcompensated" in sections 2 and 4(b) of the notice because it is a customary asbestos industry practice to do so, in order to guard against subsequent liability. All of the asbestos-containing material (ACM) was located on the underside of the existing PVC roof membrane of the exterior roof. (Interstate Ex. 17).

4. Section 6 (a) of the notice stated that the asbestos abatement emissions control procedures consisted of straight blade knives used to section the ACM so that it could be pulled up intact, in four by eight foot sections. Subsequently, Interstate used the methods described in section 6(a) during the renovation period. (Interstate Ex. 17).

5. In section 6 (b), Mr. Lindahl stated that the waste handling emission control procedures to be used during removal were wet methods and hand tools. The ACM pieces would be wrapped in 6 millimeter poly and lowered by crane to an ACM disposal unit. (Interstate Ex. 17).

6. Section 6 (c) of the notice stated that no additional ACM was expected to be found, but did not answer the form's question of what procedures were to be used in the event that Category II nonfriable ACM became crumbled, pulverized, or reduced to a powder. (Interstate Ex. 17).

7. On June 27, 1997, the notice completed by Mr. Lindahl was submitted by Interstate to the MPCA. The notice was signed by Derek Kasten, President of

Interstate. The asbestos abatement activity times and dates were 6 A.M. to 12 A.M., Monday through Friday, starting July 9, 1997 and ending July 18, 1997. (MPCA Ex. 2). On July 15, 1997, an amended notice was submitted to the MPCA. The only change of the amended notice from the original notice was the asbestos abatement activity starting date to July 21, 1997 and ending date to July 31, 1997. (MPCA Ex. 3).

8. On the morning of July 31, 1997, Jess W. Richards, Enforcement Section Inspector in the Air Quality Division, performed a routine inspection of Interstate's job site and work practices. (MPCA Ex. 4). Mr. Richards was accompanied and assisted by Charles Gierke and Dan Bryant of the MPCA. All three identified themselves to Interstate's site supervisor, Tom Roach. Mr. Roach gave the MPCA inspection team permission to enter and inspect the work site.

9. When Mr. Richards inspected the work-site, he observed that the ground was dry. It was windy, but the velocity was unknown. There were visible dust emissions coming from two 20 to 30 cubic yard dumpsters containing asbestos waste material. However, the visible dust emissions could have come from either the ground or separate adjacent dumpsters that were in close proximity.

10. Mr. Richards took five samples and pictures of the samples prior to their being collected and tested. To determine the material for friability, Mr. Richards tested the five samples as described under Minn. Rule 7011.9920, which incorporates the asbestos provisions of Title 40, Code of Federal Regulations (C.F.R.), Subpart M, § 61.141. That rule provides that "Friable asbestos-containing material means any material containing more than one percent asbestos . . . that, when dry, can be crumbled, pulverized, or reduced to a powder by hand pressure." Mr. Richards checked each sample for wetness, and used normal hand pressure to crumble each sample. By this methodology, he determined that all five samples consisted of dry, friable asbestos-containing material (ACM).

11. Sample numbers 1, 2 and 3 were taken from an on-site, 20 to 30 cubic yard dumpster which contained eight or nine 4 x 8 foot roof sheets. Each sheet consisted of three layers. (Department Ex. 5, the middle, clear plastic lined dumpster in pictures 1, 2, and 3 and close-up pictures 4, 5, 6, 7 and 8, alleged asbestos circled in red ink). Mr. Richards sampled and checked the middle of three layers, which consisted of a white paper material, from some of the 4 x 8 foot roof sheets. The dumpster was not labeled with waste generator information or OSHA warning labels. Mr. Richards did not see any removal of the Asbestos-Containing Roofing Material (ACRM) because the roof removal was completed.

12. Sample #4 was a white paper material located on the ground, twenty to thirty feet from the on-site main dumpster (where samples 1, 2 and 3 were taken), on dry pavement. (MPCA Ex. 5, picture 11).

13. Sample #5 was taken from a 20 to 30 cubic yard dumpster that was loaded on a truck for transport. This dumpster was not lined with any type of material.

Mr. Richards sampled the middle of three layers, which consisted of a white paper material, from a 4 x 8 foot roof sheet. (MPCA Ex. 5, close-up photograph 12, and photographs 1 and 2, dumpster loaded on truck in background). The dumpster was not labeled with waste generator information or Occupational Safety and Health Administration (OSHA) warning labels.

14. Caution tape was strung around only part of the work site. (MPCA Ex. 5, photograph 3). The caution tape had been blown down to the ground by the wind. Mr. Richards observed three members of the public walk through the job site and enter the school. Because of the wind, visible emissions, accessibility to the public and the observed dry, friable ACM, Mr. Richards determined the site to be in violation of the NESHAP and a safety hazard. Mr. Richards advised Mr. Roach to mark off the perimeter properly and to wet, label and package properly in leak-tight containers all dry, friable asbestos-containing waste materials. Mr. Roach assured Mr. Richards that corrective actions would be taken immediately. Mr. Richards did not return to the Rosemount renovation site to confirm whether the corrective actions had occurred.

15. The five samples were each put into a separate container, labeled, dated and locked in a brief case. The five samples were handled by proper chain of custody procedures (MPCA Ex. 6), and sent to an independent laboratory for a random analysis determination of presence, type and percentage of asbestos. Using polarized light microscopy (PLM) as required by 40 C.F.R., Subpart M, § 61.141 (MPCA Ex. 7), the laboratory determined that all five samples consisted of two layers, a and b. Layer a in all five samples consisted of forty-five to fifty percent chrysotile asbestos content. Layer b in all five samples contained no asbestos. (MPCA Ex. 7). The samples meet the friability criterion under the asbestos provisions of 40 C.F.R., Subpart M, § 61.141, which provides that "Friable asbestos-containing material means any material containing more than one percent asbestos . . .".

16. Upon receipt of the lab results, Mr. Richards completed a Case Development Form and submitted it to the MPCA's Enforcement Case Screening Committee (ECSC) to determine whether any action should be taken. The ECSC that met on October 8, 1997 was comprised of seven members, including two MPCA supervisors and two members of the on-site inspection team, Mr. Richards and Mr. Gierke. The available options to deal with Interstate's alleged violations were pursuing either: an enforcement letter; a notice letter; a warning; an administrative penalty order; or a criminal action. Mr. Richards recommended that the ECSC issue an APO because of the seriousness of the violation. The ECSC agreed unanimously to pursue an Administrative Penalty Order (APO) consisting of four violations. (MPCA Ex. 8).

17. The first alleged violation is Interstate's noncompliance with Minn. Rule 7011.9920, which incorporates by reference the requirements of 40 C.F.R., § 61.145, Standard for Demolition and Renovation. Specifically, § 61.145 (c)(6)(i) provides that "[e]ach owner or operator of a . . . renovation activity . . . shall comply with the following procedures: . . . [f]or all RACM, including material that has been removed or stripped: . . . *[a]dequately wet the material and ensure that it remains wet until*

collected and contained or treated in preparation for disposal in accordance with Section 61.150.” Dry RACM debris was scattered on the ground and inside two dumpsters at Interstate’s renovation work site, Rosemount Elementary School. (MPCA Ex. 8). (Emphasis supplied).

18. The second alleged violation was Interstate’s noncompliance with 40 C.F.R., § 61.150, Standard for Waste Disposal for Manufacturing, Fabricating, Demolition, Renovation and Spraying Operations, which provides that an owner or operator under sections 61.144 to 61.147 shall not discharge any visible emissions to the outside air during the collection, processing, packaging or transporting of any Asbestos-Containing Waste Material (ACWM) generated by the source or shall control the emissions by adequately wetting the ACWM and *by sealing all wetted ACWM in leak-tight containers*. 40 C.F.R. § 61.150 (a)(1)(iii). Interstate failed to ensure that all ACWM was wetted and sealed in leak-tight containers. (MPCA Ex. 8).

19. The third alleged violation was Interstate’s noncompliance with 40 C.F.R. § 61.150, which provides that each owner or operator shall adequately wet ACWM and label ACWM containers using Occupational Safety and Health Administration (OSHA) warning labels. 40 C.F.R. § 61.150 (a)(1)(iv). Interstate failed to label containers of ACWM with OSHA warning labels. (MPCA Ex. 8).

20. The fourth alleged violation was Interstate’s noncompliance with 40 C.F.R. § 61.150, which provides that each owner or operator shall label containers of wetted ACWM to be transported off the facility site, with the name of the waste generator and location at which the waste was generated. 40 C.F.R. § 61.150 (a)(1)(v). Interstate failed to label containers of ACWM with the name of the waste generator and location at which the waste was generated. (MPCA Ex. 8).

21. On October 13, 1997, the MPCA sent a Request For Information (RFI) to Charles Kasten, owner of Interstate. The RFI set out what violations Interstate was alleged to have committed and requested a response to the alleged violations. The RFI asked specifically whether Interstate had any explanation, excuse or other additional information that would change the committee’s preliminary determination to pursue an APO based on the four alleged violations. (MPCA Ex. 9).

22. On October 24, 1997, Mr. Kasten responded in writing to the RFI, alleging that Mr. Roach said that it had rained in the early morning hours and when removal of the Asbestos-Containing Roofing Material (ACRM) commenced, it was completely saturated due to severe leaking over the years. The response alleged further that the ACRM was lowered into a .06 mil. polyethylene sheathing-lined rolloff box, that the plastic sheathing ripped at some point and the labeling for the rolloff box “had fallen over.” Mr. Kasten argued that the ACRM removal procedures were a “generally accepted industry practice,” and that Interstate did not intend to violate any regulatory standards. (MPCA Ex. 10).

23. The ECSC reconvened and reviewed Interstate's October 24, 1997 response. The Committee determined that it was appropriate to issue an APO because Interstate's explanations were not consistent with MPCA's on-site observations. A Penalty Calculation Worksheet was completed to determine Interstate's penalty amount. The ECSC agreed unanimously to issue Interstate an APO in the amount of \$10,000, of which \$8,500 was nonforgivable and \$1,500 was forgivable. (MPCA Ex. 11).

24. Minn. Stat. § 116.072, subd. 2 authorizes the MPCA Commissioner to penalize violators up to \$10,000 for violations cited in an APO. Subdivision 2(b) provides:

(b) In determining the amount of a penalty the commissioner may consider:

- (1) the willfulness of the violation;
- (2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;
- (3) the history of past violations;
- (4) the number of violations;
- (5) the economic benefit gained by the person by allowing or committing the violation; and
- (6) other factors as justice may require, if the commissioner specifically identifies the additional factors in the commissioner's order.

25. The Agency's Penalty Calculation Worksheet tracks Minn. Stat. § 116.072 and provides guidance when calculating an appropriate monetary penalty under an APO. There are four steps in determining a penalty for first time violations. Step one is to determine whether the violation is forgivable or nonforgivable. Under Minn. Stat. § 116.072, subd. 5 (b) a violation is nonforgivable if it is serious or a repeat. The MPCA determined that violations 1, 2 and 3 were serious because the dry ACWM was not in leak-tight containers. Because asbestos is a known carcinogen and the potential exists for non-contained dry asbestos to become airborne, a potential threat to the public health and environment was created by Interstate's noncompliance. However, violation 3 was assessed forgivable because Interstate had placed caution tape around the work site to deter access. Violation 4 was determined as forgivable because it was neither serious or repeat. Interstate had no prior violations. (MPCA Ex. 11, p.2-3).

26. Step two calculated the base penalty. This involves determining first whether the potential for harm was minor, moderate or severe (vertical axis of the matrix). Second, the calculation involves determining whether the deviation from compliance was minor, moderate or severe (horizontal axis of the matrix). Each violation was calculated separately on the matrix below.

Violation 1's potential of harm to humans, animals, air, water, land or other natural resources of the state was determined as severe because of the potential for asbestos fibers to become airborne. The deviation from compliance was determined as minor because of the relatively small quantity of dry RACM on the ground. The matrix base penalty was determined at \$3,500. (MPCA Ex. 11, p.4).

Violation 2's potential of harm to humans, animals, air, water, land or other natural resources of the state was determined as severe because of the potential for asbestos fibers to become airborne from the non-seal-tight container. Visible emissions were observed coming from the container. The deviation from compliance was determined as severe because all of the RACM was dry. The lower end of the penalty range was chosen because one of the two dumpsters contained a small quantity of ACWM. The matrix base penalty was determined at \$5,000. (MPCA Ex. 11, p.4).

Violation 3's potential for harm to humans, animals, air, water, land or other natural resources of the state was determined as moderate because of the potential for the public to access the material. The deviation from compliance was determined as moderate because the waste container had not left the work site. The lower end of the penalty range was chosen because there were only two waste containers. The matrix base penalty (forgiven) was determined at \$1,000. (MPCA Ex. 11, p. 5).

Violation 4's potential for harm to humans, animals, air, water, land or other natural resources of the state was determined as moderate because of the importance of the label is to ensure proper tracking and disposal of the ACWM for the public health and the environment. The deviation from compliance was determined as minor because the waste container had not left the work site. The lower end of the penalty range was chosen because there were only two ACM waste containers. The matrix base penalty (forgiven) was determined at \$500. (MPCA Ex. 11, p. 5).

| | | Deviation from Compliance | | |
|-----------------------------------|----------|----------------------------------|--------------------------|---------------------------|
| | | Minor | Moderate | Severe |
| Potential for Harm | Severe | \$5,000 to \$2,000 | \$8,000 to \$3,500 | \$10,000 to \$5,000 |
| | Moderate | \$2,000 to \$500 | \$3,500 to \$1,000 | \$5,000 to \$2,000 |
| | Minor | \$500 to \$0 | \$1,000 to \$200 | \$2,000 to \$500 |
| | | Base Penalty Range | | |

(Source: Administrative Penalty Order (APO), Penalty Calculation Worksheet, Interstate Roofing and Waterproofing, Inc. (MPCA Ex. 11)).

27. Step three was adjustments considered for all violations. Factors considered were culpability/willfulness of the violation, economic benefit the violating party gained by not complying with the relevant law and other factors as justice may require. No adjustment was made because the MPCA determined that no willfulness, economic benefit or other factors as justice may require existed. Step four was to determine whether to reduce the penalty, if necessary, to \$10,000. Because the penalty was assessed at \$10,000, step four was not applicable. (MPCA Ex. 11, p.6-8).

28. On December 16, 1997, the MPCA issued an Administrative Penalty Order to Interstate. The APO letter set out the violations, the amount of penalty (\$8,500) and Interstate's right to appeal for administrative or judicial review. (MPCA Ex. 12).

29. Minn. Stat. § 116.072, subd. 6 requires an expedited hearing on administrative penalties to be heard within thirty days after a request for such a hearing is filed the Commissioner of the Pollution Control Agency unless the parties agree to a later date. Interstate filed a timely appeal and received an expedited hearing. The hearing convened on March 11, 1998.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

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CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of the Pollution Control Agency have jurisdiction in this case pursuant to Min. Stat. § 14.57 through 14.62 and 116.072.

2. All relevant substantive and procedural requirements of law and rule have been fulfilled, and the matter is properly before the Administrative Law Judge.

3. Any Finding of Fact more properly considered a Conclusion is hereby adopted as such.

4. For purposes of this proceeding, Interstate is the "owner or operator" within the meaning of Minn. Rule 7011.9920, which incorporates the asbestos provisions of 40 C.F.R., Subpart M, § 61.141. Interstate bears financial responsibility for the Administrative Penalty Order issued by the Commissioner of the Minnesota Pollution Control Agency on December 16, 1997.

5. The Asbestos-Containing Roofing Material in the Rosemount School renovation project was friable under § 61.141. The Rosemount renovation project meets the NESHAP threshold requirement of greater than 160 square feet of Regulated Asbestos-Containing Material. 40 C.F.R., Subpart M, § 61.145. Interstate was required to meet the NESHAP's work practice requirements under §§ 61.145 and 61.150. Appendix A to subpart M of the NESHAP was not applicable in this case because it

applies to situations involving nonfriable Category I and II type Asbestos-Containing Material.

6. Interstate violated four separate NESHAP provisions for which the MPCA issued an Administrative Penalty Order in the amount of \$10,000. Violations 3 and 4 were forgiven. Violations 1 and 2 were nonforgiven in the amount of \$8,500. Violation 2's nonforgivable penalty in the amount of \$5,000, assessed using the MPCA's penalty matrix, is appropriate. The nonforgivable penalty assessed for Violation 1, \$3,500, is unreasonable. In order to make it reasonable, it is appropriate to reduce it to \$2,000, using the MPCA's penalty matrix. A total assessed penalty amount of \$7,000 is appropriate and reasonable.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Commissioner of the Minnesota Pollution Control Agency issue an Order AFFIRMING Violation 2 and the penalty of \$5,000 for that violation, as noted in the Administrative Penalty Order issued against Interstate Roofing and Waterproofing, Inc. on December 16, 1997.

IT IS RECOMMENDED FURTHER that the Commissioner of the Minnesota Pollution Control Agency issue an Order AFFIRMING Violation 1 BUT MODIFYING the Administrative Penalty Order issued against Interstate Roofing and Waterproofing, Inc. on December 16, 1997 to reduce the penalty for that violation from \$3,500 to \$2,000.

Dated this 30th day of April, 1998.

RICHARD C. LUIS
Administrative Law Judge

Reported: Taped, No Transcript prepared.

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

There are three issues to resolve. First, whether the APO is invalid because the Rosemount Elementary School renovation roof removal project does not meet the

required threshold amount of 160 square feet of Regulated Asbestos-Containing Material under the provisions of the NESHAP due to the resting condition of the roofing material prior to removal and the removal procedures used by the Interstate. Second, if the NESHAP does apply, whether the MPCA has proven that the NESHAP regulations were violated. Third, if the asbestos provisions of the NESHAP do apply and violations were committed, whether the proposed nonforgivable penalty of \$8,500 for such violations is appropriate.

Because the Minn. Rules incorporate the federal NESHAP, it is proper to rely on both federal and state case law.

Asbestos is a known carcinogen, as recognized by the Environmental Protection Agency. (See 36 Fed. Reg. 5931). Asbestos has been determined as a causal factor in the latent “development of mesothelioma cancers of the membranes lining the chest and abdomen.” United States v. Tzavah Urban Renewal Corp., et al, 696 F.Supp. 1013, 1022 (D.N.J. 1988) (citing 38 Fed. Reg. 8820). In other asbestos related cases it is a “generally accepted’ proposition that mesothelioma was not dose related, but was caused by a single exposure to asbestos.” Independent School District No. 197 v. W.R. Grace and Co., 752 F.Supp. 286, 294 (D. Minn. 1990).

Interstate argues the appropriate weight that should be given to the NESHAP interpretation, given Mr. Lindahl’s and Mr. Richards’s qualifications. Interstate asserts that “[t]he qualifications of Richards and Lindahl are material elements of this case because resolution of this case will depend on which interpretation of the applicable regulations will be deemed applicable.” (Interstate Reply, p.1). While Mr. Lindahl’s and Mr. Richards’s testimonies as to the correct statutory reading are relevant to this case, their qualifications are not material in this issue because statutory interpretation is a question of law. Therefore, it is proper for the Administrative Law Judge to interpret the NESHAP taking all parties’ arguments into account.

In 1993, the MPCA adopted and incorporated the federal asbestos NESHAP. Renovations of buildings containing asbestos are subject to regulation under Minn. Rule 7011.9920, which incorporates the asbestos provisions of 40 C.F.R., subpart M. The NESHAP requires specific notice and work practices regarding asbestos removal if the ACM is Regulated Asbestos-Containing Material (RACM) and it is greater than 160 square feet in area. RACM is defined as:

- (a) Friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart.
- (40 C.F.R. § 161.141).

It is undisputed that Interstate is an “owner or operator” under 40 C.F.R § 61.141. Interstate contends that the ACM in its resting position is not RACM because the asbestos is encapsulated between the PVC layer and the backerboard, and that the ACRM was in good condition before removal, and the removal procedure used was straight knife blades. Interstate asserts that the encapsulation of the asbestos and the good condition of the ACRM constitute nonfriable Category II ACM which is subject to Appendix A to Subpart M, an interpretive rule governing roof removal operations. Appendix A conditions the NESHAP applicability to the amount of friable ACM generated by removal of nonfriable Category I and II ACM. If the amount of friable ACM generated exceeds 160 square feet, the NESHAP’s requirements apply. Interstate argues that its removal methods only generated approximately 17.5 square feet of friable ACM, therefore, the NESHAP does not apply. In addition, Interstate asserts that Appendix A applies to any roof.

The MPCA contends that Appendix A does not apply in this case because the threshold issue turns on whether the ACM is friable or not. Appendix A applies only if the ACM is nonfriable. The MPCA points to its on-site and the laboratory analysis determination that the ACM was friable, and Interstate’s signed renovation project notification, which stated expressly that 6,200 square feet of friable RACM was to be removed. The Administrative Law Judge agrees with the MPCA on this issue.

40 C.F.R. § 61.141 provides that “Friable asbestos-containing material [ACM] means any material containing more than one percent asbestos . . . that, when dry, can be crumbled, pulverized, or reduced to a powder by hand pressure.” 40 C.F.R. § 61.145, (a)(4) provides that paragraphs (b) notification requirements and (c) work practice requirements apply if a facility renovation project operation involves “the combined amount of RACM to be stripped, removed, dislodged, cut, drilled or similarly disturbed is (i) at least 15 square meters (160 square feet) on other facility components.” “Remove means to take out RACM or *facility components that contain or are covered with RACM from any facility.*” (Emphasis added).

Interstate argues that Appendix A To Subpart M—Interpretive Rule Governing Roof Removal Operations applies in this case. This interpretive rule sets out certain required categories and conditions concerning ACM removal in order for the NESHAP to be applicable. First, the rule repeats 40 C.F.R § 61.141’s initial inquiry as to whether the ACM is friable or nonfriable. Friability depends on whether dry ACM can be “crumbled, pulverized or reduced to powder by hand pressure.” (Append. A to Subpart M, I. 1.1.). If hand pressure does not crumble, pulverize or reduce the dry ACM to powder, the ACM is nonfriable. Second, *Nonfriable is divided into Categories I and II* according to types of Asbestos-Containing Roofing Material and their potential to release fibers when damaged. (Emphasis added). (See Append. A to Subpart M, I. 1.2.). The threshold determination is whether the ACM is friable or not. A determination of whether the ACRM is Category I or II applies only if the material is nonfriable.

The interpretive rule expressly limits its applicability to considerations of (1) the condition of the roofing material at the time of renovation; (2) the nature of the procedures to which the material will be subjected; and (3) the amount of ACM involved, *in situations involving nonfriable Categories I and II*. (Emphasis added). (Append. A to Subpart M, I. 1.2.). Nowhere does the interpretive rule mention nor can it be implied that the NESHAP's applicability to friable ACRM is dependent on threshold considerations such as the condition of the roofing material or the nature of the procedures used to remove the materials. In its post-hearing submission, Interstate points to the fact that "Appendix A is filled with references to friable ACM." (Interstate Post-Hearing Submission, p. 4). While such references exist, Interstate's construction of Appendix A's applicability in this case is misplaced.

The distinction is that Appendix A applies only to Category I or II materials that are *nonfriable*, but have the potential to *become friable* during the removal process. (emphasis added). The potential for nonfriable ACRM to become friable ACRM is stressed throughout Appendix A. Section I. 1.1. distinguishes nonfriable Categories I and II from each other by their potential to release asbestos fibers when damaged. In general, nonfriable Category II type roofing materials are more likely to become friable when damaged than Category I materials. (Append. A to Subpart M, I. 1.2.). It is clear that the concern is the release of asbestos fibers into the air. It follows that if the ACRM is nonfriable, Appendix A is applicable and it provides that "in certain situations, nonfriable ACM in the operation, [is] subject to the NESHAP." (Append. A to Subpart M, I. 1.3). The "certain situations" involving nonfriable Category I and II ACRM are set out in the remainder of Appendix A, and are dependent upon the condition of the roof and the nature of the methods used to handle and remove the material.

The MPCA correctly points to language in Appendix A which states: "EPA therefore construes the NESHAP to mean that the removal of A/C shingles [Category II ACRM] that *are not friable*, using the methods that do not crumble . . . is not subject to the NESHAP . . . ". Appendix A, 1.B.1. (emphasis added) (brackets not in original); and "[I]t is the EPA's interpretation that when such methods are used, *assuming the roof material is not friable*, the removal operation is not subject to the regulation." Appendix A, 1.C.1. (emphasis added). It is clear that certain methods used for removal are contingent upon whether the ACM is friable or not.

Given the serious concern for the high potential of friable asbestos fiber release into the air posing health risks, and the language of the NESHAP, subpart M and Appendix A, it does not follow that friable asbestos, whether encapsulated between layers or contained in any roofing material, could be exempt from regulation under Appendix A.

The issue of friable asbestos that is encapsulated between two or more layers is not a threshold issue, but is addressed in section 61.145(c), entitled Procedures for asbestos emissions control. Subparagraph (2) provides that "[w]hen a facility component that *contains*, is covered with, or is coated with *RACM* is being taken out of the facility as a unit or in sections . . . (i) adequately wet all RACM exposed during

cutting or disjoining operations and (ii) Carefully lower each unit or section to the ground” (Emphasis added). Subparagraph (4) further provides that if the “facility component containing RACM has been taken out of the facility as a unit or in sections” under subparagraph (2), the RACM shall be contained in leak-tight wrapping.

It is important to note that Interstate was not alleged to have violated subparagraphs (2) and (4), but was alleged to have violated subparagraph (6)(i) which applies to “all RACM, including material that *has been removed* or stripped,” is adequately wetted “until collected and contained or treated in preparation for disposal in accordance with § 61.150.” (Emphasis added). “Remove means to take out RACM or facility components that contain or are covered with RACM from any facility.” 40 C.F.R. § 61.141.

The only requirement for the NESHAP applicability regarding friable ACM is set out plainly in section 61.145, which provides that the total area of RACM to be removed must exceed 160 square feet for the NESHAP to apply. The interpretive rule reiterates this by stating “if the total asbestos-containing roof area is less than 160 square feet, the NESHAP does not apply, regardless of the removal method used, the type of material (Category I or II), or its condition (friable versus nonfriable).” And “if the coverage threshold is met, then all *friable* ACM and in certain situations Category I or II are subject to the NESHAP.” (emphasis added). (Append. A to Subpart M, I. A. 1.A.1.). Section A. 1.A.1. recommends that removal methods used should disturb the ACRM as little as possible whether the ACRM is friable or nonfriable.

Finally, section II. 2.1, supports this conclusion further in its notification requirements, in that “[i]f Category II material *is not friable* and will be removed without crumbling, pulverizing, or reducing to powder, no notification is required.” (Emphasis added). In sum, if the ACRM is friable, NESHAP’s applicability to it is not contingent upon any roof type, condition of the roof or methods used for removal under Appendix A.

Mr. Lindahl testified that the ACM was encapsulated and in good condition prior to removal, and therefore, nonfriable Category II ACM. Thus, Interstate argues the NESHAP does not apply because it used the proper removal procedures under Appendix A. That argument is misplaced. Mr. Lindahl notified the MPCA at the onset that the material to be removed was friable. Mr. Lindahl testified under cross-examination that he did not test for friability. Mr. Lindahl cannot now assert that the ACRM was nonfriable if he did not at any point test for friability. As discussed above, NESHAP applicability is not contingent on whether friable asbestos is encapsulated, but on whether the ACM is in fact friable or not, and on whether the total area of RACM to be removed exceeds 160 square feet. This conclusion is consistent with the serious concern over asbestos fibers released into the air during removal.

Finally, Interstate argues that the ACM was not friable because during the hearing, Mr. Richards was given a plastic bag that allegedly contained asbestos to demonstrate how he applied the hand pressure to determine friability, which

demonstration proved inconclusive. The demonstration was allowed for demonstrative purposes only. Because the sample did not come from the Rosemount site, and the material was not removed from the bag, the ALJ has assigned little weight to that piece of demonstrative evidence.

Mr. Lindahl testified that actual removal of the ACRM for asbestos content testing was not practical because that would cause damage to the roof which could not adequately be repaired and because the risks posed by asbestos fiber release were too great. This is unpersuasive because a small divot in the roof made to remove a sample for testing could be patched or repaired to contain the asbestos adequately until removal.

Although Mr. Lindahl's testimony that the ACRM was nonfriable directly contradicts the notice that Mr. Lindahl himself completed, he maintains that the notice "overcompensated" and that it is an industry practice to overstate such notices. This explanation is also unpersuasive. Because of the serious nature of asbestos removal, the MPCA, acting to protect public health and safety, should be able to rely on such required notices as accurate statements. To disregard such notices, by assuming that owners or operators overstate the extent of the potential problem, would be a questionable Administrative practice.

The notice that Mr. Lindahl completed also contradicts his own testimony that the ACRM was nonfriable Category II because he failed to answer section 6 (c)'s question as to what procedures were to be used in the event that Category II nonfriable ACM became crumbled, pulverized, or reduced to a powder. It can be inferred that if Mr. Lindahl believed the ACM to be nonfriable Category II when he filed the notice, he would have answered the question at section 6 (c). The implication is that he thought then that the ACM was friable, as stated elsewhere in the notice.

Appendix A is instructive in determining when the roofing material should be tested for asbestos and when the notice and work practice requirements must be followed. It is appropriate here to cite Appendix A, I. A. 1.A.3., which states:

Only roofing material that meets the definition of ACM can qualify as RACM subject to the NESHAP. Therefore, to determine if a removal operation is subject to the NESHAP, any suspect roofing material (*i.e.* roofing material that may be ACM) should be tested for asbestos. If any such roofing material contains more than one percent asbestos and if the removal operation is covered by the NESHAP, then [MPCA] must be notified and work practices in section 61.145(c) must be followed if a removal operation involves at least the threshold level of any suspect material, a roofing contractor *may choose not to test for asbestos if the contractor follows the notification and work practice requirements of the NESHAP.*

(Emphasis added). In this case, the MPCA has proven that NESHAP's work practice requirements were not followed by Interstate.

When the notice was signed by Mr. Katsen, president of Interstate, he certified that the information provided was accurate. Notwithstanding the fact that Mr. Lindahl did not test the ACRM for friability, the notice establishes that in Interstate's estimation there were 6,200 square feet of friable ACRM. The MPCA's showing (discussed below) that five separate samples taken from the work site were friable asbestos confirms Interstate's notice. Mr. Richards credibly testified that he observed more than 160 square feet of dry, friable ACRM in two dumpsters, an observation supported by photographs of at least one dumpster containing eight to nine 4 x 8 foot ACRM sheets. (MPCA Ex. 5, the middle, clear plastic lined dumpster in photographs 1, 2, 3).

Because there were 6,200 square feet of friable ACRM, Appendix A applicability as to nonfriable ACRM is not applicable to this case. NESHAP's work practice requirements apply, so the issue becomes whether the MPCA has proven by a preponderance of the evidence that all alleged violations occurred.

The NESHAP is a strict liability statute. Failure to follow the work practice requirements results in automatic liability. United States v. Sealtite Corp., 739 F.Supp. 464, 468-69 (E.D. Ark. 1990). The NESHAP requirements include notification to the MPCA, and specific work procedures to adequately wet RACM materials when they are being removed; and to ensure that they are adequately wetted until they are collected for disposal; to keep RACM in leak-tight containers; to properly label all ACWM containers; and to label containers of wetted ACWM to be transported off the facility site, with the name of the waste generator and location at which the waste was generated. 40 C.F.R. §§ 61.145 and 61.150.

The MPCA must show that it is more likely than not that Interstate violated the four charged provisions of the NESHAP. Minn. Stat. 116.072, subd. 7(b), Minn. Rules 1400.7300, subp. 5. An inspector's observation can be relied on to establish that the asbestos was not adequately wetted. United States v. Sealtite Corp., 739 F.Supp. 464, 467 (E.D. Ark. 1990); United States v. Tzavah Urban Renewal Corp., et al, 696 F.Supp. 1013, 1022 (D.N.J. 1988); See United States v. Walsh, 8 F.3d 659, 663 (9th Circ. 1993).

Mr. Richards is a qualified, credible witness. Although he does not possess specific training dealing with roofs, he is trained in asbestos detection, which is what is required in this case. Mr. Richards is the NESHAP administrator for the MPCA. Mr. Richards testified that he observed, photographed and hand tested dry asbestos (for friability) that was lying on the ground of the work site, and in two separate dumpsters, which shows the violation of section 61.145 (c)(6)(i) which provides that "[e]ach owner or operator of a . . . renovation activity . . . shall comply with the following procedures: . . . [f]or all RACM, including material that has been removed or stripped: . . . [a]dequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with Section 61.150." In

addition, proper sampling and laboratory analysis were conducted, and those processes confirmed that the material was friable because of the level of asbestos content. The presence of dry, uncontained RACM on the site renders immaterial Interstate's defense (see Finding 22) that the material was wet when it was removed from the roof earlier.

Mr. Richards's testimony establishes the second violation under 40 C.F.R § 61.150, titled Standard for Waste Disposal for Manufacturing, Fabricating, Demolition, Renovation and Spraying Operations, which provides each owner or operator under sections 61.144 to 61.147 shall not (a) discharge any visible emissions to the outside air during the collection, processing, packaging or transporting of any ACWM generated by the source or shall control the emissions by (1) adequately wetting the ACWM, and (iii) seal all wetted ACWM in leak-tight containers. Mr. Richards testified that he observed and photographed the RACM in non-leak-tight containers.

The third violation shown was Interstate's noncompliance with 40 C.F.R § 61.150, which provides also that each owner or operator under sections 61.144 to 61.147 shall (a)(1) adequately wet ACWM and (iv) label ACWM containers using Occupational Safety and Health Administration (OSHA) warning labels. Mr. Richards testified that he observed that Interstate failed to label containers of ACWM with OSHA warning labels.

The fourth violation shown was Interstate's noncompliance with 40 C.F.R § 61.150, which provides further that each owner or operator under sections 61.144 to 61.147 shall (v) label containers of wetted ACWM to be transported off the facility site, with the name of the waste generator and location at which the waste was generated. Mr. Richards testified that he observed that Interstate failed to label containers of ACWM with the name of the waste generator and location at which the waste was generated.

The MPCA has shown by a preponderance of the evidence that Interstate violated all four charged provisions of the NESHAP.

The final question is if the asbestos provisions of the NESHAP apply, and violations were proven to have occurred, whether the proposed nonforgivable penalty of \$8,500 for such violations is reasonable and appropriate.

The Administrative Law Judge concludes that the \$8,500 penalty is unreasonable, but that a total penalty amount of \$7,000 is reasonable and appropriate for Violations 1 and 2.

Violations 1 and 2 are separable. In United States v. Midwest Suspension and Brake, 824 F.Supp. 713, 728-33 (E.D.Mich. 1993), *aff'd*, 49 F.3d 1197 (6th Circ. 1995), the District Court evaluated violations based on discrete NESHAP requirements rather than general requirements. The court found that one violation was the failure to place all asbestos-containing waste into the proper containers. A second violation was the failure to seal the containers properly and a third violation was the failure to label the

containers properly. Id. at 733. The court rejected the argument that two unlabeled containers amounted to two separate violations. Id. In this case, Violation 1 was Interstate's failure to wet the ACM properly until contained and Violation 2 was the failure to seal the ACM containers properly.

Although Interstate had no prior violations, the Administrative Law Judge agrees that the seriousness of the first two violations warrant nonforgivable penalties. First time violations are factored in determining whether the penalty is forgivable or not. Under Minn. Stat. § 116.072, subd. 5(b), a violation is nonforgivable if it is serious or repeated. The exposed dry friable asbestos created a serious health hazard.

The Administrative Law Judge agrees that the potential for harm was severe for both violations 1 and 2 because of the health risks to life caused by the potential for release of friable asbestos fiber into the air.

Minn. Stat. § 116.072, subd. 6(c) provides “[T]he administrative law judge may not recommend a change in the amount in the proposed penalty unless the administrative law judge determines that, based on the factors in subd. 2, the amount is unreasonable.”

The Administrative Law Judge concludes that the calculated penalty in the amount of \$3,500 for Violation 1 is unreasonable and inappropriate. The MPCA determined that the deviation from compliance was minor based on the fact that there was only a relatively small amount of RACM on the ground. However, the MPCA chose to penalize Interstate at the midway amount of the severe-minor range (between \$2,000 and \$5,000). The Administrative Law Judge recommends assessing the penalty at the low end of the severe-minor range (\$2,000) based on the fact that only a small amount of dry ACM was proven to be located on the ground. Such a small amount of ACM should not warrant a \$1,500 (75%) departure from the lower end of the severe-minor range, particularly in light of the Agency’s decision to assess at the low end of the applicable range with respect to Violation 2 (see the next paragraph).

The Administrative Law Judge concludes that Violation 2’s calculated penalty in the amount of \$5,000 is reasonable and appropriate. The large amount of ACM not contained properly warrants a determination of severe deviation from compliance. And the lower end of the severe-severe range is appropriate because one of the two dumpsters contained only a small quantity of ACWM.

R.C.L.