

Secretary of Labor,  
Complainant,

v.

Southern Nuclear Operating Company,  
Inc.,

OSHRC Docket No. 97-1450

## **APPEARANCES**

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For Complainant

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For Respondent

Before: Administrative Law Judge Ken S. Welsch

## **DECISION AND ORDER**

Southern Nuclear Operating Company, Inc., (SNOC) operates the Farley Nuclear Plant in Columbia, Alabama. On May 14, 1997, the Occupational Safety and Health Administration (OSHA) initiated an inspection at the plant based on alleged exposure to asbestos hazards by a subcontractor's employees. As a result of the inspection, SNOC received a willful citation on August 22, 1997. SNOC timely contested the citation (Tr. 5).

The willful citation alleges that SNOC violated § 1926.1101(k)(2)(i) (item 1) by failing to determine the presence, location and quantity of all asbestos-containing material (ACM) or presumed asbestos-containing material (PACM) before work began in the Main Steam Valve Room, Auxiliary Building, and Turbine Building; § 1926.1101(k)(2)(ii) (item 2a) by failing to notify employers who perform work in the Main Steam Valve Room, Auxiliary Building and Turbine Building of ACM or PACM, or in the alternative, by failing to demonstrate as required by § 1926.1101(k)(5)(i) its

determination that PACM did not contain asbestos before removal work was begun; and § 1926.1101(k)(3)(ii) (item 2b) by failing to inform employees and employers before work began of the location and quantities of ACM or PACM present in the Main Steam Valve Room, Auxiliary Building and Turbine Building, and the precautions to be taken to insure that airborne asbestos was confined. The citation proposes a total penalty of \$80,000.

The parties stipulate jurisdiction and coverage (Tr. 4). SNOC argues that the citation is time barred; the violations are not established by the record; and there is no evidence of willfulness. SNOC's time bar argument is rejected and the violations, except for item 2b, are affirmed as serious violations.

The hearing, which took twenty days, was primarily held in Dothan, Alabama, during the period of February 9 to March 18, 1998. The parties filed post-hearing briefs and reply briefs.

#### *The Inspection*

SNOC, a subsidiary of The Southern Company, a public utility holding company, is licensed to operate<sup>1</sup> the Farley Nuclear Plant in Columbia, Alabama, and two other nuclear power plants in Alabama and Georgia (Tr. 64-65, 315, 452, 3353-3354). The Farley Nuclear Plant, located on 25,000 acres, produces electric power. SNOC employs in excess of 800 employees (Tr. 65). In addition to its employees, employees of contractors such as Williams Power Corporation (WPC) also work at the Farley Plant (Tr. 72).

The Farley Plant consists of two units or reactors, Unit 1 and Unit 2, each of which houses a heat exchanger containing a reactor core. In addition to the units, the Auxiliary Building, with a Main Steam Valve Room and the Turbine Building, are integral to the process of heating and cooling the reactors. The Auxiliary Building, which is common to both units, is approximately 150,000 square feet in size and houses support equipment. The Main Steam Valve Room which is located in the Auxiliary Building and is approximately 3,000 square feet, is where feedwater is boiled into steam. The Turbine Building, which houses the turbine generator, main condenser and the turbine auxiliary, is five floors and approximately 180,000 square feet in size. Piping systems in the Main Steam Valve Room, Auxiliary Building and Turbine Building and the appurtenant components,

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<sup>1</sup> The owner of the Farley Nuclear facilities is Alabama Power Company (Tr. 452). SNOC stipulates that as defined at § 1926.1101(b), it is the "facility owner" for the purposes of this case (Tr. 315).

including valves and equipment, are completely insulated. Together, the Auxiliary Building and Turbine Building contain approximately 34,000 valves and thousands of miles of piping (Tr. 3360, 3369-3370, 3377-3378, 3380).

Farley's Unit 1 was constructed in 1974 and commenced operations in 1977 (Tr. 3319-3320). Construction for Unit 2 began in 1977, and commenced operations in 1981. SNOC contracted the operation of the Farley Plant in 1991 from Alabama Power Company, also a subsidiary of The Southern Company (Tr. 3352, 3354).

To maintain customer service, Unit 1 or Unit 2 must remain in operation at all times (Tr. 1373). The occasions when a unit is removed from operation for maintenance and refueling of the reactor is scheduled as an "outage." Each unit is shut down every 18 months; the effective life of nuclear fuel in the reactor core (Tr. 525, 3415-3416, 3982). Since one unit must remain in operation, outages are staggered and the time is kept at a minimum because both units in operation maximizes the electrical power generation (Tr. 3190).

The Fall of 1996 outage for Unit 2 began October 12, 1996, and lasted for approximately 72 days, during which time Unit 1 remained in operation. The Spring of 1997 outage for Unit 1, which began on March 15, 1997, lasted 82 days (Exh. C-14; Tr. 3206, 3208).

Williams Power Company (WPC), an asbestos removal contractor, contracted to work at the Farley Plant in July 1995, and its work continued until July, 1997. WPC contracted to perform "general powerhouse maintenance and/or modifications, as well as asbestos removal and handling services throughout the Plant" (Exh. C-1; Tr. 3183-3184). The contract was implemented through purchase orders which identified the work to be performed (Tr. 3199).

As a result of a complaint by a WPC employee alleging exposure to asbestos hazards, an on-site inspection on May 14, 1997, was initiated by industrial hygienist (IH) Jennifer Leigh Jackson of OSHA (Exh. C-2; Tr. 2216-2217, 2235). Based on her inspection, both WPC and SNOC received citations. The citation involving WPC was settled (Docket No. 97-1451, Final Order June 3, 1998).

## Discussion

### Preliminary Matters

#### Section 9(c) - Timely Issuance of the Citation

SNOC argues that the willful citation was not timely issued. The OSHA inspection was initiated on May 14, 1997, and the willful citation was issued August 22, 1997. The Secretary asserts that the violations occurred during the period of January 1, 1996, to May 22, 1997.

The communication of hazards standards at subsection § 1926.1101(k) cited by the Secretary requires that before work begins in the workplace which may result in the removal or disturbance of ACM and PACM, the building owner is to make determinations and provide notice to its employees and contractor's employees regarding the presence, location, and quantity of ACM or PACM. The Secretary alleges that SNOC failed to make such determinations and to give such notice before work began at the Farley Plant.

Section 9(c) of the Occupational Safety and Health Act (Act), 29 U.S.C. § 658(c), provides that:

No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

In considering the six-month statute of limitations, the Review Commission has long recognized that the instance of noncompliance and employee access to the unsafe condition providing the basis for the alleged violation must occur within six months of the issuance of the citation. *Central of Georgia*, 5 BNA OSHC 1209 (No. 11742, 1977). In *Central Georgia R.R.*, 5 BNA OSHC at 1211 (No. 11742, 1977), the Commission defined "occurrence" as follows:

For section 9(c) purposes, a violation of section 5(a)(2) of the Act 'occurs' whenever an applicable occupational safety and health standard is not complied with and an employee has access to the resulting zone of danger. Therefore, it is of no moment that a violation first occurred more than six months before the issuance of the citation, so long as the instances of noncompliance and employee access providing the basis for the contested citation occurred within six months of the citation's issuance.

The purpose of the six-month limitation is "to ensure that claims are prosecuted while the events are still fresh, and the witnesses and evidence can be obtained." *Safeway Store No. 914*, 16 BNA OSHC 1504, 1506 (No. 91-373, 1993).

The Secretary argues that the alleged violation began when work started and continued until the OSHA inspection. She alleges that SNOC's failure to make determinations and give notice prior to the start of work are "continuing violations." The Secretary contends that if determinations and notifications<sup>2</sup> are not made by the building owner before the work is begun, the violative occurrence is continuing and exists for the entire duration of the work until the required determination and notification are made or until the work is completed (Secretary's Brief, p. 15).

For the purposes of § 9(c), the important date is the last day on which employees have access to the zone of danger. The Commission has rejected the argument that the date of violation from which the six-month period begins to run is the date on which the violative condition first came into existence. See *Kasper Electroplating Corp.*, 16 BNA OSHC 1517 (No. 90-2866, 1993) (the key date is the date of discovery of violation); *General Dynamics Corp.*, 15 BNA OSHC 2122 (No.87-1195, 1993) (dates of noncompliance and employee access are determinative for purposes of statute of limitation).

The violative condition may have existed for years prior to the six-month time frame. However, in order for the citation to be timely, the violation must still exist during the six-month period prior to the issuance of the citation. SNOC argues that it cannot be cited in August, 1997, for failing to make determinations and notifications as required by the standards as long as it made them on or before February 22, 1997 (SNOC Brief, p. 18). The court agrees if the determination and notification relate to the work performed after February 22, 1997. The Secretary asserts that SNOC did not make such determinations and notifications prior to January 1, 1996, nor did it do so prior to May, 1997.

For the purposes of this case, the Secretary establishes a violation if the determinations and notifications as required by the cited standards were not made on work begun after February 22, 1997, which potentially disturbed or removed PACM or ACM. The Secretary must show that SNOC's employees or the contractor's employees were exposed to or had access to PACM or ACM during the period of February 22, 1997, to August 22, 1997, and no

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<sup>2</sup> The Secretary's contention that SNOC is estopped from asserting the statute of limitations as a defense because of its refusal to provide information and make management personnel available for questioning is rejected. There is no showing that SNOC's failure to provide the information was other than an employer's constitutional right to question the scope of OSHA's inspection. The inspection was initiated as an inspection of WPC. Also, it was not stated how the failure to provide the information impacted OSHA's investigation or that it, in fact, delayed the issuance of the citation. The citation was issued within three months of initiating the inspection.

determinations and notifications regarding PACM or ACM were made by SNOC prior to the beginning of the work. SNOC's motion to dismiss is denied.

### The Asbestos Notification Standard Is Not Invalid

SNOC seeks to dismiss the citation because even if it failed to notify employees of PACM, the record does not show that employees were exposed to airborne concentrations of asbestos in excess of the permissible exposure level (PEL) of 0.1 fiber per cubic centimeter of air as an 8-hour time weighted average (0.1 f/cc). However, SNOC argues that no hazard exists if the airborne concentration of asbestos is below the PEL. Because the cited standard can be triggered merely by the presence of PACM, the notification standard argues SNOC is overreaching and invalid (SNOC Brief, p. 19).

There is no dispute that the notification standard at issue is not triggered by the PEL. SNOC agrees that the standard requires building owners to "notify [certain employees] of the presence, location and quantity of ACM or PACM at the work site in their building and facilities." The presence of PACM or ACM triggers the obligation to notify.

The Review Commission considers an employer's challenge to the validity of a standard properly raised in an enforcement proceeding. *See Holly Springs Brick & Tile Co.*, 16 BNA OSHC 1856, 1858 (No. 90-3312, 1994). The burden of proving a standard invalid lies with the party challenging the validity. It is a heavy burden.

The Act does not provide a guideline on how workplace hazards should be eliminated. Instead § 6(b)(5) of the Act requires that in dealing with toxic materials or harmful physical agents, the Secretary of Labor sets the standard "which most adequately assures" that no employee will suffer material impairment. Section 3(8) of the Act defines an occupational safety and health standard as being "reasonably necessary or appropriate to provide safe or healthful employment and places of employment."

Before promulgating a standard, the Secretary is required to consider the need for each measure of safety and health protection. The Secretary in enforcement proceedings is not, however, ordinarily required to prove the existence of a hazard because the promulgation of a standard

presupposes the existence of a hazard. *National Engineering & Contracting Co. v. OSHA*, 928 F.2d 762 (6th Cir. 1991). Even the showing of a low likelihood of injury is not a defense.

The current asbestos standards were reviewed and amended in response to an order by the D.C. Circuit Court, which upheld the standards in major respects. *Building and Construction Trades Department v. Brock*, 838 F.2d 1258 (1988). The Secretary's preamble to the asbestos standards provides that PACM constitutes a "high risk if asbestos containing" because it involves thermal system insulation and applied surfacing material in buildings constructed prior to 1980. 59 Fed. Reg. 40964, 40978 (August 10, 1994). The Secretary, in explaining why the PEL is not used, states:

In these standards, OSHA has taken a different approach to protecting workers exposed to levels of asbestos below the PEL. Instead of a numerical action level, employer duties involving training and surveillance are triggered by exposure to the ACM or PACM or by the type of work being done. Additionally, work practices also are required regardless of the measured exposure levels. OSHA considers this approach to better protect employees than an action level which triggers training and medical surveillance duties based on monitoring results. OSHA's approach is particularly appropriate for asbestos because in many cases, asbestos levels below the PEL cannot be reliably measured, and duties tied to an action level might therefore be triggered by measurements of dubious accuracy.

59 Fed. Reg. at 40974 (August 10, 1994)

The Secretary's findings regarding PACM are supported by the record and the potential hazard is identified. The hazard to employees is the building owner's failure to identify the location of PACM or ACM in the workplace and notify employees prior to beginning work. To avoid the notification requirement, an employer may make a negative assessment showing that there is no potential asbestos exposure. Similar to the training and competent person requirements, the notification requirement does not require a showing of an employee's exposure in excess of the PEL. The Secretary's refusal to trigger the notification requirement by the PEL does not mean there is no potential hazard to employees and the Secretary's right to regulate in this manner is negated. SNOC's motion is denied.

### The Asbestos Notification Standard is not Impermissibly Vague

SNOC contends that the notification standard is vague in the way it is written and applied (SNOC Brief, p. 24). SNOC argues that the term “presence” is ambiguous because it fails to give adequate notice of the conduct required or prohibited. Also, SNOC asserts that the Secretary’s ever-changing construction of its notice obligation makes compliance impossible. According to SNOC, the Secretary fails to offer a single comprehensive definition of what constitutes adequate notice or to whom adequate notice must be given (SNOC Brief, p. 27).

Employers are entitled to fair warning of what a standard requires. *Diamond Roofing v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). In applying the standard, the wording is viewed in context, not in isolation, and judged in light of its application to the facts of the case. *Ormet Corp.*, 14 BNA OSHC 2134, 2135 (No. 85-531, 1991). The wording of a standard is interpreted in a reasonable manner, consistent with a common sense understanding. *Globe Industries*, 10 BNA OSHC 1596 (No. 77-4313, 1982). It is not necessary, however, to impose drafting requirements of mathematical precision or impossible specificity.

A standard is not impermissibly vague simply because it is broad in nature. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2205 (No. 87-2059, 1993). Instead “a broad regulation must be interpreted in the light of the conduct to which it is being applied and external objective criteria, including the knowledge and perceptions of a reasonable person, may be used to give meaning to such a regulation in a particular situation.” *Id.* at 2205-06. The flexibility in wording or even imprecise or in artful drafting does not necessarily mean that a standard is impermissibly vague. *Ormet Corp.*, *supra* (the word “near” is imprecise but not unreasonably vague). A standard is not vague simply because its application requires the exercise of judgment.

Under these guidelines, the term “presence” is not vague and ambiguous. The common meaning of “presence” is a “fact or condition of being present” which is “now existing or in progress.” Webster’s Seventh New Collegiate Dictionary. The nature and scope of a building owner’s notification, as well as when the notification was made, must be analyzed depending on the facts of each case and noncompliance judged based on the purpose and objective of the standard. SNOC has not shown that the Secretary’s interpretation or application was inconsistent or has changed. SNOC’s motion is denied.

### Other Preliminary Issues

SNOC also seeks to dismiss the citation on the basis of an alleged unreasonable inspection and the Secretary's noncompliance with Alabama State Bar ethics rules. Both arguments are rejected.

SNOC argues that the inspection was unreasonable because of IH Jackson's motive to issue high penalties. SNOC states that an IH's performance evaluation is based in part on the amount of penalties she proposes (SNOC Brief, p. 43). SNOC, however, mischaracterizes the testimony of the area director. The area director testified that there is no element in an inspector's evaluation involving the amount of the penalties. An element in the evaluation does involve enforcement, which evaluates the inspector's ability to recognize hazards, issue citations, properly classify hazards, and comply with office policy. This enforcement element evaluates the inspector's method of calculating the penalties. SNOC does not argue that IH Jackson failed to comply with OSHA's method of calculating penalties. Regardless, it is noted that penalties are assessed *de novo* by the Review Commission in contested cases.

Also, SNOC asserts that the Solicitor's contact with current employees of SNOC during this case violated Alabama State Bar ethics rules (SNOC Brief, p. 44). As stated during the hearing, this is a matter for the Alabama State Bar in interpreting its rules. There is no violation of Commission procedure and it was not shown that SNOC was prejudiced. The acceptance of written interview statements is permitted under Federal Rules of Evidence, Rule 801(d)(2)(D). A copy was provided to SNOC, who could have called the employee if necessary. The acceptance into evidence does not indicate what, if any, weight is given to the written statement.

### Alleged Violations

The Secretary has the burden of proving a violation.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

*Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Requirements of § 1926.1101(k)(2)(i) (item 1), and  
§ 1926.1101(k)(2)(ii) (item 2a), or in the Alternative §1926.1101(k)(5)(i)

Citation item 1 alleges that before work began in the Main Steam Valve Room, Auxiliary Building, and Turbine Building, SNOG did not determine the presence, location and quantity of all ACM and PACM, including all Flamemastic, Marinite, Furmanite, A-cloth, packing material and gaskets, in violation of § 1926.1101(k)(2)(i). Section 1926.1101(k)(2)(i) provides that:

Before work subject to this standard is begun, building and facility owners shall determine the presence, location, and quantity of ACM and /or PACM at the work site pursuant to paragraph (k)(1) of this section.

Section 1926.1101(k)(1) requires the building owner to identify all thermal system insulation (TSI) and sprayed or troweled on surfacing materials in buildings as asbestos-containing unless determined not to be asbestos-containing. Also, the building owner must identify other materials as asbestos-containing if the owner has actual knowledge, or should have known through the exercise of reasonable diligence, that other materials contain asbestos. When communicating the information to employees, the building owner is to identify presumed asbestos containing material (PACM) as asbestos containing material (ACM) so that the appropriate asbestos handling and removal procedures are initiated.

Citation item 2a alleges that SNOG failed to notify its employees and all employers of employees who worked in the Auxiliary Building, Turbine Building and Main Steam Valve Room of the presence, location and quantity of all ACM and PACM, in violation of § 1926.1101(k)(2)(ii). Section 1926.1101(k)(2)(ii) provides that:

Building and/or facility owners shall notify the following persons of the presence, location and quantity of ACM or PACM at the work sites in their buildings and facilities. Notification either shall be in writing or shall consist of a personal communication between the owner and the person to whom notification must be given or their authorized representative.

The persons required to be notified by the building owner include the owner's employees, tenants, and prospective employers working at the facility whose employees will work within or adjacent to areas containing ACM or PACM.

In lieu of giving notification, item 2a also alleges that SNOC did not make a determination that PACM did not contain asbestos before work began, as required by § 1926.1101(k)(5)(i). Section 1926.1101(k)(5)(i) provides:

An employer or owner may demonstrate that PACM does not contain more than 1% asbestos by the following:

The demonstration under § 1926.1101(k)(5)(i) is accomplished by having an inspection conducted which demonstrates that the material is not ACM or by performing tests of the material containing PACM which demonstrate no ACM is present.

SNOC stipulates that as a licensed operator, it is the owner of the Farley Nuclear Plant within the meaning of asbestos communication standards (Tr. 315). Section 1926.1101(b) defines "building/facility owner" as the "legal entity, including a lessee, which exercises control over management and record keeping functions relating to a building and/or facility in which activities covered by this standard take place." SNOC has been the licensed lessee operator of the plant since 1991.

Also, there is no dispute that the Farley Nuclear Plant, including the Auxiliary Building, Main Steam Valve Room and Turbine Building, was constructed prior to 1980 (Tr. 3319-3320). The asbestos communication standards at § 1926.1101(k) recognize that most asbestos-related construction activities involve previously installed building materials. The Secretary considers the building owner the best source of information about the presence of asbestos.

Section 1926.1101(b) defines ACM (asbestos containing material) as "any material containing more than one percent asbestos." PACM (presumed asbestos containing material) is defined as "thermal system insulation and surfacing material found in buildings constructed no later than 1980." "Thermal system insulation (TSI)" means "ACM applied to pipes, fittings, boilers, breeching, tanks, ducts or other structural components to prevent heat loss or gain." "Surfacing material" is defined as material that is sprayed, troweled-on or otherwise applied to surfaces (such as acoustical plaster on ceilings and fireproofing materials on structural members or other materials on surfaces for acoustical, fireproofing, or other purposes).

The Secretary contends that SNOC failed to make determinations and notify its employees and the employees of Williams Power Company (WPC) as to the presence, location and quantities of asbestos containing materials in the work area to which they may be exposed

(Secretary's Brief, p. 108). The Secretary argues that it is not sufficient to state that asbestos materials may be present somewhere in the workplace.

Section 1926.1101(k)(2)(ii) states that notification must include the presence and location of all ACM and PACM at the work sites in the building and facility. The owner is responsible for both determining and communicating the presence, location and quantity before work begins. A general statement that it may be present is not a determination. Also, stating that such materials are at the plant does not necessarily provide the location of the material. The building owner is required to affix labels or signs to locations identified as PACM or ACM, § 1926.1101(k)(8)(vii).

Item 2b - Alleged Violation of § 1926.1101(k)(3)(ii)

Citation item 2b alleges that SNOC violated § 1926.1101(k)(3)(ii) by not notifying its employees of the location and quantity of ACM and PACM present in the Auxiliary Building, Turbine Building and Main Steam Valve Room before employees performed work involving the removal or disturbance of ACM and PACM materials.

As alleged, § 1926.1101(k)(3)(ii) is duplicative of SNOC's responsibility under § 1926.1101(k)(2)(ii) (item 2a). Section 1926.1101(k)(3)(ii) provides that:

Before work under this standard is performed employers of employees who will perform such work shall inform the following person of the location and quantity of ACM and/or PACM present in the area and the precautions to be taken to insure that airborne asbestos is confined to the area.

Under this standard, the persons required to be notified by an employer include the owners of the building and employees who will perform the work and employers whose employees will be working in adjacent areas. The responsibility or obligation under § 1926.1101(k)(3)(ii) applies to an employer and requires the employer to notify a building owner such as SNOC of the location of asbestos-containing material. Employers such as Williams Power Company (WPC) working at the Farley Plant are required to notify SNOC. The citation alleges, however, SNOC violated the standard. The duty of a building owner to notify its employees and employees of a subcontractor such as WPC is under § 1926.1101(k)(2)(ii), which is already cited in Item 2a. To cite SNOC as an employer under § 1926.1101(k)(3)(ii) duplicates its responsibility as a building owner under § 1926.1101(k)(2)(ii). The Secretary has not

identified any additional obligation imposed on SNOC by § 1926.1101(k)(3)(ii) not imposed by § 1926.1101(k)(2)(ii). The alleged violation of § 1926.1101(k)(3)(ii) is vacated.

Items 1 and 2a - Alleged Violations of § 1926.1101(k)(2)(i) and § 1926.1101(k)(2)(ii), or in the Alternative § 1926.1101(k)(5)(i)

The Secretary alleges that SNOC failed to make a determination whether asbestos-containing material existed under § 1926.1101(k)(2)(i) (item 1), and failed to notify its employees and WPC's employees, under § 1926.1101(k)(2)(ii) (item 2a), as to the existence of the materials before work began which involved handling or potentially disturbing the materials. The employee complaint against SNOC alleged the lack of notification as to Flamemastic 71A, Marinite, Furmanite, A-cloth, and gaskets<sup>3</sup> (Exh C-4).

By contracting WPC to in part perform potential asbestos handling and removal work at the Farley Plant, SNOC was aware that asbestos material was present (Exh. C-1). WPC was required to comply with OSHA asbestos control standards. Site engineer Steve Gates, in an undated memo, advised Ronnie Whitehead, SNOC safety specialist, of concerns with the handling of asbestos material, including Marinite board used for fire protection on cable trays, mastic used on fire protection Marinite board, and A-cloth used under mirror insulation (Exh. C-11, p. 2330). Also, in the outage book for Spring, 1997, SNOC acknowledges that “[a]t Plant Farley asbestos may be found primarily on gasket surfaces like valves, at heat exchanges, or in cooling tower cement, asbestos fill sheets, transite or splash boards (Exh. C-14).

To decide a violation of §§ 1926.1101(k)(2)(i) and 1926.1101(k)(2)(ii), a review of each material (Flamemastic, Marinite, Furmanite, A-cloth, Gaskets and Valve Packing) cited by the Secretary is made to determine if work on the material was performed after February 22, 1997, and that no determination or notification was made by SNOC prior to beginning the work.

**Flamemastic**

Flamemastic is a paste or gummy type substance which is sprayed on or troweled on to the surfaces as a fireproofing barrier (Exhs. C-16, R-9; Tr. 415-416, 856). It is applied around electrical penetrations and to connections around the ends of pipes and between seams of

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<sup>3</sup> The Secretary stipulated that the citation does not include work involving roofing materials (Tr. 887).

insulation (Tr. 910). As a troweled on material applied for fireproofing, Flamemastic is a surfacing material within §1926.1101(b).

There were different types of Flamemastic at the Farley Plant; some of which were asbestos containing (Flamemastic 71A) and some of which were not (Flamemastic 77). The asbestos containing Flamemastic could not be visually differentiated from the non-asbestos Flamemastic (Tr. 418-419, 905, 2550). SNOC concedes that Flamemastic at the Farley Plant is a PACM (SNOC Brief, p. 30).

The Secretary asserts that SNOC was not diligent in retaining documentation pertaining to the asbestos Flamemastic. The Secretary argues that SNOC failed to make the required determinations and notifications regarding the Flamemastic prior to May, 1997 (Secretary's Brief, p. 98).

It is not disputed that SNOC did not have a material safety data sheet (MSDS) for Flamemastic 71A showing that it was asbestos containing until November, 1996. On November 15, 1996, Southern Company Services<sup>4</sup> (SCS) discovered that the Flamemastic materials used at the Farley Plant might be asbestos containing. SCS notified SNOC by letter attaching the MSDS for Flamemastic 71A (Exh. C-16; Tr. 990-991). The letter advised SNOC that:

During the course of our ABN review it has come to our attention that the previously approved sealant material Flamemastic 71A contained asbestos. By this letter SCS is informing FNP [Farley Nuclear Plant] of this finding, in that this material may be present in existing plant installations, and that some removal is likely due to the pending re-work of Kaowool<sup>5</sup> installations in response to recent NRC [Nuclear Regulatory Commission] concerns. Please find attached an OSHA Material Safety Data Sheet for the Flamemastic 71A mastic material for your use (Exh. C-16).

SNOC agrees that the SCC letter was the first indication that any Flamemastic at the Farley Plant contained asbestos (SNOC Brief, p. 13). The only MSDS that SNOC had was for the non-asbestos containing Flamemastic 77 product (Exhs. R-9, R-10; Tr. 420, 1552). SNOC's records

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<sup>4</sup> SCS, also a subsidiary of The Southern Company, is a architectural/engineering firm providing design engineering and operating support to customers (Tr. 983).

<sup>5</sup> Kaowool is described as a non-asbestos insulating wrap (Tr. 364).

reveal that the last order for Flamemastic 71A was May, 1985 (Exh. R-11; Tr. 1564). Upon learning that there may be asbestos containing Flamemastic, SNOC claims that it immediately notified WPC, the asbestos contractor, before additional work began involving the disturbance of Flamemastic. SNOC contends that WPC disregarded its instruction.

SNOC's fire marshal Jerry Hayes provided WPC's insulator foreman Wayne Howell and WPC's competent person Don Allen a copy of the SCS's Flamemastic letter and the MSDS and told them to treat all Flamemastic as asbestos (Tr. 1195, 1200, 1508, 1558-1559). However, in a memo by Jerry Hayes, he confirms that he gave the SCS November 15, 1996, memo to Wayne Howell and Don Allen of WPC (Exh. C-32). He states that "[n]o other notifications were made by me at this time." Hayes notes that "[n]one of the above persons appeared to have a concern or any questions about the subject until April 4, 1997."

At an April 4, 1997, meeting, Hayes was informed by WPC that samples of Flamemastic 71A were found and analyzed as asbestos containing. Hayes concludes in his memo that "[t]o my knowledge all Kaowool work has stopped and there have been no decisions made on how the abatement of this Asbestos will be handled." (Exh. C-32).

Marvin Howell, a WPC insulator foreman, testified that Hayes had shown him the letter pertaining to Flamemastic 71A during the first week of December, 1996 (Tr. 899-900). Howell acknowledges that he read the SCS Flamemastic letter aloud to WPC's insulators (Tr. 2305-2306). He testified that he instructed the insulators to stop work if they were concerned about any material being Flamemastic 71A (Exh. R-5; Tr. 975). Howell denies that he was instructed by SNOC to treat all Flamemastic as asbestos containing. Howell testified that Hayes said "it was probably of not much concern, that this stuff -- this material had not been manufactured since 1973 and there was probably none in the plant" (Tr. 2299). Howell also testified that because Hayes' comments led him to believe that there was no concern of asbestos in any of the Flamemastic, WPC employees removed Flamemastic during the period from February 22 to April, 1997, without utilizing any asbestos precautions (Tr. 855, 905). Howell estimated that during October, 1996, and May 22, 1997, there were approximately 20 incidents of workers encountering Flamemastic which might have contained asbestos, but there were no warnings in the plant or on SNOC's work orders (Tr. 873-874, 903).

Donald Allen, WPC's competent person, testified that Hayes showed him another letter indicating that Flamemastic 71A contained 15% asbestos. The letter is not in evidence (Tr. 4461-4462). Allen testified that he did not know whether the Flamemastic contained asbestos because "they had redone stuff and all. I didn't have no idea where the asbestos was at out there in the plant" (Tr. 4469).

During March, 1997, WPC insulators brought a sample of Flamemastic to Wes Owen, another WPC competent person (Tr. 1314-1315). Prior to March, 1997, Owen also testified that no representative of SNOC had told him to treat the Flamemastic as asbestos containing (Tr. 1320). Ronnie Whitehead, SNOC's safety specialist, notes that WPC insulators were concerned on March 27, 1997, that "the Flamemastic they were tearing off might be Flamemastic 71A" (Exh. C-24). The work was stopped and ten samples were collected from the area containing similar Flamemastic material and forwarded to a laboratory for analysis on March 28, 1997. The sample results, dated April 2, 1997, showed 2 - 5% asbestos. Whitehead prepared a written sequence of events concerning the March incident (Exh. C-24). In his written sequence, Whitehead does not indicate at any time that SNOC instructed WPC to consider all Flamemastic as asbestos containing. In fact, he identifies the reason for employees working on asbestos containing Flamemastic, there was "[n]o formal process is in place to notify Farley Nuclear Plant when an engineering support group identifies a hazardous material that might result in a workplace exposure" (Exh. C-24). As contributing factors, Whitehead writes that SNOC procedures "are not referenced or used in the installation/repair of Kaowool" and that "[a]ssociated drawings which contain installation instructions for Kaowool/Mastic do not reference or mention Flamemastic 71A contains asbestos" (Exh. C-24). Whitehead recommends as corrective action that SNOC "[i]mplement a formal notification process to alert Farley Nuclear Plant management when a hazardous material is identified" (Exh. C-24).

The record establishes that SNOC was aware that asbestos containing Flamemastic was present at the Farley Plant in the Fall of 1996. SNOC agrees that some Flamemastic at the plant prior to May, 1997, did contain asbestos (Tr. 420-421). There is no showing that SNOC attempted to locate or identify the quantity. Also, the record shows that SNOC failed to notify WPC, the removal contractor, as to the location and quantity of Flamemastic. It may have provided WPC with the SCS letter which WPC read to its insulators. The letter alone, however, fails to identify the location and quantity of potential asbestos. The record indicates that SNOC

down played the potential exposure to asbestos-containing Flamemastic. SNOC's argument that it instructed WPC to treat all Flamemastic as asbestos containing is contradicted by WPC. Also, there is no showing that the instruction was in writing, apart from the SNOC work orders or was reinforced verbally by SNOC prior to WPC's work in March, 1997.

SNOC's argument that it complied with the exception at § 1926.1101(k)(5)<sup>6</sup> is not supported by the record. SNOC performed no bulk samples analysis on the Flamemastic prior to April, 1997. Even after it became known that WPC's employees were removing Flamemastic in March, 1997, neither Hayes nor Whitehead made a decision about the hazard or what to do (Exhs. C-24, C-32). It is the building owner's responsibility to make the determination and notify contractors such as WPC of the presence, quantity and location of the Flamemastic. SNOC failed to comply.

### Marinite

Marinite is a board-like substance which is used as a fire barrier to stop the spread of fire. It is not used as insulation (Tr. 929, 1592-1593, 1796, 1871-1872, 3393-3394, 3795-3796, 3940). Marinite is applied at electrical penetrations, cable trays, electrical conduit, and other electrical components (Tr. 929). SNOC's Final Shutdown Safety Analysis Review (FSAR), § 8B, specifies that "Marinite XL board" is used as a "barrier that is installed to inhibit the spread of fire along a vertical cable tray run." "[T]he intent is not to completely stop the fire for any specified time frame but only to limit its expansion" (Exh. C-36).

Ronnie Whitehead, SNOC's safety specialist, describes Marinite as a "wall board. It's like sheet rock" (Tr. 1592). He does not consider Marinite as thermal system insulation (TSI) because it is a fire barrier (Tr. 1592). Steven Sparks, SNOC certified hygienist, defined wallboard as "something that would be used for a wall" and Marinite "as a fire barrier on cable trays mainly for penetration" (Tr. 3844). He also did not consider Marinite as TSI (Tr. 235).

The Secretary argues that the Marinite is TSI because it is fireproof structural insulation (Secretary's Brief, p. 26-32). Del Harrison, WPC's site manager, states that Marinite is used to create "a thermal lag, trying to minimize the time it takes to heat up a cable to burn it up. It's a

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<sup>6</sup> To rebut the designation of installed material as PACM, § 1926.1101(k)(5) requires the owner to demonstrate that PACM does not contain more than 1% asbestos by (A) having a completed inspection conducted or (B) performing tests of the material which include analysis of bulk samples.

thermal lag is all it is” (Tr. 3287). The Secretary also claims that Marinite is not wallboard. It merely resembles wallboard or sheetrock (Exh. C-28; Tr. 1120).

OSHA’s interpretation bulletin dated February 7, 1997, excludes wallboard from PACM (Exh. R-62). The bulletin states that “[t]his section of the standard, which is the only section that requires bulk sampling, does not include wallboard systems. PACM materials, specifically TSI and sprayed on and troweled on surfacing materials are not typically multi-layered, unlike wallboard systems.” “The important point to note is that wallboard and wallboard systems are not covered by the presumptive rule” (Exh. R-62). The bulletin further provides:

[B]uilding owners do not have to identify asbestos-containing wallboard systems under the presumptive rule. Other building materials such as wallboard and wallboard systems may contain asbestos but unless an employer has specific knowledge or should have known through the exercise of due diligence that these materials contain asbestos, the standard does not compel the building owner to sample these materials.

Marinite is a multi-layered like wallboard. The Secretary argues that her interpretation bulletin does not apply because Marinite is not used as wallboard in making or covering walls (Secretary’s Brief, p. 27). It is used as a fire barrier. The bulletin, however, distinguishes wallboard from other materials because it is multi-layered and not based on use (Exh. R-72). Also, Marinite is not TSI because its purpose is not to prevent heat loss or gain. Marinite is used as a fire barrier. Therefore, unless SNOG has specific knowledge or should have known that the Marinite contained asbestos, SNOG is not in violation of §§ 1926.1101(k)(2)(i) or 1926.1101(k)(2)(ii).

The standard requires building owners to make determinations if the owner has “actual knowledge or should have known through due diligence” that the material contains asbestos. Section 1926.1101(k)(1). The Secretary defines “due diligence” as:

A reasonable employer, informed of this standard and other pertinent regulations must inquire into the possibility that a building material is asbestos-containing. The required extent of the inquiry may vary, depending on the prevalence of the ACM for that use in that location, previous surveys, inspections, and other knowledge sources, and the date the material was installed.

60 Fed Reg 33974, 33981 (June 29, 1995).

The preamble to the asbestos standards (59 Fed. Reg. 40964, 41015 (August 10, 1994)) states:

Of course, “due diligence” would also require employers to investigate whether other building material about which there was information suggesting asbestos content was in fact asbestos-containing.

By letter dated May 8, 1997, SCS advised SNOC that “[d]uring the course of SCS’s continued support of the Kaowool installation re-work, it has come to our attention that fireproof structural insulations Marinite #36 and Marinite XL contain asbestos which is a known carcinogen. The majority of Marinite board currently in place is the XL brand” (Exh. C-21). Marinite XL and Marinite 36 have an asbestos content of more than 1% (Tr. 410). SCS further advised that “[t]hese products were discontinued as of 12/31/85 and 12/31/80, respectively according to the Material Safety Data Sheets” (Exh. C-21). SCS notes that there are currently available Marinite I, M, and P, which contain crystalline silica. SCS attaches the MSDS and notes that Marinite XL and possibly some Marinite #36 materials “may be present in existing plant installations and that some removal is likely due to the ongoing re-work of Kaowool wrap cable tray installations in response to recent NRC concerns” (Exh. C-21).

SNOC argues that Marinite is not a PACM so its duty could not have arisen until May 8, 1997, when SCS’s audit generated the Marinite letter and revealed that there could be asbestos in Marinite at the Farley Plant. (SNOC Brief, p. 32; Exh. C-21; Tr. 410-411, 1024, 1595-1596). SNOC asserts that no asbestos-containing Marinite has ever been used at Farley (Exh. R-34; Tr. 366, 403-404, 406, 417, 690-691, 2122, 2130, 3937). SNOC’s bulk samples and warehouse records of the Marinite showed that there was no asbestos containing Marinite at the Farley Plant (Exhs. R-16, R-34; Tr. 215-216, 235-236, 1599-1600, 1603-1604, 1716, 2740). SNOC states that as soon as it received SCS’s Marinite letter, it immediately notified asbestos contractor WPC. Whitehead gave a copy to WPC after May 8, 1997. Also, SNOC bulk sampled the locations worked on by WPC (Tr. 225).

The Secretary argues that Whitehead admitted that prior to May, 1997, he never initiated any inquires as to whether any Marinite at the Farley Plant was asbestos-containing and that to his knowledge no one else did (Tr. 401-402). Also, the Secretary argues that an incident involving an electrical penetration put SNOC on notice that asbestos-containing Marinite was present in the plant prior to SCS’s Marinite letter of May 8, 1997.

The incident occurred on April 14, 1996, when R. L. (Bud) Kearsy, WPC insulation foreman, stopped work at the 100 foot elevation, Unit 1, stairwell, Number 1, Auxiliary Building. Kearsy observed that an “asbestos board” had been penetrated and debris from at least two different types of material was lying on the floor (Tr. 553-554, 1330). Kearsy described the scene as “a cover over an electrical penetration had been breached.” He noted that the suspicious looking material was gray and the “filler had a fibrous or cotton look of fibers” (Tr. 553). The unidentified material resembled black foam (Tr. 1330). The outer shell was a hard material, almost like a piece of slate. Kearsy observed that the material lying on the floor and the material over the penetration were of the same consistency and color (Tr. 553-555). The material “resembled Marinite” (Tr. 554). Upon observing the material, the work of the two SNOC electricians was stopped (Exh. C-18, p. 478). The electricians were not trained in asbestos removal (Tr. 3267). Instead of taking a sample of the material around the penetration, Kearsy took samples of the material from the floor to SNOC’s hazardous waste section (Tr. 552, 554-556). The samples were analyzed and found to contain approximately 40% amosite asbestos (Tr. 3052-3053). However, Kearsy concluded that the “asbestos board” was not Marinite (Tr. 3057).

By letter dated June 6, 1996, WPC Site Manager Del Harrison also notified SNOC of the April, 1996, incident (Exh. C-18). Harrison told SNOC that the “results (of personnel air monitoring under simulated conditions) indicated there were sufficient airborne fibers generated to pose a potential safety concern for the Electricians involved in initially breaching the penetration.” The sample results ranged from .013 to 10.721 asbestos exposure (Exh. C-18).

SNOC argues that the material found in the stairwell and later tested positive for asbestos was not Marinite. It involved a substance never seen before or since at the Farley Plant (SNOC Brief, p. 11-12; Tr. 710). SNOC argues that Kearsy was not present when the electricians were performing the penetration work and thus did not know the origin of the material on the floor (SNOC Brief, p. 33; Tr. 713). When he arrived at the penetration, there were at least two different types of material on the floor and the pieces varied in size from a grain of sand to a half dollar (T. 554, 1331). Some of the material from the floor resembled Marinite in that it was flat like board, but was a different color and texture from anything previously handled at the plant (Tr. 553-554, 1330). Harrison explained that penetrations such as at the stairwell contained rubberized foam (Tr. 3221-3222). He concluded that the material was an anomaly that has never been encountered again (Tr. 3256).

The Secretary claims that if SNOC had kept MSDS for Marinite XL and #36, Kearsy's conclusion would have been different. The Secretary asserts that although SNOC did some bulk samples of Marinite after April, 1997, and none of the samples showed asbestos, this does not refute the possibility that WPC workers were exposed to asbestos-containing Marinite. The Secretary refers to SNOC's recent asbestos handling procedures drafted after the OSHA inspection which warns SNOC employees that "asbestos containing Marinite board may be found on cable tray runs and electrical penetrations in the Turbine Building, Diesel Building, Service Water Building and Auxiliary Building" (Exh. C-8, p. 300, issued June 13, 1997). Also, the Plant Modification Procedures for Kaowool Installation, dated May 28, 1997, warns that asbestos-containing Marinite XL and #36 may be present at Farley and "have been determined to contain asbestos" (Exh. C-11, p. 2382).

It is undisputed that no communications were made by SNOC about Marinite-containing asbestos at the Farley Plant prior to May, 1997 (Tr. 412). No asbestos-containing Marinite was shown to even have been used at the Farley Plant (Tr. 366, 403-404, 411, 417, 690-691, 2045-2046, 2051, 2119, 2122, 2130, 2141-2042, 2150-2151, 3937). SNOC's bulk samples failed to show the presence of asbestos-containing Marinite (Exh. R-16). Also, the Secretary fails to establish that employees worked on possible asbestos-containing Marinite during the period of February 22 to August 22, 1997. Even if the material disturbed in April, 1996, by WPC was Marinite, the exposure is barred by the six-month statute of limitations. There is no showing that employees disturbed asbestos-containing Marinite during the six-month statute covered by the citation. Even if the material disturbed in April, 1996, by WPC was Marinite, the exposure is barred by the six-month statute of limitations. There is no showing that employees disturbed asbestos-containing Marinite during the six-month statute covered by the citation. The Secretary's argument of possible exposure is speculative. Even if the material disturbed in April, 1996, by WPC was Marinite, the exposure is barred by the six-month statute of limitations. Kearsy concedes that the Marinite at the Farley Plant does not contain asbestos (Tr. 690). After May, 1997, it did notify employees and contractors of the potential. The Secretary failed to meet her burden of proof and the violations are vacated as to Marinite.

### **Furmanite**

Furmanite is used to temporarily patch steam leaks in valves until it can permanently be repaired. The Furmanite is injected into the piping system or valve and forms a seal or insulator to prevent leakage. According to SNOC's chemical product list, Furmanite is used as a "sealant on the LP turbine outer gland vertical to stop air leakage" (Exh. R-12). SNOC refers to Furmanite as a "quick fix."

SNOC asserts that Furmanite can last no longer than approximately 18 months (Tr. 1575, 1883-1884, 3944). The recommended shelf life for Furmanite is one to three years (Exh. R-69; Tr. 1576, 3814, 3818). Asbestos-containing Furmanite was discontinued in May, 1986 (Exh. R-14; Tr. 1591, 1882, 3813). By letter dated June 9, 1997, SNOC was advised that the two asbestos-containing Furmanite compounds (FSC-N-6A and FSC-N-7A) were replaced by two other products containing carbon fiber in August, 1984, and October, 1987, respectively (Exh. R-14). SNOC argues that the last time any asbestos-containing Furmanite could have been in a pipe if taken off the refrigerated shelf was November, 1990. Based on its usage and shelf life of one to three years, SNOC asserts that Furmanite cannot be considered PACM.

However, since Furmanite is a material which is "sprayed, troweled-on or otherwise applied to surfaces" inside the piping system and components "for acoustical, fireproofing and other purposes," namely, to seal or insulate, Furmanite is a surfacing material as defined at § 1926.1101(b). As surfacing material, Furmanite meets the definition of PACM.

SNOC argues that no asbestos-containing Furmanite has ever been approved for use in the Farley Plant since 1987 (SNOC Brief, p. 10; Tr. 2052-2053). An internal SNOC memo dated November 13, 1986, indicates that the Furmanite 7A and 6A showed asbestos concentrations of 50 - 80%, while Furmanite 7B and 9A had zero concentrations of asbestos (chrysotile) (Exh. C-27). SNOC argues that memo of dubious origin. The memo further states:

[B]ecause there is little chance that the location of the asbestos-containing furmanite products is known, it is recommended that all repair material used for sealing steam leaks, such as the Furmanite material should be treated as if they all contain asbestos. Due to the content of some of the Furmanite products, it is recommended that a substitute material be found and that all Furmanite product numbers be verified for the presence of asbestos and any found to contain asbestos should be discontinued from use.

The records indicate that there was no asbestos-containing Furmanite at the Farley Plant. None was approved for use (Exhs. C-26, R-65, R-68) or present in the warehouse (Exhs. R-69,

R-70). SNOC's chemical product list shows the use of Furmanite FSC - 50D, 3B, 6B, 7B and 9A approved for critical system use at Farley (Exh. C-26, p. 6). These products were approved for use in October, 1997 (Exh. R-65, p.6). The products did not contain asbestos.

The record fails to show that any SNOC employees or WPC employees worked on or adjacent to piping systems containing Furmanite during the period of February 22 to August 22, 1997. IH Jackson concedes that she had no evidence of asbestos containing Furmanite at the plant during the period of January, 1996, to May, 1997 (Tr. 2673). Also, there is no showing that SNOC should have treated the Furmanite as asbestos containing.

### **A-Cloth**

Cloth and wrap insulation is applied on piping systems and components. The cloth is covered by metal flashing. The cloth is used to "fabricate removable thermal insulator pads to go on certain portions of the piping, those portions where insulation would have to be removed in order to do what we would call an in-service inspection" (Tr. 3438). The insulation wrap or cloth is applied to prevent heat loss or gain to the piping systems. Some of the cloth or wrap is asbestos- containing A-cloth (Exhs. C-17, R-51; Tr. 3435, 3438). SCS's "Equipment and Piping Thermal Insulation" inquiry for SNOC states that the "[r]emovable insulation shall be Owens-Corning 'Temp-Mat' wrapped with a protective covering of Style 3270-AA asbestos cloth with cleanguard" (Exh. C-11, p. 2302).

There is no dispute that A-cloth contains asbestos (Tr. 1692, 3435). However, SNOC argues that A-cloth has not been installed at the plant since the 1970's. Lawrence Stinson, SNOC assistant general manager for plant operations, testified that A-cloth is no longer used at Farley and that A-cloth has been replaced with a non-asbestos wrap known as Zetex or Kaylo (Exh. R-29, C-31; Tr. 1696, 1710, 3439).

The Secretary's concern is the asbestos cloth still in place at the plant. In 1980, Ronnie Whitehead, SNOC's safety specialist, told R. L. Kearsey, WPC's insulator foreman, where the A-cloth was located at the plant. Kearsey acknowledges that SNOC told him to treat A-cloth as asbestos in 1980 and that he told WPC employees not to disturb it without checking with him (Tr. 581, 692-693). In his written statement, Kearsey, WPC foreman and competent person, stated that "it was my job to inform Williams' employees of areas where I knew there was asbestos. These areas were the A-cloth, the roofing, the gaskets and the transite panels. I

instructed the employees that they were not to disturb this material without first checking with me” (Exh. R-3). However, Kearsley testified that he did not trust SNOC to identify the location of ACM or PACM “because they didn’t know” (Tr. 726). Kearsley claims that he can visually differentiate between A-cloth and other insulation cloth (Tr. 737). However, since it is covered with metal flashing, A-cloth is not visible until the flashing is removed (Exh. C-11). Only WPC employees worked on A-cloth (Tr. 479).

By memo in 1986, SNOC advised that:

The second area of concern is the removal of the A-cloth and the installation of the Z-cloth. Samples of both were taken and sent to a laboratory for analysis. The A-cloth was analyzed to contain approximately 65% chrysotile asbestos and the Z-cloth was analyzed to be composed of 100% fibrous glass. As it was desimentated [sic] to us, there is a small amount of the A-cloth left in the plant and it is planned to be replaced with the Z-cloth” (Exh. C-25).

By memo dated November 17, 1990, SNOC noted:

Bulk asbestos insulation has been removed from the site. However, we still have several places in the plant(s) where A-cloth may presently be installed. The most probable areas are the turbine buildings and MSVRs. Also Auxiliary Bldg where pads are utilized around valves welds and ISI points. It is our intention and policy to remove A-cloth whenever discovered and replace it with the non-toxic Z-cloth” (Exh C-25).

The Secretary concedes that SNOC has made efforts to remove the A-cloth with non-asbestos wrap (Exh. C-25). The Secretary argues, however, that SNOC did not recognize or determine whether any asbestos insulation, A-cloth, remained prior to the Spring, 1997, outage (Secretary’s Brief, p. 90). According to the Secretary, no determinations were conducted to ascertain if it remained prior to May, 1997, and if so, where it was located and the quantities. Whitehead admits that during January 1, 1996, to May 22, 1997, there was an area in the Main Steam Valve Room where piping was covered with thermal insulation which contained asbestos (Tr. 384-385).

SNOC has known since the construction of the plant that A-cloth contained asbestos (Tr. 690). There is no dispute that A-cloth is TSI and should be considered PACM (Tr. 3797). Prior to the work in October, 1996, SNOC provided WPC with a bulk sample from the main steam and valve area verifying the presence of asbestos cloth (Tr. 1321-1322, 1364, 1715-1716,

2727, 2742). The bulk sample showed 94% chrysotile asbestos (Exh. R-18). Henry Owens, WPC's safety supervisor, testified that he received the results of the bulk sample before the Fall, 1996, work (Tr. 1364, 1607-1608, 1715-1716, 2727, 2784, 3827).

Marvin Howell, WPC's insulator foreman, testified that workers in October, 1996, removed the sheet metal from a piping system in the Main Steam Valve room and there was asbestos pads, A-cloth. The work immediately stopped (Tr. 847-848).

In March, 1997, in the pipe penetration room of the Auxiliary Building, Howell was informed by sheetmetal workers removing the sheet metal on a pipe that they discovered A-cloth. The work was stopped. Howell identified the cloth underneath as A-cloth (Tr. 861-862). There was no signs warning of asbestos and the work order did not tell the workers. Howell indicated that there were other incidents from March 1 to May 22, 1997, where they found A-cloth (Tr. 926-927).

SNOC failed to make the determination and notify WPC of the A-cloth. The violations are affirmed.

### **Gaskets and Valve Packing**

Gaskets and packing are inside a valve (Tr. 1632, 1779). Only SNOC employees do valve work (Tr. 1368-1369, 1636). A gasket is pressure-retaining material which seals, insulates or covers the gap between two mating surfaces (Tr. 3998, 4482). Gaskets are round with a hole in the middle (Tr. 4132). Gasket material is grayish in color and comes in sheets of various sizes and types (Tr. 1385, 1926-1927, 3998). Gaskets are located with various components, including valves, manways, equipment appurtenant to piping systems and seals for oil pumps (Tr. 4017-4018, 4047-4048). Prior to May, 1997, SNOC's MSDS showed that some gasket material contained asbestos (Exh. C-29; Tr. 1385). The MSDS advised that "[w]hen removing used gaskets, avoid excessive mechanical actions and place the asbestos containing residues in a plastic bag for disposal" (Exh. C-29). Bulk samples of gasket material contain in excess of 60% asbestos (Exh. C-25, p. 1376). The Plant record further states:

Even though the asbestos content is high, the potential for exposure during installation is minimal, because the integrity of the material is in good shape; and not in a deteriorated condition. The problem with the gaskets increases during removal from valves or other pieces of equipment. The material has become deteriorated which increases the potential for asbestos exposure due to the inability of

the binding material to encase the asbestos fibers. Due to the content of some of the flexitallic gaskets, as presented above, and the possible release of fibers from the binder material in a deteriorated condition, it is recommended that the user department find a substitute gasket material. Until a suitable substitute is found, the recommendations for work practices involving the furmanite materials are applicable for removing the flexitallic gaskets (Exh. C-25).

Packing material is installed in valves to allow the valve to open and close “and yet stay sealed from the atmosphere” (Tr. 4059). The removal and replacement of valve packing material is “very common work” at the Farley Plant (Tr. 4059). The various types of valve packing include Sepco and John Crane (Tr. 4061, 4381). According to an Alabama Power Company memo to file dated December 18, 1984, valve packing at the Farley Plant “is known to have asbestos as a fixed ingredient “ (Exh. C-11, p. 2296).

It is undisputed that gaskets and valve packing materials are PACM because the materials are TSI (Secretary’s Brief, pp. 72, 85; SNOC Brief, p. 37). Since gaskets and valve packing materials are TSI and located in buildings constructed prior to 1980, the gaskets and valve packing materials, regardless of the asbestos content, were by definition PACM. SNOC identified gaskets and valve packing material as TSI in its asbestos awareness training outline (Exh. C-8, p. 304).

It is impossible to identify the gasket or valve packing until after the valve is removed (SNOC Brief, p. 37; Tr. 479-480, 1384-1385, 1632, 1716, 2779). SNOC argues, therefore, that it instructed its employees to treat all gaskets and packing as ACM (Tr. 1548, 1635, 1719-1720, 2926, 3740-3741, 3576). Special procedures were developed for handling gaskets and packing that contain asbestos (Exh. R-8). Employees received the instruction through SNOC’s (1) Safety and Health Manual, (2) the Outage Book, (3) drawings, and (4) asbestos awareness training (Tr. 1516-1517, 1635, 1715, 3740). Steve Hornsby, maintenance mechanic, stated in an interview that he “use[d] drawings to ID the asbestos gasket or packing material” (Exh. C-33). See example of drawings (Exh. C-11, pp. 2347-2348). Also, SNOC offered “8-Hour Class II Asbestos Training Manual for Removal/Replacement of Gaskets and Valve Packings” (Exh. R-60). SNOC provided asbestos training and asbestos worker retraining in 1995 and 1996 (Exh. R-61). Air monitoring results show no employee exposed to levels of asbestos above the PEL or

excursion limit during gasket removal and cleanup of metal surfaces behind the gaskets in 1989, 1995 and 1997 (Exh. R-21; Tr. 1634, 2622).

OSHA did not see a gasket or packing material disturbed (Tr. 2698). The standard does not prohibit a general instruction to treat all gaskets and packing material as ACM. The locations of the asbestos-containing valves were unknown by SNOC (Tr. 1385). Joseph Robbins, SNOC warehouse supervisor, testified that SNOC's management has made an ongoing effort to locate the gaskets, but not until after the OSHA inspection was there "aggressive efforts" (Tr. 1908, 1988). The Secretary's preamble to the asbestos communication standard at 59 FR 40964, 41015 (Aug 10, 1994), provides:

OSHA believes that this presumptive approach allows building/facility owners whose building/facilities contain PACM and other employers of employees potentially exposed to PACM flexibility to choose the most cost-effective way to protect employees. They may treat the material as if it contains asbestos and provide appropriate required training to the custodial staff; test the material and rebut the presumptions; or combine strategies.

However, the record fails to show that during the Spring, 1997, outage, SNOC had a policy to treat all gaskets and packing material as asbestos containing. SNOC knew that Farley had asbestos-containing gaskets and packing material (Exh. C-25; Tr 1376; 1984-1985, 1986, 1988). In the Spring, 1997, outage books given to employees, SNOC identified that "asbestos may be found in various locations at Farley Plant," including gasket surfaces and valves (Exh. C-14, p. 20).

SNOC workers performed such work on several valves, and there was no warning to workers of the hazard on work orders (Tr. 475, 461, 4132, 4146, 4352, 4483-4485). SNOC's "General Maintenance Procedure" involving special handling of packing of gaskets that contain asbestos, revised June 17, 1996, warns "Exercise care when removing packing on gaskets which contain asbestos. Potential for asbestos exposure increases as binding material deteriorates from use and its environment" (Exh. R-8). This general advice does not instruct employees to treat all gaskets and packing as asbestos containing. Ronnie Whitehead, SNOC safety specialist, testified that other than during an asbestos awareness training program prior to 1996, he was not aware of any other time when SNOC's employees were told to treat all gaskets as asbestos containing (Tr.1721). Employees testified that the training did not address asbestos precautionary measures and permitted them to use dry asbestos removal procedures, including using a wire abrasive

wheel, a scraper, screw driver, and sandpaper (Tr. 4020-4021). Also, employees testified that supervisors typically go and check the gasket removal work (Tr. 4021-4022).

SNOC's senior engineer Steve Gates in an undated memo advised Whitehead that "if you can prove that the gasket/packing is non-asbestos via a drawing on previous history search, the requirements of the procedure do not apply. However, we obviously should lean to the conservative and apply this procedure [FNP-O-GMP-82.0] if there are any questions or doubts" (Exh. C-11, p. 2330). This memo does not show that an instruction was given.

Employees Benny Butler and Roger Norris testified that they removed valves and replaced John Crane packing material in numerous locations (Tr. 4382-4383, 4477-4482). However, Norris testified that it has not been for over two years (Tr. 4477). Butler testified that he was instructed and not told why John Crane was being replaced or that it contained asbestos (Tr. 4382). Although he had not run into it since 1996, he does not know whether all John Crane 187-I packing had been removed from all valves prior to January, 1997 (Tr. 4393-4394). Butler and Norris received no instruction as to how to treat the valve packing. He did not observe it being treated as asbestos (Tr. 4381-4383, 4389-4393). Norris' only instruction was "just take it out and throw it in the garbage" (Tr. 4481).

The record fails to show that SNOC made a timely determination and notification of asbestos containing gaskets and packing materials prior to May, 1997 (Tr. 373). Employees were exposed to potential asbestos containing materials during the removal. SNOC employees testified that they worked newer work orders for valves in the Turbine building during the Spring, 1997, outage (Tr. 3989, 4483-4485). The method of removing, as described, shows that precautions were not taken (Tr. 4064-4068, 4472-4482). The Spring, 1997, outage book directs that valves primarily in the piping penetration room need to be replaced (Exh. C-14, p. 10). The outage book does not advise that all valves should be treated as containing asbestos or to take asbestos precautions. The violations are affirmed.

#### Willful Classification

The failure to determine and notify employees of the presence, location and quantity of Flamemastic, A-cloth, gasket and packing material, as required by 1926.1101(k)(2)(i) and 1926.1101(k)(2)(ii), are alleged as willful. A willful violation is "one committed with intentional knowing or voluntary disregard for the requirements of the Act, or with plain indifference to

employee safety.” *Conie Construction, Inc.*, 16 BNA OSHC 1870, 1872 (No. 92-264, 1994). A willful violation differs from other classifications of violations by a heightened awareness of the illegality of the conduct or conditions and by a state of mind showing conscious disregard or plain indifference.

The Secretary argues that SNOC, as building owner, not only was the best source of information concerning the material, it also exercised control over the construction work done at the Farley Plant (Secretary’s Brief, p. 59). SNOC was in a position to have superior knowledge. It had available MSDS, plant diagrams, blue prints, and records of previous materials utilized. SNOC knew that the Flamemastic, A-cloth, gaskets, and valve packing materials were asbestos containing and might be present at the Farley Plant (Secretary’s Brief, p. 60). The record shows the materials were PACM. However, according to the Secretary, SNOC failed to determine the locations and quantity and notify its employees and WPC’s employees of the potential asbestos exposure before work began. The Secretary argues that SNOC knew that it was required to make determinations and it had not done so. R. L. Kearsey, WPC’s insulator foreman, testified that he did not trust SNOC to identify the location of ACM and PACM “because they didn’t know” (Tr. 726).

The record, however, fails to establish that SNOC was in willful violation. This was SNOC’s first OSHA inspection and there is no history of past violations. During the 1997 inspection, OSHA found no violations of SNOC’s asbestos training, personal protective equipment, or its asbestos removal and handling procedures (Tr. 2625-2626, 2673-2674, 2803, 3155). Although the Farley Plant was constructed prior to 1980, SNOC did not become the leasee operator until 1990. It is not shown that SNOC had greater knowledge of the content of the materials used prior to its operation of the plant. Further mitigating a finding of willfulness is the size of the plant facilities, with miles of piping and thousands of valves.

It is noted that the building owner’s communication of hazards responsibilities under the asbestos standards at § 1926.1101(k) did not become an obligation until October 1, 1995. *See* § 1926.1101(q). SNOC showed that as non-asbestos materials came on the market, it replaced the asbestos material. WPC was an asbestos removal contractor.

Also, the NRC is present on site at all times and conducts periodic safety audits of the plant. There are three full-time NRC resident inspectors at the Farley Plant (Tr. 3387). SNOC must maintain an NRC operator’s license (Tr. 3386-3387). The NRC inspectors conduct safety

inspections and if the safety violation compromises radioactive security, the NRC has the authority to revoke SNOC's license or shut down operations (Tr. 3389).

SNOC's workers are represented by the International Brotherhood of Electrical Workers (IBEW), which promotes safety through various programs (Tr. 4182-4183). Neither SNOC nor any contractor on site had ever been cited previously by OSHA and there has never been a single formal employee complaint or contractor (Tr. 3458). SCS's audits identified the possibility of asbestos-containing materials. There is no dispute that SNOC provided WPC with a copy of the SCS report and WPC at least read the report to its insulators. WPC was specifically hired to perform asbestos removal and handling work (Exh. C-1).

The air sampling shows all exposures below the PEL and excursion limit (Tr. 1611, 1717, 3834). Air monitoring was performed in 1988 and 1989 during the removal of A-cloth (Exh. R-19). Also, air monitoring was performed in 1989, 1995 and 1997 during the removal of gaskets and cleanup (Exh. R-21). Further, SNOC performed several bulk sample analyses prior to the OSHA inspection. Although the bulk samples showed the presence of asbestos, the record does not establish that SNOC acted willfully by disregarding the results. The results were furnished to WPC.

SNOC has a safety program, stops outages when it discovers unsafe practices, has weekly employee safety meetings, undergoes outside safety audits, provides employee training programs including an asbestos awareness program, gives employees copies of the Outage book and Safety Manual, and maintains a safety and health department at the plant (Exhs. C-5, Attachment B, C-14, R-61; Tr. 3382-3383, 3386-3387, 3389-3391, 3414-3415, 3420-3421, 3422-3423, 3618-3621, 3532-3533, 4183, 4255, 4547). SNOC has received safety awards for no lost work day injuries (Exhs. R-55, R-56, R-57; Tr. 3446-3448, 3456, 3457).

Sparks, SNOC's certified industrial hygienist, testified that prior to January, 1996, he had read the asbestos provisions and had reference books addressing asbestos (Tr. 80, 83, 84, 88). SNOC concluded that the asbestos standards applied to Farley (Tr. 110, 112). Sparks also sought information from the OSHA office (Tr. 104). Sparks understood prior to January, 1996, that SNOC was responsible for communicating the presence, location and quantity of asbestos (Tr. 124-125). Also, it is noted that IH Jackson initially recommended the violations as serious (Exh. R-36; Tr. 217, 3459).

The violations of § 1926.1101(k)(2)(i) and § 1926.1101(k)(2)(ii) are reclassified as serious. SNOC was aware of the presence of asbestos materials, including Flamemastic, A-cloth, gaskets and packing material, in the plant which were worked on during the Spring, 1997, outage by its employees or employees of WPC. Asbestos is a known health hazard and exposure can cause serious health problems, including death.

#### Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

SNOC is a large company with in excess of 800 employees. There is no history of prior OSHA violations. Credit is considered for good faith based on SNOC's safety record and its overall safety program.

The gravity for violations of §§ 1926.1101(k)(2)(i) and 1926.1101(k)(2)(ii) is considered moderate. It is recognized that asbestos exposure poses serious health risks. However, the air monitoring showed that employees were not shown to be exposed to asbestos above the PEL or excursion level. In fact, the air monitoring failed to indicate asbestos exposure to any level of airborne asbestos. A building owner such as SNOC is required to make determinations and notification to employees and contractors of PACM unless a negative assessment was done. The record establishes that appropriate determinations and notifications were not done with respect to Flamemastic, A-cloth, gaskets, and valve packing materials. A \$3,000 penalty is assessed for each violation. SNOC has posted signs identifying areas of asbestos (Exh. C-8, Attachment III). SNOC also has work protection procedures for "Asbestos Coating Gaskets", "Asbestos Coating Valve Packing", "Penetrating Asbestos Coating Material Marinite Based, Flamemastic, A-cloth" (Exh. C-8, Attachment 5).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

**ORDER**

Based upon the foregoing decision, it is ORDERED that the Citation:

1. Item 1, violation of § 1926.1101(k)(2)(i), is affirmed as serious and a penalty in the amount of \$3,000 is assessed.
2. Item 2a, violation of § 1926.1101(k)(2)(ii), is affirmed as serious and a penalty in the amount of \$3,000 is assessed. The alternative violation of § 1926.1101(k)(5)(i) is vacated.
3. Item 2b, violation of § 1926.1101(k)(3)(ii), is vacated.

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KEN S. WELSCH  
Judge

Date: June 2, 1999