

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

U.S. POSTAL SERVICE, dba EAST
PORTLAND STATION,

Respondent.

OSHRC Docket No. 23-1008

Appearances:

Afroz Baig, Esq. & David H. Clark, Esq., Department of Labor, Office of Solicitor, San
Francisco, California & Seattle, Washington
For Complainant

Nadalynn Hamilton, Esq., USPS National OSHA Unit, Plano, Texas
For Respondent

Before: Judge Christopher D. Helms – U.S. Administrative Law Judge

DECISION AND ORDER

I. INTRODUCTION

Like many of its older-built facilities, the United States Postal Service’s (“USPS” or “Respondent”) East Portland Station, located at 1020 SE 7th Avenue, Portland, OR (“EP Station” or “Station”), was constructed using asbestos-containing materials (“ACMs”). (Tr. 96, 570, 614, 785; Exs. C-34, at 11, 20, 24-28; R-24, at 5). Particularly, the original floor planks installed throughout much of the ground floor were confirmed to contain asbestos. (Tr. 349, 538-40, 570, 785, 798; Exs. C-7, at 2; C-34, at 24-26; R-24, at 5). Additionally, some fire and vault doors

throughout the Station were made of presumed asbestos-containing materials (“PACMs”). (Tr. 98, 785-86; Ex. C-34, at 5 & 6).

In December of 2022, the United States Occupational Safety Health Administration (“OSHA”) received several asbestos-related complaints for USPS-owned or operated facilities in the Portland, Oregon area, including the EP Station. (Tr. 42-43, 93-94, 179-80; Exs. C-1, C-10, C-12, at 1). As to the EP Station, OSHA received a complaint that the flooring in the facility was not being properly maintained and further that the Station’s employees were not being properly trained on the presence of asbestos or how to mitigate exposure to it. (Tr. 42-43; Exs. C-1, C-12, at 2).

OSHA Compliance Safety and Health Officer (“CSHO”) Brian Peters investigated the complaint regarding the EP Station, along with several other USPS facilities in the Portland area. (Tr. 43-44; Exs. C-10, C-12, at 2). Over the course of four visits to the EP Station, CSHO Peters conducted walkthrough inspections, interviewed employees, requested and reviewed documents, and took samples of materials throughout the station to test for the presence of asbestos. (Tr. 41-44, 50-52, 57-58, 61-67, 72-77, 79-81, 164-65, 364-65, 407, 413-17, 581-83, 621-24, 671; Exs. C-2, C-3, C-12, at 1-4). These samples, fourteen in total tested, included a dust sample from the filter of a high-efficiency particulate air (“HEPA”) vacuum used to vacuum the Station’s floors, several samples of dust and debris from the Station’s ground and basement floors, and samples of insulation from a pipe in the Station’s basement. (Tr. 65, 79-84, 165, 170-71, 402-06, 417-19, 429-30, 461-62, 466-70, 478-81, 494, 622-26, 656, 699-701, 786-88, 802-03, 946-48; Exs. C-5, C-6, C-12, at 3; C-47, C-51, at 9-11; R-24, at 8-10).

The samples were sent to OSHA’s Salt Lake Technical Center to be tested and analyzed for the presence of asbestos. (Tr. 81, 87-88, 244, 263, 273-78, 282; Exs. C-47, at 2, 4, 6, 8, 10, 11,

13, 15, 18, 21, 24, 27, 30, 33, 36 & 39; C-48; R-24, at 9). All fourteen of the samples tested negative for the presence of asbestos except one, a piece of material taken from a quarter-sized hole in the floor of the Station's "vestibule" area. (Tr. 90-91, 258, 283-97, 302-03, 314-16, 786-88, 798; Exs. C-5, at 1; C-47, C-48, C-51, at 9-11, R-24, at 9).

Following the CSHO's inspections, and after a review of documentation submitted by the USPS in connection with OSHA's investigation, OSHA issued three Citations and Notifications of Penalty ("Citations") to Respondent alleging various asbestos-related and hazard communication ("HazCom") violations in connection with the EP Station as follows:

Citation 1, Item 1 alleged a serious violation of 29 C.F.R. § 1910.1001(k)(4) for failing to empty the HEPA vacuum in a manner which prevented reentry of asbestos dust into the workplace.

Citation 2, Item 1 alleged a repeat-serious violation of 29 C.F.R. § 1910.1001(k)(1) for failing to keep the floors near the vestibule area of the Station as free as practicable of ACM waste, debris, and accompanying dust.

Citation 2, Item 2 alleged a repeat-serious violation of 29 C.F.R. § 1910.1001(j)(3)(i) for failing to inform employees of the presence and location of ACMs in the Station.

Citation 2, Item 3 alleged a repeat-serious violation of 29 C.F.R. § 1910.1001(j)(7)(iv) for failing to provide an asbestos awareness training program for housekeeping employees that fulfilled the required elements.

Citation 3, Item 1 alleged a repeat-other-than-serious violation of 29 C.F.R. § 1910.1200(e)(1)(i) for failing to list asbestos on a list of hazardous chemicals known to be present in the Station.

Citation 3, Item 2 alleged a repeat-other-than-serious violation of 29 C.F.R. § 1910.1200(g)(8) for failing to ensure safety data sheets for asbestos were made available to the Station's employees.

The three Citations proposed a total penalty of \$108,042 for the alleged violations.

Respondent filed a timely notice of contest of the Citations, bringing the matter before the Occupational Safety and Health Review Commission ("Commission").¹ The matter was designated for Conventional Proceedings by the Chief Administrative Law Judge and thereafter assigned to this Court. A trial was held on June 30 to July 3, 2025, in Portland, Oregon and was continued by videoconference on July 29, 2025.

The following individuals testified at trial: (1) CSHO Brian Peters; (2) Cecil Tipton, OSHA's Portland Area Director; (3) Claude Edward Robinson, an expert physical scientist working at OSHA's Salt Lake Technical Center;² (4) Cheryl Walton, a USPS employee and Vice President of the Portland local chapter of the American Postal Workers Union; (5) Jeffrey Alan White II, the Acting Manager of Customer Service at the EP Station during part of OSHA's investigation; (6) Nkole Bulbul, USPS's District Safety Manager for Oregon, Montana, and Idaho at the time of OSHA's investigation; (7) Laveda Padilla, USPS's West Pacific Field Safety and Health Specialist at the time OSHA's investigation; (8) Kaylinn Hoyt, USPS's District Senior Safety Specialist for Oregon, Montana, and Idaho at the time of OSHA's investigation; (9) Loren Collins, the Acting Manager of the EP Station at the time of OSHA's investigation; (10) Jeri Renee

¹ The Commission is an independent adjudicatory agency and is not part of the Department of Labor or OSHA. 29 U.S.C. § 661. The Commission was established to resolve disputes arising out of enforcement actions brought by the Secretary of Labor under the OSH Act and has no regulatory functions. 29 U.S.C. § 659(c); *Martin v. OSHRC (CF&I)*, 499 U.S. 144, 154-57 (1991).

² The Court qualified Mr. Robinson, who personally conducted the analysis of the samples collected from the EP Station, as an expert in "the process [and] analysis used by OSHA to test the sample[s]" for the presence and quantity of asbestos. (Tr. 262).

Medina, a supervisor at the EP Station; (11) Thomas Rodman Harvey, USPS's expert witness on certain aspects of industrial hygiene and asbestos;³ (12) Daniel Crane, the Secretary's rebuttal expert on certain aspects of industrial hygiene and asbestos;⁴ and (13) Greg Johnson, the President of National Asbestos Flooring Encasement Systems, a subcontractor that had performed encasement work on the floors of the EP Station. Additionally, limited excerpts of Mr. Collins's deposition were admitted as Exhibits C-64 and R-28.

Both parties submitted timely post-trial briefs.⁵ Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law.

For the reasons discussed below, the Court **VACATES** all three Citations in their entirety.

II. STIPULATIONS & JURISDICTION

The parties stipulated to various facts, applicable law, and the Commission's jurisdiction over this proceeding. *See* Joint Stipulation Statement (filed Dec. 24, 2024) ("J. Stip."). Rather than set forth the Joint Stipulations in their entirety, the Court will reference them as is relevant and appropriate.

³ The Court qualified Mr. Harvey as an expert on "analytical methods for sampling asbestos, which ... include[s] the collection methods and analysis of material," as well as "how to identify the presence, quantity, and location of asbestos at a worksite." (Tr. 782). The Court further indicated it would allow "limited testimony on the exposure to the hazard, only to make sure that the Court is aware of what type of asbestos ... he's referencing would be the hazard," i.e., "environmental exposure" but not employee exposure specific to the events in this case. (Tr. 782-83).

⁴ The Court qualified Mr. Crane as an expert "in the field of material science, in particular as to asbestos testing and methodologies." (Tr. 909). The Court also allowed "some limited testimony on collection and preparation of samples and environmental exposure [to asbestos]." (Tr. 909).

⁵ Any affirmative defenses not raised at the hearing or in Respondent's post-trial brief are deemed waived by Respondent. *United States v. LeMaux*, 994 F.2d 684, 689-90 (9th Cir. 1993); *Mansfield Indus., Inc.*, No. 17-1214, 2020 WL 8871368, at *3 (OSHR, Dec. 31, 2020). In its post-trial brief, Respondent has asserted the defense of unpreventable employee misconduct for Citation 2, Item 1, the alleged violation of 29 C.F.R. § 1910.1001(k)(1). Resp't's Br. 32-34. Respondent has also asserted the defense of infeasibility for both Items of Citation 3, the alleged HazCom violations. Resp't's Br. 46-47. The Court deems any other affirmative defenses waived.

Based on the Joint Stipulation Statement and the trial record, the Court finds the Commission has jurisdiction over this matter under section 10(c) of the Occupational Safety and Health Act of 1970 (“OSH Act”) upon Respondent’s timely filing of a notice of contest. *See* 29 U.S.C. § 659(c); *see also* J. Stip. ¶¶ I(1) & (11). The Court also finds Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of sections 3(3) and 3(5) of the OSH Act, 29 U.S.C. §§ 652(3), (5). *See* J. Stip. ¶¶ I(2)-(4).

III. FACTUAL BACKGROUND⁶

A. The Asbestos Hazard

Though historically it had a more expansive definition, the term “asbestos” currently refers to a collection of six different fibrous minerals with similar properties and commercial applications.⁷ (Tr. 254, 267, 875-77; Exs. C-46, at 4; C-51, at 4). Of these six minerals, chrysotile asbestos makes up approximately 95% of the asbestos used in commercial applications in the United States. (Tr. 280, 877; 29 C.F.R. § 1910.1001, App. A(1.4)).

As is commonly known, exposure to asbestos fibers has been shown to be harmful to humans. (Tr. 41, 216, 375-76, 839-40, 917-18, 924-28; Exs. C-24, at 1; C-27, at 1; C-28, at 18; C-51, at 7; *see also* Occupational Exposure to Asbestos, Tremolite, Anthophyllite, and Actinolite, 51 Fed. Reg. 22612-01, 22613 (June 20, 1986) (to be codified at 29 C.F.R. pts. 1910 & 1926)

⁶ After a careful review of the record, the Court bases its factual findings on the evidence it has found credible, probative, and reliable. To the extent there is evidence in the record contrary to an explicit factual finding, the Court does not credit or give weight to that evidence.

⁷ As detailed by the Secretary’s expert witness, Mr. Crane, the six “commercially important” minerals currently referred to collectively as “asbestos” are: chrysotile, cummingtonite-grunerite a.k.a. amosite, crocidolite, anthophyllite, tremolite, and actinolite. (Tr. 877-88; Exs. C-46, at 3; C-51, at 4; *see also* 29 C.F.R. § 1910.1001(b) (definition of “asbestos”)). All six types of asbestos are fibrous in structure. (Tr. 254, 877; 29 C.F.R. § 1910.1001, App. A(1)). Chrysotile’s fibers are “serpentine” in structure, meaning the fibers curve or curl, while the remaining five types are “amphibole,” meaning the fibers are “straight [and] needle-like.” (Tr. 271, 280).

(“Asbestos Standard Preamble”) (“In publishing these two revised standards governing occupational exposure to asbestos ... in construction and in general industry, OSHA is acting to regulate a hazard widely recognized by other Federal agencies, health experts, and the general public.”). Inhalation of asbestos fibers or absorption through the skin can lead to a host of serious illnesses, including asbestosis, lung cancer and certain other cancers, mesothelioma, and general inflammation. (Tr. 41, 202-04, 927-28; *see also* Asbestos Standard Preamble, 51 Fed. Reg. at 22615-22616). Although exposure to even small amounts of asbestos can potentially be harmful, it is repeated exposure over time that tends to cause the more serious illnesses and injuries associated with asbestos. (Tr. 839-40; Exs. C-27, at 2; C-28, at 18; *see also* 29 C.F.R. § 1910.1001(c) (regulating employee exposure to asbestos as a function of periodic time)).

Because these ill-effects of asbestos exposure were not widely acknowledged until the turn of the 20th century, ACMs were commonly used as building materials, such as insulation or flooring, in the construction of older buildings throughout the United States, including some facilities owned or operated by the USPS. (Tr. 893; Exs. C-28, at 15, 23; C-46, at 4; 29 C.F.R. § 1910.1001(b) (definitions of “asbestos-containing material” and “presumed asbestos containing material”); Asbestos Standard Preamble, 51 Fed. Reg. at 22613).

B. The USPS & the EP Station

1. The USPS

The USPS is “operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people” and “ha[s] as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people.” 39 U.S.C. § 101(a); *see also* J. Stip. ¶ I(3). To this end, the USPS

owns or operates thousands of postal facilities throughout the United States and its territories. (J. Stip. ¶ I(4); Tr. 443, 575); *see also Postal Facts*, U.S. POSTAL SERV., <https://facts.usps.com/total-postal-managed-retail-offices/>; *USPS Owned Facilities Reports*, U.S. POSTAL SERV. <https://about.usps.com/who/legal/foia/owned-facilities.htm>. There are several such facilities in and around Portland, Oregon, including the EP Station. (J. Stip. ¶¶ I(6) & (7); Tr. 379, 1023; Exs. C-10, at 1-2; C-26).

2. The EP Station

a. Operations & Layout

The EP Station is a one-story, brick building, measuring approximately 23,000 square feet in size and situated just east of the Willamette River in Southeast Portland. (J. Stip. ¶ I(6); Exs. C-34, at 8, 11, 13; R-24, at 5). At any given point in time, including during the time period relevant here, the Station employs approximately 70 to 80 USPS employees, including supervisors, customer service clerks, sorters, carriers, and a custodian.⁸ (J. Stip. ¶¶ I(13)-(15); Tr. 340, 391, 485, 611, 642-43; Exs. C-12, at 6; C-13, at 2, 5, 8, 18; C-35). The Station's employees are primarily engaged in "postal operations," which involves receiving, sorting, and delivering mail and packages, as well as providing postal services to retail customers. (J. Stip. ¶ I(7); Tr. 44, 46-49, 51-52, 345, 610-11, 614, 671-72).

On the west end of the Station's ground floor is a customer entrance leading to a lobby with P.O. boxes as well as retail windows where clerks provide postal services to retail customers. (Tr. 44, 345, 414, 611; Ex. C-34, at 13 & 15). Behind the customer service lobby are several rooms

⁸ During the time relevant here, an individual named John Miranda was the custodian assigned to the EP Station. (J. Stip. ¶ I(15); *see also* Tr. 102-04, 197, 392, 612-13, 620, 643-44; Exs. C-26; C-35, at 2; C-39). Substitute custodians were periodically assigned to work at the Station if, for example, Mr. Miranda was on leave. (Tr. 355, 612). However, Mr. Miranda is the focus of both parties' briefing of the issues before the Court, and the Court accordingly focuses on him in analyzing the alleged violations.

including managerial offices, restrooms, a custodial closet, and a large workroom where many of the Station's employees receive, sort, and distribute mail and packages to carriers for delivery. (Tr. 44, 46-49, 51-52, 83, 87, 345, 365, 372, 414-15, 462, 582, 614, 620, 623, 671-72, 699; Ex. C-34, at 15). The Station also has a basement which contains several rooms including a boiler room, locker room, lunchroom, storage rooms, and a second custodial closet. (Tr. 64, 80, 365, 370, 407, 418, 787; Ex. C-34, at 15). At the back of the building are a parking lot, where employees park their personal vehicles, and a loading dock, where mail is delivered to the Station for sorting, distribution, and delivery. (Tr. 47, 51-52, 611, 671-72, 699; Ex. C-34, at 15).

b. The Vestibule & Its Doors & Pins

The workroom and loading dock are connected by a "mailing vestibule," an approximately 10-foot by 20-foot area located toward the northeast corner of the workroom. (Tr. 47, 83, 345, 353, 361, 399, 411, 431, 671, 699; Ex. C-34, at 15). Two large, swinging doors separate the vestibule from the workroom. (Tr. 47, 51-52, 345, 350, 353, 404-05, 427-28, 629-32, 672, 685). Each of these swinging doors has a "pin," i.e., a "four-foot[-]long metal rod with a little kind of 'L' curve at the top," attached to the upper and lower part of the door.⁹ (Tr. 629; *see also* Tr. 51-52, 83-84, 350-51, 427-28, 628-30, 674, 684-85). The upper door pins can be pressed into the door frame, and the lower pins can be pressed into the floor¹⁰ to lock the doors or, alternatively, prop the doors open. (Tr. 51-52, 83-84, 350-51, 427-28, 628-30, 633-34, 674, 684-85, 691-92; Exs. C-5, at 1; R-5, at 12 & 13).

⁹ Despite the extensive attention both the vestibule doors and pins received from the parties at trial, no clear photograph of either was introduced. (Tr. 675).

¹⁰ In other USPS facilities with similar doors, a "sheath hole," i.e., a metal cylinder, would have been installed in the floor to accommodate the lower pin of the doors. (Tr. 427-28, 633-34, 684-85). However, because the vestibule doors in the EP Station are not original to their doorways, there are no designated sheath holes in the ground for using the lower pins to prop the doors open, only the floor itself. (Tr. 51-52, 83, 427-28, 633-34, 684-85; Exs. C-5, at 1; R-5, at 12 & 13).

Over time, employees' use of the lower door pins to prop open the doors caused some visible deterioration to the Station's floors in and around the vestibule. (Tr. 83, 85-86, 350-51, 559-60, 628-30, 671; Exs. C-5, at 1; R-5, at 12 & 13). Of particular importance to the issues raised by this case, the lower pins from the doors being pushed into the floor created several indentations in the tile overlay on the flooring, including an approximately quarter-sized hole in the floor near one of the doors inside the vestibule.¹¹ (Tr. 51-52, 85, 170, 350-51, 404-05, 431, 435-36, 468, 471-72, 624-25, 628-30, 634-35, 656-59, 680-81; Exs. C-5, at 1; R-5, at 12 & 13). Because of the demonstrated potential for damage to the floors, employees at the EP Station are verbally instructed not to use the door pins to prop the vestibule doors open. (Tr. 354, 685-89, 709-10).

In addition to the door pins, two other factors may have contributed to some of the visible deterioration in the floors in the vestibule area. First, large equipment used to transport mail, such as large, metal "gross parcel mail containers," regularly travels through these doorways as mail and parcels are brought into and out of the facility from the loading dock. (Tr. 47-49, 399-400, 411-12, 671-72). Second, because it leads in from the parking lot behind the Station, the vestibule serves as the main thoroughfare for employees entering and exiting the workroom for their work shifts and thus receives a fair amount of foot traffic on a daily basis. (Tr. 80, 672).

¹¹ While some photographs of these indentations and a closeup photograph of the quarter-sized hole were submitted at trial, the location of the indentations and the hole relative to the vestibule doors is unclear. The Court notes that the indentations depicted in Respondent's photographs are likely distinct from the hole depicted in the Secretary's photograph in that there is a shallow groove leading up to the indentations in Respondent's photographs but no such groove leading up to the hole depicted in the Secretary's photograph. *Compare* Ex. C-5, at 1, *with* Ex. R-5, at 12 & 13. Mr. Collins, who offered the clearest account of the location of these indentations, placed them approximately two feet to both the right and left inside the vestibule area, presumably matching the swing range of the doors. (Tr. 628). He further associated the quarter-sized hole with the right door (if facing the vestibule from the workroom) and indicated only that it was somewhere inside the vestibule area. (Tr. 628, 656-59).

3. Asbestos in the EP Station

The EP Station was originally constructed in 1936, and, like many buildings constructed during that time, parts of the Station were constructed using ACMs. (Tr. 96, 570, 614, 785; Exs. C-34, at 11, 20, 24-28; R-24, at 5). More particularly, the original flooring installed throughout the ground floor workroom and vestibule area was comprised of 12-by-24-inch asbestos-containing floor planks. (Tr. 349, 538-40, 570, 785, 798; Exs. C-7, at 2; C-34, at 24-26; R-24, at 5).

An Asbestos Survey Report, commissioned by the USPS and conducted by a firm named PBS Environmental in February of 1997 (“1997 Survey”), confirmed, through sample testing, that the floor planks in the Station contained 35% chrysotile asbestos. (J. Stip. ¶ I(12); Tr. 96, 536-39, 785, 798, 819; Exs. C-34, at 1, 4-7, 19, 24-26, 40; R-24, at 5). The 1997 Survey further determined that this asbestos was “non-friable”¹² with a “low” disturbance potential. (Ex. C-34, at 24-26 (designating the planks as non-friable and assigning the planks a “Risk Assess./Hazard Ranking” of “1b”); *id.* at 56 (indicating that a Hazard Ranking of 1b means “ACBM Disturbance Potential” is “Low”)). Additionally, the 1997 Survey identified several fire doors throughout the Station as being made of PACMs, though the doors could not be tested without damaging them. (Tr. 98, 785-86; Ex. C-34, at 5, 6).

¹² “Friability” refers to the “potential for a product containing asbestos to release breathable fibers ...” 29 C.F.R. § 1910.1001, App. G(I.C); *see also* Tr. 799-800; Ex. C-51, at 5. “Friable means that the material can be crumbled with hand pressure and is therefore likely to emit fibers.” App. G(I.C); *see also* Tr. 799-800; Ex. C-51, at 45; 40 C.F.R. § 61.141 (EPA regulation defining “friable asbestos material” as “any material containing more than 1 percent asbestos ... that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure.”). In line with the 1997 Survey’s conclusion as to the floor planks in the EP Station, Appendix G to OSHA’s asbestos regulations states that “vinyl-asbestos floor tile ... [is] considered non-friable and generally do[es] not emit airborne fibers unless subjected to sanding or sawing operations.” App. G(I.C).

a. Hazardous Chemical List & Safety Data Sheets

Management for the EP Station maintained a binder, kept in the upstairs custodial closet,¹³ which contained a hazardous chemical list and safety data sheets for various chemicals employees might encounter while working in the facility. (Tr. 47, 400-01, 415-16, 419, 539, 591; Ex. C-37). Although the content of this binder was not introduced into evidence or otherwise explained in any detail,¹⁴ there is no dispute that, at the time of the CSHO's investigation, the binder's hazardous chemical list did not list asbestos, nor did the binder contain a safety data sheet for asbestos.¹⁵ (Tr. 53, 367, 540, 570-72).

b. USPS's Measures to Address Asbestos in the Station

Management for the USPS, including local management at the EP Station, was aware that the Station's original flooring contained asbestos. (Tr. 97-98, 124, 465, 515-17, 536, 626-27, 642, 683, 697-98). USPS employed several measures to address the presence of asbestos in the EP Station.

i. *Encapsulation of the Station's Floors*

In 2015, USPS contracted with a company called National Asbestos Flooring Encasement Systems ("NAFES") to perform an "encasement" or "encapsulation" of the asbestos planks installed in the Station's ground floor. (Tr. 421-22, 517-18, 530-32, 541, 616, 838, 999-1000,

¹³ Of the witnesses to address this subject, only Ms. Walton stated that there were no safety data sheets in the upstairs custodial closet. (Tr. 365). In light of the weight of testimony to the contrary, including the CSHO's, the Court does not credit Ms. Walton's testimony on this point.

¹⁴ Only the CSHO addressed the content of the binder in any meaningful way, stating: "It was a fairly small sampling. There was about eight or nine [safety data sheets]. And asbestos was not in there." (Tr. 53).

¹⁵ The reason for these omissions, Ms. Padilla explained, was that the building was built in the 1930s, and the use of asbestos-containing materials in constructing new buildings was essentially banned by the 1980s. (Tr. 540, 570-72; Ex. C-34, at 5, 11). Thus, it was impossible to obtain a safety data sheet from the company that manufactured the planks because the company "just doesn't exist anymore." (Tr. 540; *see also* Tr. 570-72). As an alternative to a safety data sheet, employees were given access to the 1997 Survey "in conjunction with" Safety Talk 127 on asbestos, the contents of which the Court details below. (Tr. 540-41, 572); *see also* Part III(B)(3)(b)(ii) and (v)(1), *infra*.

1018; Exs. R-2; R-24, at 5 & 6). In short, the encapsulation process involved bonding several layers of additional material to the asbestos-containing floor planks, on top of which additional layers of concrete patching and vinyl tile were applied.¹⁶ (Tr. 422, 517, 532, 541, 616, 998; Exs. R-2, at 5-11; R-24, at 5 & 6). NAFES also performed repairs on some of the tiles in the vinyl overlay of the floors in 2023.¹⁷ (Tr. 562-64, 999-1000, 1018, 1025-27; Ex. R-27, at 2, 6¹⁸). By encapsulating the asbestos-containing floor tiles, USPS significantly reduced, if not outright eliminated, the possibility that normal operations conducted at the EP Station could wear away these tiles to the extent that the asbestos could be liberated from the tiles or otherwise become airborne. (Tr. 230, 517-18, 532, 541, 559-60, 615-16, 618-19, 810-11, 953, 999-1000; Exs. C-13, at 4; C-24, at 2; C-28, at 114, 145-47, 244; R-2; R-24, at 5 & 6).

¹⁶ According to Mr. Johnson, the President of NAFES, his company has encapsulated approximately five million square feet of asbestos flooring for the USPS since he started the company in 1997. (Tr. 999). Indeed, USPS represents approximately 98% of NAFES's business. (Tr. 1019). Mr. Johnson described NAFES's encapsulation process for a USPS facility in detail as follows:

We go into a facility. We shift the equipment out of a particular area. We go in, pick up the debris, we HEPA vac[uum] the floor and generally have to damp mop it ...

We apply our encapsulant, which is a self-adhesed backed product that is a thin membrane made-up of a polyurethane backing, fiberglass scrim [netting], and aluminum foil on the top. We apply this to the old asbestos floors. Once we apply it, you've got a complete encapsulated floor.

At that point, we spread our concrete floor patch ... apply our adhesive, apply the new tile, put two coats of sealer on the floor, and then in about 15 minutes we're able to move the equipment back in place and we just shift to the next section.

(Tr. 998; *see also* Tr. 532, 541, 616, 810-11; Ex. R-2, at 1).

¹⁷ As detailed by Mr. Johnson, repairing an encapsulated floor is a "pretty simple process," as follows:

[W]e go in, take the damaged tile, whatever it was caused from, heat-release the tile, because once you heat the tile it reactivates. We remove the tile, spread new concrete floor patch, and glue it, put the new tile in. It's a non-disturbance situation because the old asbestos tile is still under the encapsulant ...

(Tr. 999).

¹⁸ After significant arguments from the parties over the admissibility of Respondent's Exhibit 27, a report prepared for the USPS by a company called WSP USA Solutions, Inc., the Court eventually admitted the report for the limited purpose of demonstrating why NAFES returned to the EP Station in 2023 but not for the truth of any of the matters addressed in the report. (Tr. 544-61, 865-67, 1028-32). The Court therefore cites this report only for that limited purpose.

ii. Availability of the 1997 Survey to Employees

Employees at the EP Station had access to the 1997 Survey, which details the presence and location of asbestos throughout the facility. (Tr. 465, 515-16, 540, 572, 626-27, 649; Ex. C-34, at 5-7, 23-28; R-24, at 14).

iii. “A” Signs

At some point after the 1997 Survey was completed, USPS posted “A” signs at various locations in the Station to notify employees of areas where ACMs were present.¹⁹ (Tr. 53, 349, 372, 425, 577-78, 635-36, 842-43; Ex. R-24, at 14).

iv. Regular Cleanings

1. Sweeping & Mopping

At the time of the inspection, the Station’s custodian regularly dry swept and mopped the floors throughout the Station. (J. Stip. ¶ I(15); Tr. 72, 76-77, 532-33, 612-13; Exs. C-3, at 4; C-39). Sweeping and “spot mopping” were performed daily, and one “large mop” was performed weekly. (Tr. 532-33, 613).

¹⁹ At trial, several witnesses referenced these “A” signs and acknowledged that the signs indicated the presence of ACMs in the EP Station. (Tr. 53, 349, 372, 425, 578, 635-36, 842-43). However, no photographs of the signs were entered into evidence, and it is not clear from the trial testimony if these signs contained any other words or information other than the letter “A”. See Ex. C-24, at 2 ¶ 2(2) (USPS Asbestos Management Plan describing only “signs and labels to communicate the presence of ACBM and PACM in accordance with OSHA regulations.”).

2. Vacuuming & the HEPA Vacuum

Additionally, the custodian would vacuum some areas inside of the building daily, like the workroom floor or the offices. (J. Stip. ¶ I(15); Tr. 76-77, 613-14, 647). Other areas not considered to be entirely “inside,” like the vestibule area, were not regularly vacuumed. (Tr. 614).

The vacuum used by the custodian at the EP Station at the time of the inspection was a recently acquired HEPA-filtered backpack vacuum.²⁰ (Tr. 64-65, 164-65, 395, 567, 581; Exs. C-6; R-5, at 2-5). This HEPA vacuum was not designed or intended to collect ACMs or address the hazards associated with that task. (Tr. 69, 567-68). After finishing vacuuming the designated areas, the custodian would simply open the vacuum, remove the old filter, throw it in a garbage can, and put in a new filter. (Tr. 75, 78; Exs. C-6; R-5, at 2-5).

²⁰ The EP Station had recently acquired the HEPA vacuum as the result of a program called “Custodial Team Cleaning” or “CTC,” which had been implemented at all of the postal facilities in the Portland area. (Tr. 581). Although the contours of this program are not particularly clear from the record, it seems to have had at least two aspects: 1) a scheduling aspect whereby a primary custodian, Mr. Miranda, was assigned to clean the Station with other custodians filling in when Mr. Miranda was absent (Tr. 355); and 2) a training aspect involving how to use the HEPA vacuum and in which areas of the Station to use it. (Tr. 357-60, 395-97). Ms. Hoyt further explained that “as a piece to [CTC], we were all given brand new vacuums to clean the facilities.” (Tr. 581).

3. Waxing

Although the Station's floors may have been intermittently waxed, the Court finds insufficient evidence in the record to establish that this occurred with any regularity during the time period relevant to this case.²¹

v. Employee Training

In addition to these practical measures, USPS also provided training on asbestos to its employees as follows:

1. Safety Talk 127

During the time relevant to this case, the USPS's main method of training its employees on the presence and location of asbestos in the EP Station was "Safety Talk 127," the content of which is embodied in a two-page document. (Tr. 128-29, 397-98, 424-25, 451, 465, 584, 614-15, 714, 726-27; Exs. C-24, at 4; C-27, C-35). Safety Talk 127 addresses such topics as "What is Asbestos?", "Where is the hazard?", and "Safely Working Around Asbestos." (Ex. C-27). During

²¹ While Mr. Collins, the Acting Manager of the EP Station during the CSHO's inspections, forthrightly testified as to the frequency of the custodian's sweeping and mopping of the floors during the relevant time period, he equivocated on the frequency of waxing during that same time, stating: "At that time, I couldn't speak to where [the frequency of waxing] was at that time. But I traditionally try to do it at least every month-and-a-half." (Tr. 613). Ms. Padilla, the Senior Field Safety and Health Specialist for USPS's West Pacific region, was the only other witness to testify on the frequency of the waxing of the floors in the Station. In her estimation, despite the USPS's Asbestos Management Guide requiring the regular sealing and waxing of asbestos-containing flooring, the Station's floors did not require regular waxing and sealing because they had been encapsulated and thus were "a different material." (Tr. 531-32; Ex. C-28, at 120-21). Rather, she believed regular sweeping and mopping was sufficient to address any attendant issues related to the asbestos in the tiles below the encapsulation. (Tr. 532-33). The CSHO alleged that during one of his inspections, he spoke with Mr. Miranda, who stated that he did not buff the floors himself and, although he was not directly asked, did not mention anyone else buffing the floors either. (Tr. 76). Finally, Union Vice President Ms. Walton, the only other witness to address on the subject of whether the Station's floors were waxed, did not believe the floors were being regularly waxed, but her opinion was based only on her belief that the floors had a "dull look." (Tr. 360-61).

The Court thus finds that the Station's floors may have been, at most, intermittently waxed or buffed at the time of OSHA's investigation. However, as the Court concludes in more detail in addressing Item 1 of Citation 2 below, the Secretary has not shown that regularly waxing the Station's would do anything further to address the potential accumulation of asbestos-containing dust or debris due to the encapsulation and vinyl overlay applied to the floors.

at least three sessions a year,²² managers at the EP Station would read this document verbatim to the Station's employees. (Tr. 397-98, 424-25, 433-34, 475-77, 619-20, 638-39, 714, 726). However, because Safety Talk 127 was developed to be administered at multiple USPS facilities, it is not specific to the presence or location of asbestos in the EP Station. (Tr. 128-29, Ex. C-27). For this reason, the managers who conducted Safety Talk 127 at the EP Station would supplement Safety Talk 127 with information specific to the EP Station, including where asbestos was located in the Station and the meaning of the "A" signs to indicate the presence of asbestos at those locations.²³ (Tr. 424-25, 433-34, 475, 615, 619-20, 635-36, 638-39).

2. Additional Training

In addition to Safety Talk 127, the trial record contains cursory references to two other types of training that may have touched on the subject of asbestos. The Court does not find that the content of either type of training is particularly clear. However, as the parties have referenced these trainings in briefing the issues before the Court, the Court will briefly recount the available evidence related to each.

²² As Mr. Collins explained, USPS carriers have "rotational days off" that change each week such that any safety talks need to be given at least "three days in a row [to] hit all the rotations." (Tr. 714). Additionally, employees on annual leave may need to be caught up on missed safety talks when they return to work. (Tr. 714). Ms. Medina corroborated that Safety Talk 127 is given at least three times a year. (Tr. 726).

²³ Mr. Collins, who was primarily responsible for administering Safety Talk 127 during the relevant time period, stated that he supplemented the verbatim language from the Safety Talk document with additional information specific to the EP Station. (Tr. 615, 635-36, 638-39; *see also* Tr. 398). Mr. White indicated that, while he had not delivered Safety Talk 127 at the EP Station, he had done so at other USPS facilities and had supplemented the verbatim language with site-specific information when doing so. (Tr. 424-25, 433-34). Ms. Bulbul, who had not administered Safety Talk 127 herself, nonetheless indicated that it was a common practice for USPS managers to add site-specific information to general safety talks. (Tr. 475-77). In her very brief testimony, Ms. Medina did not address this topic either way. (Tr. 725-29). In light of the other evidence in the record, the Court does not assign any evidentiary weight to Ms. Medina's silence on this issue.

VILT

Both the CSHO and Ms. Hoyt described a type of virtual training with the acronym “VILT,” though neither witness could recall what this acronym stands for. (Tr. 197, 585). The CSHO described this training as “advanced” training, and Ms. Hoyt confirmed the existence of a VILT on asbestos awareness that is purportedly given to USPS custodians. (Tr. 197, 593). However, the content of this training is nowhere in the trial record. Moreover, although the CSHO indicated that USPS intended to train the Station’s custodian with the VILT asbestos training following OSHA’s inspection of the EP Station (Tr. 102-03, 197; Exs. C-26, C-35, at 2), there are no records or other evidence of the custodian actually receiving this training. (Tr. 102-03, 195-97, 593-94).

Custodial Team Cleaning (CTC)

A few witnesses also suggested there might be an asbestos-related training component to the CTC program, which had resulted in the HEPA vacuum being provided to the EP Station. (Tr. 184, 357-59; *see also* note 20, *supra*). Ms. Walton suggested that this CTC training was different from the annual asbestos training and might touch upon the use of the HEPA vacuum and “how it’s supposed to be emptied.” (Tr. 357-59). She also suggested that custodians should be trained under the CTC annually but that no custodians in the Portland area had been trained on it because a trainer could not be located. (Tr. 359-60). Mr. White corroborated the supposed content of the training but did not recall any “lapse” in providing the training to the Station’s custodian. (Tr. 395-97). Mr. Harvey described the training in his expert report,²⁴ but the document or documents on which his description is based are not in the record. (Ex. R-24, at 7). Other than these brief

²⁴ According to that report, CTC is a “comprehensive 16-hour training program in all aspects of custodial operations in the [USPS] facilities. The training program includes an entire chapter on vacuum cleaning, including instructions on how to change out the Microfilter.” (Ex. R-24, at 7).

points, the trial record does not contain anything more specific on the content of the CTC training, whether it actually addressed asbestos, or whether it was actually provided to the Station's custodian.

C. Complaint to OSHA & OSHA's Inspections

1. Complaint to OSHA

In December of 2022, multiple complaints were lodged with OSHA regarding perceived safety issues in several of USPS's Portland-area facilities. (J. Stip. ¶ I(6); Tr. 42-43, 93-94, 179-80; Exs. C-1, C-10, C-12, at 1). This included a complaint regarding the EP Station that "[a]sbestos flooring throughout the building is not being properly maintained or cared for and employees are not aware of the nature of the problem or how to mitigate exposures." (J. Stip. ¶ I(6); Tr. 42-43; Exs. C-1, C-12, at 2). In response, OSHA assigned CSHO Peters to investigate the allegations in the complaint. (Tr. 43-44; Ex. C-12, at 2).

2. The CSHO's Inspections

CSHO Peters visited the EP Station on four separate occasions: first on December 15, 2022, and then again on January 24, February 2, and February 10, 2023. (Tr. 41-44, 63, 79-80; Exs. C-2, C-3, C-12, at 1-3). Over the course of his visits to the Station,²⁵ CSHO Peters:

- conducted at least one walkaround inspection of the Station's ground floor, where he observed "scratches [and] scuffs" on the floors as well as grooves and indentations in the floor near the vestibule doors (Tr. 50-52, 364-65, 413-16, 581-83, 621-24, 671; Exs. C-2 at 5; C-3, at 5 & 6; C-12, at 2 & 4);
- conducted at least one walkaround inspection of the basement, where he observed exposed insulation on a pipe that was seemingly caused by an ongoing repair (Tr. 63-64, 79-81, 407; Exs. C-3, at 4; C-12, at 2 & 3);

²⁵ The testimony and other evidence of the CSHO's inspections pointed to exact dates of some of his activities, while leaving others unclear. (*E.g.*, Tr. 72 (indicating only that the CSHO "eventually" had the opportunity to interview Mr. Miranda)). Given that the exact dates of these activities are not particularly relevant to the issues involved in this case, the Court will simply lay out the results of the CSHO's inspections *in toto* without attempting to pinpoint exact dates that each event occurred.

- inspected the HEPA vacuum used by the custodian to vacuum certain areas of the Station (Tr. 64-67, 79, 164-65, 416-17; Exs. C-3, at 2; C-12, at 3);
- interviewed some employees on whether they had been trained on the presence and location of asbestos in the facility and concluded that such training was “scarce or nonexistent” (Tr. 57-58, 61-62; Exs. C-2, at 3 & 4; C-12, at 2);
- interviewed the custodian, Mr. Miranda, on whether he had been trained on asbestos and was told he had not been trained in the last year (Tr. 72-77; Exs. C-3, at 4; C-12, at 3);
- interviewed Mr. Miranda on his use of the HEPA vacuum and learned that he would change the filter daily and simply drop the old filter into the garbage, which the CSHO did not believe was the proper way to use the vacuum (Tr. 75-76; Exs. C-3, at 5; C-12, at 3);
- requested and eventually received some documents related to the EP Station’s policies and training for asbestos, as well as its HazCom program (Tr. 52-53, 67-68, 93-95, 99-106, 110-14, 160-64, 180, 188, 190, 192-93, 195-96; Exs. C-10, C-11, C-12 at 1, 2, 4, 6-8; *see also* Exs. C-24-28, C-32, C-34, C-35, C-37, C-39 & C-40);
- was given access to the binder containing a hazardous chemical list and safety data sheets for the EP Station, which neither listed asbestos as a hazardous chemical in the Station nor contained a safety data sheet for asbestos (Tr. 53, 365-66, 415-16, 419, 539-40, 570-71; Ex. C-12, at 2 & 4);
- was provided with the 1997 Survey, confirming the presence of asbestos in the Station and management’s knowledge thereof (Tr. 96-97; Exs. C-12, at 7; C-34).

3. The CSHO’s Sample Collection

Over the course of his visits to the Station, CSHO Peters also collected several samples to test for the presence of asbestos. (Tr. 79-83, 170-71, 402-06, 418-19, 429-30, 461-62, 467-70, 478-81, 494, 622-26, 699-701, 786-88, 946-48; Exs. C-47, C-51, at 9-11; R-24, at 8-10). He collected one dust sample from the HEPA vacuum’s filter. (Tr. 65, 165, 417, 787; Exs. C-6, C-12, at 3; C-47, at 2; R-24, at 8). In the basement, the CSHO collected dust samples from various

points of the floor,²⁶ as well as several samples of the exposed insulation from the pipe he had previously observed. (Tr. 80-81, 403, 461-62, 466-67, 624, 656, 786-87; Exs. C-12, at 3; C-47, at 2, 4, 6, 8, 10, 11 & 15; R-24, at 8). On the Station's ground level, he collected multiple dust samples from the floor, including from the vestibule.²⁷ (Tr. 83-84, 170-71, 404, 467-68, 622-23, 787, 802-03, 946; Exs. C-5, C-12, at 3; C-47, at 13; R-24, at 9). Of particular note, one of the samples collected from the Station's ground level was obtained from the quarter-sized hole in the floor of the vestibule that had been created by one of the door pins ("Sample 11").²⁸ (Tr. 84, 404-06, 429-30, 467-70, 478-81, 494, 622-26, 699-701, 787-88, 946-48; Exs. C-5, at 1; C-12, at 3; C-47, at 13; R-24, at 9).

4. The CSHO's Sampling Methods

a. Tweezers, Brush & Card

For the insulation samples, CSHO Peters used a pair of tweezers to extract the insulation from the pipe. (Tr. 81-82, 170). For most of the dust samples collected from the Station's floor, CSHO Peters used the "brush and card method" for collection. (Tr. 81, 83, 170-71, 238-39, 403, 420, 462-63, 467-68, 478-79, 788-89, 802-03; Exs. C-12, at 5; R-24, at 9). This involved using a

²⁶ According to the Bulk Sampling Worksheets submitted at trial, these samples were collected from the "custodian['s] shop," the "basement hallway by the breaker panel," the "NW end of the basement under exposed pipes and insulation," the "basement lunchroom," and the "basement storage room." (Ex. C-47, at 2, 4, 6, 8, 10 & 11).

²⁷ According to the Bulk Sampling Worksheets, these samples were collected from the "main floor south end," the "main floor middle in hole near door," the "main floor near door," and the "main floor north end." (Ex. C-47, at 13).

²⁸ Each sample collected from the EP Station was assigned at least two internal numbers during the collection and testing process: a simple, numeric "Sample Number" and an alphanumeric "Sample Submission Number." (Tr. 276-77; Ex. C-47, at 2, 4, 6, 8, 10, 11, 13 & 15 (in box at bottom labeled "Bulk Sampling Data")). Some of the samples were then grouped under a different "Sampling Number" (Exs. C-8, at 19 & 22; C-47, at 36 & 39 (box in top right corner) (emphasis added)) or "OIS Sampling Sheet Number." (Ex. C-47, at 2, 4, 6, 8, 10, 11, 13 & 15 (box in top right corner); *see also* Tr. 275). The Court will use the Sample Number to describe any specific samples, particularly Sample 11. For clarity of the record, the Court notes that Sample 11's Sample Submission Number was F22461, and it was grouped with Samples 10, 12, and 13 under Sampling Number 415923. (Ex. C-47, at 13).

standard-sized paintbrush to collect a small amount of dust or debris onto an index card. (Tr. 81, 83, 238-39, 420, 462-63, 467-68, 478-79, 803-04; Ex. R-24, at 9). Once a sufficient amount of dust or debris was gathered on the card, CSHO Peters would transfer the sample to a small glass vial and seal it. (Tr. 81, 83, 87-88, 238-39, 462-63, 467-68, 479-79; Ex. R-24, at 9).

b. Sample 11 & a Metal Tool

However, CSHO Peters did not use the brush and card method to collect Sample 11 from the hole in the floor of the vestibule. (Tr. 85-86, 404-10, 429-30, 468-70, 471-72, 479-80, 494-97, 504, 621-22, 624-26, 634, 699-701, 788-90, 797-98, 921, 946-48, 976-81; Exs. C-5, at 1; C-47, at 13; R-24, at 9). Instead, he inserted some sort of metal instrument into the hole and “dug” or “scrap[ed]” around the interior of the hole for at least a minute, eventually extracting Sample 11 from within.²⁹ (Tr. 405-10, 429-30, 468-70, 479-80, 494-97, 504, 621-22, 624-26, 699-701; *see also* Tr. 789-90, 797-98; Ex. R-24, at 9). Then, like other samples taken from the Station’s floors, CSHO Peters placed Sample 11 in a glass vial and sealed it for testing. (Tr. 83-84, 87-88, 835; Exs. C-7, C-47, at 13 & 14).

²⁹ The Court’s finding as to how the CSHO collected Sample 11 is based not only on testimony from three witnesses who observed the CSHO collect the sample but also on the lack of any reasonable explanation as to how the CSHO could have physically collected the sample from the quarter-sized hole using a paintbrush and/or business card, as he alleged he did. (Tr. 81-85, 170-71; Exs. C-5, at 1; C-12, at 5). The Court is not persuaded by the Secretary’s argument that Mr. Collins’ deposition testimony, wherein he essentially could not recall whether or not he saw the CSHO taking samples from the vestibule, undermines his detailed trial testimony about how the CSHO collected Sample 11. *See Brady SoCal, Inc.*, No. 18-1584, 2020 WL 6532732, at *16 (OSHR CALJ, Sept. 25, 2020) (finding that an employee’s “failure to remember whether the guardrails were there when initially asked by the CSHO is not inconsistent with him later recalling, having had time to consider the question, they had been missing....”). The Court is similarly not persuaded that Respondent’s failure to produce a photograph of the CSHO collecting samples in the vestibule undermines Mr. White’s testimony on this subject, when Mr. White could not recall whether or not such a photograph even existed. Sec’y’s Br. 23 (citing Tr. 408-09 (Mr. White stating: “I don’t see why I wouldn’t [have taken a photograph of the CSHO collecting Sample 11], but I honestly can’t remember if I did or not.”)).

D. OSHA's Testing Methods for Asbestos

Of the approximately 24 samples CSHO Peters collected from the EP Station,³⁰ 14 samples, including Sample 11, were sent to OSHA's Salt Lake Technical Center in Utah to test for the presence and quantity of asbestos. (Tr. 81, 87-88, 244, 263, 273-78, 282; Exs. C-47, at 2, 4, 6, 8, 10, 11, 13, 15, 18, 21, 24, 27, 30, 33, 36 & 39; C-48; R-24, at 9). Because these procedures and methods are necessary to understand some of the arguments raised by the parties, the Court will give an overview of the procedures and methods used to test for asbestos at the Salt Lake Technical Center before turning to the results of the samples collected for this case.

1. Sample Types

OSHA only recognizes two types of samples for purposes of analyzing the presence of asbestos: bulk samples and air samples.³¹ (Tr. 255, 278, 895, 920; Ex. C-51, at 6 & 7). As to bulk samples, OSHA categorizes any physical sample collected from a surface as a bulk sample, including substances that might colloquially be described as "dust" or "debris." (Tr. 254-55, 257, 288, 303-05, 895, 920-21, 937-40, 972-73; Ex. C-51, at 6 & 7). To test bulk samples for the presence of asbestos, analysts at OSHA's Salt Lake Technical Center follow the method set forth in OSHA Method ID-191 ("ID-191"), a guidance document developed in the mid-1990s. (Tr. 254, 948-49; Ex. C-46, at 3).

³⁰ The Sample Numbers assigned to the tested samples range from 1 to 24, with some intervals (i.e., 8, 9 and 14-20) missing, while the Sample Submission Numbers are sequentially uninterrupted (F22454 to F22467). (Ex. C-47, at 2, 4, 6, 8, 10, 11, 13 & 15 (in box at bottom labeled "Bulk Sampling Data")). This leads the Court to believe the CSHO collected more samples than were eventually tested.

³¹ Neither party conducted air sampling at the EP Station during the time period relevant to this case (Tr. 172, 215-16, 235, 303, 473, 534-35, 827; Ex. R-24, at 10). Thus, OSHA's procedures for air sampling, which vary significantly from its bulk sample testing procedures, are not implicated here. *See generally* 29 C.F.R. § 1910.1001(c) & (d); *see also* Tr. 827-28, 956; Ex. C-51, at 6.

All of the samples collected in this case were categorized as bulk samples by OSHA and analyzed using the methods described in ID-191. The Court will therefore outline the salient points of OSHA's testing and analytical procedures under ID-191.³²

2. Testing Methods Under ID-191

Samples collected during OSHA inspections are then sent from all over the country to OSHA's Salt Lake Technical Center to undergo various types of testing or analysis, including for the presence of asbestos. (Tr. 81, 88, 244, 263-64, 282-83; Exs. C-7, C-45). After a sample is received at the Technical Center, it is logged by a sample room clerk, given a sample number, and assigned to an analyst. (Tr. 263-64, 276-77; Exs. C-45, C-47).

a. Visual Examination

After being assigned a bulk sample, the analyst first does a gross visual examination of the sample under a stereoscope, a low magnification scope. (Tr. 265-67, 286; Ex. C-46, at 11). The gross examination is to determine what portions of the sample look "fibrous" and thus might contain asbestos and also whether the sample requires any treatment prior to being examined under a microscope. (Tr. 266-67, 286-87; Ex. C-46, at 10 & 11).

ID-191 addresses a number of possible treatments a bulk sample might undergo prior to being examined for the presence of asbestos. For example, a "wet" sample, i.e., a sample with a high water content, might need to be dried out prior to examination. (Tr. 266; Ex. C-46, at 10). Alternatively, a sample with potential asbestos fibers that are bound in a non-asbestos matrix, such

³² Respondent has not challenged the accuracy or legitimacy of Polarized Light Microscopy, the primary method set forth in ID-191 for analyzing certain types of samples for the presence of asbestos; indeed, its own expert witness, Mr. Harvey, agrees that this method is suitable for analyzing certain types of "bulk building material samples." (Ex. R-24, at 12). Instead, Respondent argues that Polarized Light Microscopy is inappropriate as applied to a true "dust" sample and that its use here implies that one of the samples collected by the CSHO was not truly "dust." Resp't's Br. 14, 26-29. The Court therefore only lays out the basic procedure set forth in ID-191 as is necessary to understand the arguments raised by Respondent.

as vinyl, tar, or another organic compound, might need to be “liberated” from the matrix prior to examination, a process known as “gravimetric reduction.” (Tr. 267-69, 308-09; Exs. C-46, at 5 & 10; C-51, at 6; R-24, at 9). Gravimetric reduction is necessary because the matrix in which potential asbestos fibers are bound can obscure the fibers when viewed under a microscope and thereby prohibit the analyst from accurately assessing the presence or quantity of asbestos in the sample. (Tr. 268, 307-09, 334, 790-91, 936-37; Exs. C-46, at 5 & 10; C-51, at 11; R-24, at 9).

b. Gravimetric Reduction/Ashing

ID-191 offers several possibilities for gravimetric reduction depending on the nature of the matrix in which the potential asbestos is bound. (Ex. C-46, at 10). For example, a sample might be gravimetrically reduced using an organic solvent, like tetrahydrofuran (THF), or a “low-molarity acid.” (Tr. 267-68, 289-90, 313, 790-91; Ex. C-46, at 10). A sample can also be gravimetrically reduced by “ashing” the sample in a high-temperature furnace for a period of time to burn away interfering materials. (Tr. 267-69, 289, 308-09, 328-29, 334, 936-37; Exs. C-46, at 10; C-51, at 6; R-24, at 9). Some samples require a combination of different treatments prior to examination. (Tr. 289-90, 313-14, 937). If a sample has to undergo any treatments, the analyst will take a pre-treatment and post-treatment weight of the sample. (Tr. 290; Ex. C-46, at 10).

c. Slide Preparation

After a sample has undergone a gross examination and any necessary treatments to remove interferants, the analyst prepares a slide of the sample for microscopic examination. (Tr. 269, 292; Ex. C-46, at 11). A “refractive index liquid,” a chemical solution that is known to interact with asbestos fibers in an observable way, is added to the slide. (Tr. 269-70, 272, 292-94, 308; Ex. C-46, at 11). A portion of the test sample, which is now typically of a powdery consistency, is then added to the refractive liquid. (Tr. 270, 293; Ex. C-46, at 10 & 11). Once the other half of the

slide is put on top of the sample in the refractive liquid, the slide is ready for microscopic examination. (Tr. 270, 293-94; Ex. C-46, at 11).

d. Polarized Light Microscopy

ID-191 endorses Polarized Light Microscopy (“PLM”) as the primary method for analyzing bulk samples for the presence of asbestos. (Tr. 255-56, 916; Ex. C-46, at 4, 5, 19 & 20). For PLM, a prepared slide is placed under a “a phase-contrast microscope with a polarizer put in.” (Tr. 256; *see also* 271, 806; Ex. C-46, at 9, 19 & 20). The microscope provides approximately 400x visual magnification of the sample. (Tr. 806; Ex. C-46, at 13). At the same time, the polarizer filters out certain frequencies of light, allowing the remaining frequencies to interact with potential asbestos fibers in the sample in a manner that is predictable and observable. (Tr. 256, 271, 913-14; Ex. C-46, at 17-19). For example, the analyst might observe: 1) the serpentine (curved) or amphibole (needle-like) morphology (shape) of the fibers that are known to be indicative of asbestos (Tr. 271, 294; *see also* note 7, *supra*); 2) “birefringence,” a refractive property which results in particular colors that are known to be associated with asbestos fibers being observable in the sample³³ (Tr. 294-95, 334-35; Ex. C-46 at 20-22); 3) different birefringence colors associated with asbestos when the sample is put under “dispersion staining”³⁴ (Tr. 271-73, 294-95, 334-35; Ex. C-46, at 22-23); and/or 4) an “extinction angle,” which is when a “fiber ... blinks out when you’re at 180 degrees or parallel to the polarizer,” which is also consistent with asbestos. (Tr. 295-96; Ex. C-46, at 20).

³³ Mr. Robinson more concretely explained asbestos’s birefringence thusly: “[W]hen you’re looking [at asbestos fibers] under polarized light ... you’ll see blue in one direction and yellow in one direction.” (Tr. 334-35).

³⁴ As Mr. Robinson explained, dispersion staining is a setting or “mode” on the polarized light microscope whereby the sample is “put[] in a dark field.” (Tr. 272, 334-35). As he further explained, “when you’re looking [at asbestos fibers] under polarized light ... once you make the adjustments to put it into ... dispersion-staining mode, you’ll see blue and magenta.” (Tr. 334-35; *see also* 272).

When an analyst determines that asbestos fibers are present in a given sample, they then do a “microvisual estimation” of the percentage of asbestos in the sample by “looking around the scope, trying to determine how much asbestos is there relative to other materials that are on the slide.” (Tr. 273; *see also* Tr. 256, 296; Ex. C-46, at 14). The estimated percentage of asbestos is then calculated by reducing the percentage observed in the microvisual estimation by the percentage of materials removed if the sample underwent gravimetric reduction.³⁵ (Tr. 290, 296-97; Ex. C-46, at 14 & 15).

e. Electron Microscopy

ID-191 recognizes that certain samples can be particularly small, inhomogeneous, or otherwise “difficult” to examine using PLM. (Ex. C-46, at 5, 12-14). Such samples may require different analytical methods, namely the use of an electron microscope,³⁶ to determine the presence of asbestos by providing a far greater magnification of a sample than PLM can provide.³⁷ (Tr. 806, 950-51; Ex. C-46, at 5, 12-14).

3. Testing of the EP Station Samples

After CSHO Peters sent the samples from the EP Station to the Salt Lake Technical Center, all fourteen samples were assigned to chemist Eddie Robinson to analyze them for the presence of asbestos. (Tr. 274-75, 282-83, 302-03; Exs. C-45, C-48). For each sample, Mr. Robinson

³⁵ So, for example, if, after treatment, a sample weighed ten percent less than the sample did pre-treatment, the percentage of asbestos observed in the microvisual estimation of the prepared sample would be reduced by a corresponding ten percent in calculating the amount of asbestos in the sample. (Tr. 290, 296-97; Ex. C-46, at 14 & 15).

³⁶ ID-191 references two types of electron microscopy that might be used in identifying asbestos fibers: Scanning Electron Microscopy or “SEM” and Transmission Electron Microscopy or “TEM.” (Ex. C-46, at 4, 12-14; *see also* 29 C.F.R. § 1910.1001, App. B(6.7)). Of these two methods, only TEM was addressed at trial, but only briefly. (Tr. 805-07, 852-53, 950-51; *see also* Ex. R-24 at 11 & 12).

³⁷ According to Mr. Harvey, TEM allows for a magnification of approximately 20,000x, versus 400x for PLM. (Tr. 806). This is consistent with ID-191’s prescription to use SEM or TEM for samples with particles less than one micrometer in diameter. (Ex. C-46, at 13).

completed a “Bulk Sample Analysis Form,” which is designed to ensure the assigned chemist follows OSHA’s internal procedures for analyzing for the presence of asbestos as set out in ID-191. (Tr. 283-84, 298-300, 958-60; Exs. C-45, C-48).

a. Visual Examination & Ashing

Following the initial gross examination, Mr. Robinson briefly described each sample in the Bulk Sample Analysis Form, describing Samples 1, 2, 3, 4, 6, 7, 10, 11, 12 and 13 simply as “Dust” and Samples 21, 22, 23 and 24 simply as “Insulation.” (Tr. 257-58, 287-88, 298, 303-05, 333; Ex. C-48, at 2-9, 11-16). Mr. Robinson determined that none of the samples except Sample 11 required any preparation to remove interferants or obscurants prior to doing a PLM examination. (Tr. 267-69, 292, 306-07, 792-93; Exs. C-48, at 2-8, 11-16; C-51, at 11; R-24, at 9).

However, during his gross examination of Sample 11, Mr. Robinson observed that the sample contained visible fibers that were bound in a matrix that he described as a “black tarry material,” or a “black hydrocarbon” that “likely ... had mastic in it,”³⁸ that would prevent him

³⁸ Mr. Robinson did not expand on his use of the term “mastic,” which can refer either to the “aromatic resinous exudate from mastic trees used chiefly in varnishes” or, more generally, “any of various pasty materials used as protective coatings or cements.” *Mastic*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/mastic> (last visited June 17, 2026).

from properly examining the sample using PLM.³⁹ (Tr. 288-89, 306-11, 334, 788, 802, 854, 934-36; Exs. C-48, at 9 & 10; C-51, at 9; R-24, at 9). Mr. Robinson therefore ashed Sample 11 for two hours in an approximately 500°C furnace to burn off the interfering material. (Tr. 268-69, 288-89, 308-12, 328-29, 334-35, 788, 791-93, 802, 936-37; Exs. C-46, at 10; C-47, at 36; C-48, at 9). The ashing process reduced the weight of Sample 11 by approximately 33%. (Tr. 290; Exs. C-47, at 36; C-48, at 10; R-24, at 9).

³⁹ Mr. Robinson, who personally examined Sample 11, consistently testified, albeit in varying terms, that he observed tar in the sample and thus decided to ash the sample prior to examination. (Tr. 288-89 (having to ash the sample “[b]ecause it had tar”), 306-07 (describing a “tar-like material” and a “black hydrocarbon” with “mastic in it”), 307-10, 311 (describing a “black tarry material”), 334). The fact that Sample 11 only required ashing prior to Mr. Robinson’s examination, as opposed to treating with other methods like an acid wash, is consistent with Mr. Harvey’s opinion that the sample contained organic tar and not a synthetic material like vinyl. (Tr. 788, 790-92, 796-802, 853-55, 936-37; Ex. R-24, at 9 & 10). Both witnesses agreed that asbestos fibers bound in such a matrix would require some method of liberation before they could become airborne. (Tr. 308-09, 788, 790-92, 796-802, 853-55).

On the other hand, Mr. Crane testified that the materials observed in Sample 11 prior to Mr. Robinson’s preparation and examination could have been many things, including vinyl flooring, “mastic with which the tile was put down,” “the encapsulant on top,” or a sealant known as “Black Beauty,” which the USPS sometimes uses on its facilities’ floors. (Tr. 935; *see also* Tr. 351-54, 564-65).

The Court rejects most of Mr. Crane’s testimony on this point. Mr. Crane never directly observed Sample 11 prior to its ashing, and so the Court finds much of his testimony on what was present in the sample to be speculative. (Tr. 935 (“I didn’t look through the microscope at that sample.”)). Particularly, he never detailed how mastic or encapsulant would be consistent with Mr. Robinson’s observations of a black hydrocarbon or black tarry material in Sample 11. Moreover, his testimony that Sample 11 may have contained vinyl flooring, which according to Mr. Crane himself would require both a THF treatment and ashing prior to examination (Tr. 936-37), is contradicted by the fact that the sample only required ashing prior to Mr. Robinson successfully examining it. (Tr. 268-69, 288-89, 308-12, 328-39, 334-35, 788, 791-93, 802, 936-37; Exs. C-46, at 10; C-47, at 36; C-48, at 9). Mr. Crane’s speculation that the substance may have been the sealant called “Black Beauty,” which another witness described as a “black tar,” is actually consistent with Mr. Robinson’s observations. (Tr. 288-89, 306-11, 334, 351-54, 564-65).

The portion of Mr. Crane’s expert report addressing the presence of tar in Sample 11 is internally and externally contradictory, and the Court likewise rejects it. In the report, Mr. Crane suggests that Mr. Harvey’s “characterization of ashing as used solely to remove the tar [in Sample 11] is incorrect.” (Ex. C-51, at 9). He goes on to state that “any tar present in this case would have been unlikely to obscure the presence of asbestos fiber[s].” *Id.* at 9-10. But Mr. Crane retreats on his initial statements only two paragraphs later, stating that the “[a]shing performed by Mr. Robinson was for the purpose of providing a better estimate of the chrysotile content by removing plant fibers and synthetic fibers as well as some tar.” *Id.* at 10 (emphasis added). And, contrary to Mr. Crane’s account, Mr. Robinson repeatedly testified that he performed ashing on Sample 11 to remove the tar he had observed during his gross examination, not the plant or synthetic fibers mentioned in Mr. Crane’s report, and that he did so because he otherwise could not have properly examined the sample using PLM. (Tr. 288-89, 306-11, 334).

b. Results

Mr. Robinson examined each of the samples collected from the EP Station using PLM. (Tr. 255-56, 258, 271-73, 282-83, 912; Exs. C-46, at 4, 5, 13, 14, 19 & 20; C-47, at 18, 21, 24, 27, 30, 33, 36 & 39; C-48, at 2-9, 11-16; C-51, at 6; R-24, at 9). In so doing, he determined all of the samples except Sample 11 were “non-detect” for the presence of asbestos, meaning they were determined not to contain any visible asbestos fibers.⁴⁰ (Tr. 258, 302-03, 786-87; Exs. C-47, at 18, 21, 24, 27, 30, 33, 36 & 39; C-48, at 2-8, 11-16; C-51, at 11; R-24, at 9). As for Sample 11, Mr. Robinson determined that it contained approximately 10% chrysotile asbestos after ashing, resulting in an estimated 7% in the original sample. (Tr. 90-91, 283-97, 314-16, 786-88, 798; Exs. C-47, at 36; C-48, at 9 & 10; C-51, at 9-11; R-24, at 9; *see also* note 35, *supra*).

E. OSHA’s Findings and Citations

After Mr. Robinson’s findings were finalized,⁴¹ they were reported back to the OSHA area office in Portland. (Tr. 90-91, 234, 278-80, 300, 970-71; Ex. C-47, at 17-41). Based on the sample results and the information collected from the remainder of CSHO Peter’s investigation of the EP Station, OSHA determined that Respondent had violated multiple general industry safety standards governing asbestos and HazCom. (J. Stip. ¶¶ I(5), (8) & (9); Tr. 118-24, 128-30, 133-35, 138-39, 144-46; Exs. C-12, C-13). OSHA therefore issued the three Citations to Respondent, alleging

⁴⁰ Although many of OSHA’s general industry standards on asbestos are not triggered by materials containing less than 1% asbestos (*see* 29 C.F.R. § 1910.1001(b) (definition of “ACM”)), Mr. Robinson indicated that if he had observed *any* amount of asbestos, including an amount less than 1%, in any of the non-detect samples he would have included a “value less than one percent” in his reports. (Tr. 302-03). Correspondingly, OSHA’s Sampling Reports read as follows: “The Reporting Limit for asbestos bulks [sic] is 0.01%.” (Ex. C-47, at 18 (section 33)).

⁴¹ Before findings are sent back to an OSHA field office, a second chemist known as a “checker” will “look over everything in the data package and make sure everything looks correct; that there weren’t any mistakes or anything like that that need to be corrected.” (Tr. 299; *see also* Tr. 279, 959-60; Exs. C-45, C-47, at 18, 21, 24, 27, 30, 33, 36, 39; C-48, at 18). A supervising chemist also signs off on the assigned chemist’s analysis. (Tr. 279, 299; Exs. C-45, C-47, at 18, 21, 24, 27, 30, 33, 36, 39; C-48, at 18).

serious, repeat, and other-than-serious violations of the OSH Act and alleging total penalties of \$108,042. (J. Stip. ¶¶ I(5), (8), (9) & (10)).

IV. Discussion

A. Law Applicable to the Alleged Violations

All of the alleged violations are of general industry safety standards promulgated by the Secretary under the OSH Act. To establish a violation of a safety standard under the Act, the Secretary must prove: (1) the cited standard applied; (2) the employer failed to comply with the terms of that standard; (3) employees were exposed to the hazardous condition covered by the standard; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Atl. Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The Secretary has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361, 1365 (No. 92-3855, 1995).

“Preponderance of the evidence” is defined as:

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Preponderance of the evidence, Black’s Law Dictionary (12th ed. 2024).

B. Citation 1, Item 1 – HEPA Vacuum Standard

Citation 1, Item 1 alleged a serious violation of 29 C.F.R. § 1910.1001(k)(4), which states: “HEPA-filtered vacuuming equipment shall be used for vacuuming asbestos containing waste and debris. The equipment shall be used and emptied in a manner which minimizes the reentry of asbestos into the workplace.”

The Secretary alleged that Respondent's violation of 29 C.F.R. § 1910.1001(k)(4) occurred as follows:

29 CFR 1910.1001(k)(4): The employer did not use and/or empty vacuuming equipment with high-efficiency particulate air (HEPA) filters in a manner which minimized reentry of asbestos into the workplace:

a) On or about 12/15/2022 and at times prior thereto, at the sorting and distribution area in East Portland Station Post Office, located at 1010 SE 7th Avenue, Portland, OR 97214, where floor tiles known to contain asbestos were visibly deteriorated and disturbed by contact with a door locking mechanism, the employer failed to empty the HEPA vacuums in a manner which prevented reentry of asbestos into the workplace due to dust escaping from the back of the vacuum when it was emptied into the garbage can.

Citation at 7.

1. The Standard Applied

29 C.F.R. § 1910.1001(a)(1) states that OSHA's general industry asbestos standard "applies to all occupational exposures to asbestos in all industries covered by the [OSH Act] ...". There is no dispute that the USPS is engaged in an industry covered by the OSH Act. *See* 29 U.S.C. § 652(5); Postal Employees Safety Enhancement Act, Pub. L. No. 105-241, 112 Stat. 1572 (1998) ("An Act to make the [OSH Act] applicable to the [USPS] in the same manner as any other employer.").

However, the asbestos standard does not define the term "occupational exposure," and thus the breadth of that term is unclear from the language of the standard itself. *See* Asbestos Standard Preamble, 51 Fed. Reg. at 22677 (noting that "OSHA has not defined the term 'occupational exposure' in the regulatory text."). In such a scenario, reference to the standard's preamble, "the most authoritative evidence of the meaning of the standard," is warranted. *Superior Rigging & Erecting Co.*, 18 BNA OSHC 2089, 2091 (No. 96-0126, 2000); *see also Tops Markets, Inc.*, 17 BNA OSHC 1935, 1936 (No. 94-2527, 1997) ("When the standard is ambiguous, we turn to

legislative history.”), *aff’d* 132 F.3d 1482 (D.C. Cir. 1997) (table). The Asbestos Standard Preamble makes clear that the standard is meant to apply widely, even to “employees in buildings where asbestos products ha[ve] been installed.” Asbestos Standard Preamble, 51 Fed. Reg. at 22677. Thus, despite the applicability of the standard being couched in terms of exposure, the Court finds that the standard applies where the Secretary has demonstrated the mere presence of ACMs in a building where employees work.⁴² Such is undisputedly the case for the EP Station. (Tr. 349, 538-40, 570, 785, 798; Exs. C-7, at 2; C-34, at 24-26; R-24, at 5).

For this Item, Respondent has collapsed its arguments regarding applicability, noncompliance, and exposure into a single argument in its brief. Resp’t’s Br. 21 & 22. The Court does not find any of Respondent’s arguments alter the Court’s conclusion on applicability.

The Court finds the standard applies.

2. The Secretary Failed to Establish Noncompliance

The cited standard has two requirements: 1) that a HEPA vacuum “be used for vacuuming asbestos containing waste and debris”; and 2) that any such vacuum “be used and emptied in a manner which minimizes the reentry of asbestos into the workplace.” 29 C.F.R. § 1910.1001(k)(4). The Court finds the Secretary has failed to demonstrate noncompliance with either requirement.

As to the standard’s first requirement, the Station’s custodian regularly used a HEPA vacuum to vacuum certain parts of the floor. (Tr. 76-77, 613-14, 647). However, the Secretary has not demonstrated that this vacuum was “used for vacuuming asbestos containing waste and debris” as contemplated by the standard. As Ms. Padilla stated at trial, this HEPA vacuum was

⁴² Of course, the Secretary still needs to prove the element of exposure as part of her prima facie case. *Atl. Battery Co.*, 16 BNA OSHC at 2138.

not designed or intended to be used for the task of collecting asbestos waste or debris. (Tr. 567-68). Further evidence bears out that the vacuum was not engaged in this task. The dust sample taken directly from the vacuum's filter did not contain any discernible amount of asbestos when it was analyzed. (Tr. 258, 302-03, 786-87; Exs. C-47, at 2-3; C-48, at 2; *see also* note 40, *supra* (Mr. Robinson explaining that he would note the presence of any amount of asbestos even if it did not meet the 1% to qualify as an ACM)). Moreover, while the vacuum was used in various areas of the Station's ground floor, including the workroom floor and offices, it was notably *not* used in the vestibule area, the only area where the CSHO, after some effort, obtained a sample that tested positive for asbestos. (Tr. 614; *see also* Tr. 90-91, 283-97, 314-16, 786-88, 798; Exs. C-47, at 36; C-48, at 9 & 10; C-51, at 9-11; R-24, at 9). Samples taken from other areas where the custodian may have actually used the vacuum, like the north and south ends of the main floor, contained no visible amount of asbestos when they were analyzed. (Tr. 76-77, 258, 302-03, 613-14, 647, 786-87; Exs. C-47, at 13; C-48, at 8 & 12; *see also* note 40, *supra*). The Secretary has thus failed to demonstrate noncompliance with the standard's first requirement.

In turn, because the Secretary cannot demonstrate that the HEPA vacuum was actually used to vacuum asbestos waste or debris, he likewise cannot prove the violation as alleged in the Citation, i.e., that the custodian "failed to empty the HEPA vacuums in a manner which prevented reentry of asbestos into the workplace due to dust escaping from the back of the vacuum when it was emptied into the garbage can." (Citation at 7; *see also* Tr. 119-21; Ex. C-13, at 1-3). Simply put, because the vacuum was not used to collect asbestos-containing waste or debris, there was nothing to "minimizes the reentry of" when the custodian disposed of the vacuum's filter in the manner alleged to be violative.

The Secretary nonetheless argues that the Station's custodian was not "trained on the ... proper usage" of the HEPA vacuum and that no training records were produced to show that the Station's "custodians were trained on the proper method to empty the vacuum." Sec'y's Br. 24 & 25. However, while evidence that the Station's custodian was trained on the use of the vacuum may have been relevant to whether or not the USPS was in compliance with the standard, nothing in the language of the standard requires such training. *Cf.* 29 C.F.R. § 1910.1001(j)(7)(iv) (an explicit training requirement for employees engaged in housekeeping operations). The Court therefore does not find the Secretary's argument regarding a lack of training to be compelling where he has failed to demonstrate noncompliance in the first instance. *See Hartford Roofing Co.*, 17 BNA OSHC at 1365 (burden is on the Secretary to set forth evidence for each element of the violation).

Based on the foregoing, the Court finds the Secretary has failed to establish noncompliance with the standard.

3. The Secretary Failed to Establish Exposure & Knowledge

"Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996). Meanwhile, Respondent's knowledge of the violation may be established by showing the employer knew, or with reasonable diligence could have known, of the violative condition. 29 U.S.C. § 666(k); *Jacobs Field Servs. N.A.*, 25 BNA OSHC 1216, 1218 (No. 10-2659, 2015).

For many of the same reasons the Court found the Secretary failed to demonstrate noncompliance with the cited standard, the Court likewise finds that he has failed to demonstrate either the exposure or knowledge elements of the violation. Because the HEPA vacuum was not

used for vacuuming asbestos containing waste and debris, employees were not exposed to asbestos hazards as a result of the manner in which the custodian emptied the vacuum's filter. And, because there was no underlying violation of the cited standard, the Secretary cannot demonstrate that Respondent had either actual or constructive knowledge of any such violation.

4. Conclusion

Because the Secretary failed to establish the elements of noncompliance, exposure and knowledge, the Court VACATES Citation 1, Item 1.

C. Citation 2, Item 1 – As Free As Practicable Standard

Citation 2, Item 1 alleged a repeat-serious violation of 29 C.F.R. § 1910.1001(k)(1), which states: “All surfaces shall be maintained as free as practicable of ACM waste and debris and accompanying dust.”

The Secretary alleged that the violation of 29 C.F.R. § 1910.1001(k)(1) occurred as follows:

29 CFR 1910.1001(k)(1): The employer did not maintain all surfaces as free as practicable of ACM waste and/or debris and accompanying dust:

a) On or about 2-10-2022 and at times prior thereto, at the sorting and distribution area in East Portland Station Post Office, located at 1020 SE 7th Avenue, Portland, OR 97214, where floor tiles were known to contain asbestos were visibly deteriorated and disturbed by contact with a door locking mechanism in the vestibule, postal workers were exposed to asbestos hazards because the employer failed to ensure that the floors were as free as possible of asbestos-containing dust.

Citation at 8.

1. The Standard Applied

As the Court previously concluded, OSHA's asbestos standards apply to the employees at Respondent's EP Station by virtue of the fact that ACMs were installed in the facility. *See* Part IV(B)(1), *supra*.

Nevertheless, Respondent contests the applicability of this standard, arguing that because it is a “performance standard” and not a “specification standard,” the Secretary “cannot *presume* that a hazard exists, but instead, must *prove* that a hazard exists” before the standard applies. Resp’t’s Br. 23 (emphasis in original); *see generally* *Lowe Constr. Co.*, 13 BNA OSHC 2182, 2185 (No. 85-1388, 1989) (discussing the difference between a performance and specification standard). The Court disagrees. In *Central Florida Equipment Rentals, Inc.*, which involved an alleged violation of a performance standard, the Commission applied the general rule that “the Secretary need not prove the existence of a hazard each time a standard is enforced, unless the standard by its terms is operative only when a hazard has been established.” 25 BNA OSHC 2147, 2150-51 (No. 08-1656, 2016) (“[T]here is no question that the cited provision is a ‘performance’ standard.”). “In other words, the promulgation of such a standard means OSHA has established that the specified condition presents a hazard.” *Id.* at 2150.

And, indeed, many performance standards target specific workplace hazards. *See, e.g., Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2286-87 (No. 97-1073, 2007) (discussing a performance standard that addresses employee exposure to lead dust); *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2198 (No. 00-1052, 2005) (discussing a performance standard that addresses the hazards associated with mechanical presses); *Lowe Constr. Co.*, 13 BNA OSHC at 2185 (discussing a performance standard that addresses egress from trenches). In such instances, the performance standard merely grants the employer flexibility in *how* to abate the targeted hazard. *See Cent. Fla. Equip. Rentals*, 25 BNA OSHC at 2151 (“We also note that there is no question that the cited provision is a ‘performance’ standard. It identifies an objective ... but does not specify the means for accomplishing it.”); *Siemens Energy & Automation, Inc.*, 20 BNA OSHC at 2198; *Lowe Constr. Co.*, 13 BNA OSHC at 2185 (detailing the change in

requirements for a standard that was changed from a specification standard to a performance standard).

Neither case cited by Respondent compels a different conclusion for the cited standard or even for performance standards in general. In *Clifford B. Hannay & Son, Inc.*, the Commission acknowledged that “[o]rdinarily, when a standard prescribes specific means of enhancing employee safety, a hazard is presumed to exist if the terms of the standard are violated.” 6 BNA OSHC 1335, 1337 (No. 15983, 1978). Even so recognizing, the Commission nonetheless accepted, under the facts of the particular case, the employer’s evidence that a violation of the cited standard had not posed any danger to its employees and thus reclassified the violation as *de minimis*. *Id.* at 1337-38; *see also* 29 U.S.C. § 658(a) (“The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.”). In short, the Commission in *Clifford B. Hannay & Son* merely adjusted the classification of the violation because facts of the case supported a reduction to the severity of the violation; it did not set forth any holding on the difference between performance and specification standards. Accordingly, the Court finds this case inapposite to Respondent’s argument.

Respondent also cites *Fabricated Metal Products, Inc.*, in which the Commission stated, in a footnote, that with “a specification standard ... proof of noncompliance with the standard establishes the existence of a hazard” but that “[w]ith a *general* standard ... the Secretary must prove that the violation of the standard presents a hazard.” 18 BNA OSHC 1072, 1073 n.4 (No. 93-1853, 1997) (emphasis added).

It is not clear to the Court that the Commission’s use of the term “general standard” in *Fabricated Metal Products* is equivalent to the term “performance standard,” as Respondent seems

to suggest. Based on the Court’s reading of the case, the term seems to refer to the machine-guarding standard entitled “[g]eneral requirements for all machines,” which has the term “hazard” written into the standard and thus requires the Secretary to prove the existence of a hazard to establish a violation. *Fabricated Metal Prods.*, 18 BNA OSHC at 1073 n.4 (differentiating between 29 C.F.R. § 1910.219, which applies specifically to “all types and shapes of power-transmission belts,” with § 1910.212, which applies generally to “all machines”); *see also* 29 C.F.R. § 1910.212(a) (“One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards ...” (emphasis added)); *see also*, e.g., *Amerisig Se., Inc.*, No. 93-1429, 1995 WL 49329, at *3 (OSHCRCALJ, Feb. 6, 1995) (“Section 1910.212(a)(1) is one of the Secretary’s general standards. It applies generally to protect employees when they are exposed to diverse point-of-operation hazards. Unlike for specific [machine-guarding] standards, the Secretary must show that the hazard addressed by the general standard existed.” (citing *ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1147 (No. 88-1250, 1993))). This reading best comports with the Commission’s holding in *Central Florida Equipment Rentals* that, even for performance standards, the existence of a hazard must be an express element of a standard before the Secretary is required to make such a showing. *Cent. Fla. Equip. Rentals*, 25 BNA OSHC at 2150.

Here, the cited standard does not have the “presence of a hazard [a]s an element in the text of the standard itself” and thus there is no requirement that the Secretary demonstrate the existence of a hazard to establish that the standard applies. *Id.* Even still, the Court notes that, whatever might be the case with other performance standards, OSHA’s asbestos standard specifically and pointedly identifies the hazard it is designed to address: the presence of asbestos in the workplace. 29 C.F.R. § 1910.10001(a); Asbestos Standard Preamble, 51 Fed. Reg. at 22677. In promulgating

the standard, the Secretary identified troves of evidence that the presence of asbestos in the workplace can be hazardous to employees, including those that do not work directly with asbestos. *See* Asbestos Standard Preamble, 51 Fed. Reg. at 22615-22631, 22677. Thus, even if Respondent's argument regarding the existence of a hazard for performance standards is correct, the Secretary has adequately proven the existence of a hazard here.

Thus, the Court again finds the Secretary only needs to show that the EP Station's employees worked in a building where ACMs were installed to establish that the standard applied. *See* 29 C.F.R. § 1910.1001(a) (specifically identifying asbestos as the hazard); *see also* Asbestos Standard Preamble, 51 Fed. Reg. at 22677 ("Significant areas of concern expressed were exposures to office employees in buildings where asbestos products ha[ve] been installed ... [This situation is] covered by this standard. The employee's presence in the workplace places him at increased risk from asbestos exposure regardless of whether the employee is actually working with asbestos.").

The Court therefore finds the standard applied.

2. The Secretary Failed to Establish Noncompliance

a. Dust v. Debris

Although the Secretary bears the burden of establishing this element in the first instance, the Court will first address Respondent's main argument regarding noncompliance because, if accepted, it would necessarily narrow the scope of the potential violation and thus the Court's analysis of the noncompliance element.

As the Court previously laid out, the standard requires an employer to maintain surfaces "as free as practicable of ACM waste and debris and accompanying dust." 29 C.F.R. § 1910.1001(k)(1). Respondent's argument regarding noncompliance rests on what it views as a

distinction between “dust” and “debris” in the cited standard, as well as the Secretary’s description of the violation in the Citation. This description first sets forth as follows: “The employer did not maintain all surfaces as free as practicable of ACM waste and/or debris and accompanying dust ...” Citation at 8 (emphasis added). However, the narrative description of the violation then goes on to allege that Respondent violated the standard when it “failed to ensure that the floors were as free as possible of asbestos-containing dust.” *Id.* (emphasis added). In other words, the Secretary included “waste and/or debris” in the initial, general description of the violation but then omitted both terms from the more specific, narrative description of the violation.

Based on this omission, Respondent argues as follows: Sample 11, the only sample shown to actually contain asbestos, was not in fact “dust” but was “debris.” Resp’t’s Br. 26. Respondent emphasizes that the cited standard differentiates dust from debris, but the Citation only alleges Respondent’s failure to keep the floors free from dust. *Id.* at 26. Respondent then proceeds at length to point out what it believes to be the difference between dust and debris. *Id.* at 26-28. Respondent again emphasizes that the narrative portion of the Citation only alleged that it “failed to ensure that the floors were as free as possible of asbestos-containing dust” and argues that the “sample results do not support the violative condition [the Secretary] chose to cite.” *Id.* at 29-30 (emphasis in original). Respondent continues that the “Citation explicitly cites dust” and that a “strained interpretation of the standard by [the Secretary that includes debris] is unfair to Respondent, as the employer.” *Id.* at 30.

Respondent’s final statement frames its argument as one of fair notice of the alleged violation. On this point, the OSH Act requires a citation to “describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated.” 29 U.S.C. § 658(a). The Commission has held that “the

particularity requirement of section 9(a) does not require minute detail; it requires only that the employer be given fair notice” of the alleged violation. *Meadows Industries, Inc.*, 7 BNA OSHC 1709, 1710 (No. 76-1463, 1979). In other words, “[c]itations must give fair notice to the employer so that it understands the charge being made and has an adequate opportunity to prepare and present a defense.” *Babcock & Wilcox v. Sec’y of Labor*, 622 F.2d 1160, 1164 (3d Cir. 1980). Thus, even citations that are “not artfully drafted” are acceptable so long as the employer is on sufficient notice of the issues raised by the citation and is not prejudiced in preparing its defense. *See Lancaster Enters., Inc.*, 19 BNA OSHC 1033, 1036 n.12 (No. 97-0771, 2000); *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1822 (No. 88-2572, 1992) (“To determine whether a party has suffered prejudice, it is proper to look at whether the party had a fair opportunity to defend ...”).

The Court finds Respondent was on sufficient notice of the violation, despite the Secretary citing only “dust” in the narrative portion of the Citation. The Court first notes that the initial description of the violation in the Citation points to “waste and/or debris and accompanying dust” as the basis for the violation. Citation at 8 (emphasis added). Respondent has not proffered any reason that the Court should disregard this portion of the Citation in determining whether it provided sufficient notice of the nature of the violation alleged. *See Gen. Dynamics Land Sys. Div., Inc.*, 15 BNA OSHC 1275, 1279 (No. 83-1293, 1991) (“It is well settled that administrative pleadings are to be liberally construed ... This has been particularly true for citations issued under the [OSH] Act”), *aff’d*, 985 F.2d 560 (6th Cir. 1993).

However, even if the Court were to only focus on the portion of the Citation highlighted by Respondent, the Court finds Respondent was clearly prepared to present a defense to the alleged violation, regardless of whether Sample 11 was properly characterized as “dust” or “debris.” By way of a few examples, at trial Respondent’s attorney cross-examined: the CSHO concerning his

collection techniques for Sample 11 (Tr. 170-72), AD Tipton on his understanding of the requirements of the cited standard (Tr. 234-36), and Mr. Robinson on his categorization of Sample 11 as “dust” versus “debris.” (Tr. 303-05). Respondent also retained an expert witness, Mr. Robinson, to opine on the propriety of the CSHO’s sampling techniques and the difference between dust and debris. (Tr. 793-97, 798-99; Ex. R-24, at 9 & 10). Moreover, despite Respondent’s demonstrated ability to present a defense to the violation, it has “not pointed ... to any evidence that it would have presented had it had more complete notice of the nature of the charges.” *ConAgra Flour Milling Co.*, 15 BNA OSHC at 1822.

On a more fundamental level, the Court finds the alleged distinction between “dust” and “debris” that Respondent explored at trial and now emphasizes at length in its post-trial brief is really a distinction without a difference. The cited standard requires an employer to keep its surfaces as free as practicable of *both* “debris and accompanying dust.” 29 C.F.R. § 1910.1001(k)(1) (emphasis added). Thus, regardless of whether Sample 11 was properly classified as dust or debris, it was covered by the standard, and Respondent was required to keep its surfaces as free as practicable from it. *See USPS d/b/a Kenton Station*, No. 23-1004, 2026 WL 1110270, at *26 (OSHR CALJ, Mar. 16, 2026) (similarly concluding that “[t]he distinction between ‘dust’ and ‘debris’ has little significance when reviewed under the lens of fair notice since the standard requires a workplace be kept clear of asbestos whether it is asbestos dust or asbestos debris.”).

Finally, to the extent that debris as a basis for the alleged violation was at any point an “unpleaded issue” during the course of these proceedings, the Court finds that by the time of the trial Respondent “squarely recognized” that the parties were trying this issue and addressed it at length accordingly. *See Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385, 1387-88 (No. 1995)

(“[C]onsent to try an unpleaded issue may be express or implied, but it occurs only when the parties squarely recognized that they were trying an issue not raised in the pleadings.”); *see also* (Tr. 303-05, 333 (cross-examining Mr. Robinson on the difference between dust, debris, and bulk samples); Tr. 793-97, 798-99 (eliciting direct testimony from Mr. Harvey on alleged differences between dust and debris); Tr. 972-73 (cross-examining Mr. Crane on the difference between dust and debris); Ex. R-24, at 9 & 10 (expert report on dust versus debris)).

For these reasons, the Court will not “inflexibly hold the Secretary to a narrow construction of the language of a citation” based on the Citation’s use of “dust” but not “debris” in the narrative portion of the violation description. *Gen. Dynamics Land Sys. Div., Inc.*, 15 BNA OSHC at 1279. The Court rejects Respondent’s contrary arguments made on this point.

b. Respondent’s Efforts to Maintain as Free as Practicable

The Secretary argues, and the Court agrees, that the cited standard is a performance standard because “[i]t identifies an objective ... but does not specify the means for accomplishing it.” *Cent. Fla. Equip. Rentals, Inc.*, 25 BNA OSHC at 2151; *see also* Sec’y’s Br. 28. The requirements of a performance standard “are interpreted in light of what is reasonable” and include only those measures that a “reasonably prudent employer” would recognize as necessary under the circumstances. *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC at 2287; *see also Brennan v. Smoke-Craft, Inc.*, 530 F.2d 843, 845 (9th Cir. 1976) (where a standard does not state the means of compliance, applying the standard of what “a reasonably prudent man familiar with the industry would find necessary to protect against this hazard”); *Assoc. Underwater Servs.*, 24 BNA OSHC 1248, 1250 (No. 07-1851, 2012).

Neither party has cited any authority definitively interpreting the meaning of the cited standard.⁴³ However, in interpreting a similarly worded lead dust standard,⁴⁴ OSHA has stated that “the requirement [of keepings surfaces as free as practicable] is met when the employer is vigilant in his efforts to ensure that surfaces are kept free of accumulation of lead-containing dust.” OCCUPATIONAL SAFETY & HEALTH ADMIN., Letter of Interpretation RE: “Clarification of ‘as free as practicable’ and lead contamination under 29 CFR 1926.62,” (Jan. 13, 2003) (available at <https://www.osha.gov/laws-regs/standardinterpretations/2003-01-13-1>) (“2003 Lead Interpretation Letter”);⁴⁵ see also *Union Tank Car Co.*, 18 BNA OSHC 1067, 1069-70 (No. 96-0563, 1997) (interpretation letters can serve as some authority as to the meaning of ambiguous regulations). This involves an evaluation of “the employer’s housekeeping schedule, the possibility of exposure from these surfaces, and the characteristics of the workplace.” 2003 Lead Interpretation Letter. OSHA continued that “[t]he intent of this provision is to ensure that

⁴³ The Court finds *Dec-Tam Corp.*, 15 BNA OSHC 2072 (No. 88-253, 1993) (“*Dec-Tam*”), cited by the Secretary, to be of limited use in determining what is required by the standard. Although the case involved an alleged violation of the same asbestos housekeeping standard, Section (k)(1), the Commission did not interpret the meaning of “as free as practicable” or extrapolate on what is required to comply with the standard. Rather, the issue raised by the employer was whether the violation of Section (k)(1) was duplicative of another citation item alleging a violation of Section (f)(1)(i), which requires employers to “institute engineering controls and work practices to maintain employee exposure to or below” the permissible levels set forth in Subsection (c). *Dec-Tam*, 15 BNA OSHC at 2085-86. The question before the Commission was whether or not the employer could have complied with both standards by using “wet removal methods.” *Id.* at 2086. The Commission found that the employer could have. *Id.* In so finding, the only conclusion reached by the Commission that even touched upon compliance with Section (k)(1) was that, on the record before it, wet removal methods *could* demonstrate compliance with the standard. *Id.* The Commission made no finding that wet removal methods, or indeed any other specific method, were required by the standard. Nor did the Commission expound on the meaning of “as free as practicable.” The Court finds this holding of limited utility in resolving the issues raised here.

⁴⁴ 29 C.F.R. § 1926.62(h)(1) states: “All surfaces shall be maintained as free as practicable of accumulations of lead.”

⁴⁵ Subsequent to the events in this case, OSHA issued another letter interpreting the same lead-in-construction standard in a manner similar to the 2003 Letter. OCCUPATIONAL SAFETY & HEALTH ADMIN., Letter of Interpretation RE: “Clarification of ‘as free as practicable’ lead contamination of surfaces,” (Sept. 29, 2025) (available at <https://www.osha.gov/laws-regs/standardinterpretations/2025-09-29>) (“2025 Lead Interpretation Letter”).

employers regularly clean and conduct housekeeping activities to prevent avoidable lead exposure” *Id.*

Here, the record establishes that Respondent undertook several measures to ensure that its floors were as free as practicable of accumulations of asbestos dust and debris. These measures included:

1) most prominently, the encapsulation of all the asbestos floor planking installed in the facility. This process involved applying three layers of encapsulation (a polyurethane adhesive, fiberglass netting, and aluminum foil) directly to the asbestos-containing floor planks, and then concrete floor patching and a vinyl tile overlay on top of the encapsulants (Tr. 411, 517, 532, 541, 562-64, 616, 998-1000, 1025-27; Exs. R-2, at 5-11; R-24, at 5 & 6; R-27, at 2 & 6; note 16, *supra*);

2) the Station’s custodian regularly sweeping and mopping the floors, including sweeping and “spot” mopping the floors daily and performing one “large mop” weekly (Tr. 72-, 76-77, 532-33, 612-13; Exs. C-3, at 4; C-39); and

3) the Station’s custodian vacuuming large parts of the ground floor daily, including the work floor and offices (Tr. 76-77, 613-14, 647).

c. The Secretary’s Arguments for Noncompliance

Because the Secretary bears the burden of demonstrating noncompliance, he must show that a reasonably prudent employer would have enacted additional measures to keep the Station’s floors as free as practicable from asbestos than Respondent already had in place. *See Smoke-Craft, Inc.*, 530 F.2d at 845; *Assoc. Underwater Servs.*, 24 BNA OSHC at 1250; *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC at 2287. The Secretary advances three arguments in support of noncompliance; none is persuasive.

i. *Dust Accumulation & Dec-Tam*

As a general matter, the Secretary, citing *Dec-Tam*, argues that the accumulation of dust around the Station, which allowed the CSHO to obtain his samples, was itself evidence that Respondent needed additional housekeeping measures beyond those it had already instituted to keep the floors free as practicable from asbestos-containing dust and debris. The Court finds the Secretary's reliance on *Dec-Tam* for this proposition to be misplaced.

Dec-Tam involved a company that specialized in asbestos removal engaged in a project to remove ACMs from a ferry boat. *See Dec-Tam Corp.*, No. 88-253, 1989 WL 406324, at *1 (OSHR CALJ, June 12, 1989); *see also Dec-Tam Corp.*, 15 BNA OSHC at 2073 (noting that the facts contained in the ALJ's decision "are largely undisputed"). As a result, *Dec-Tam* implicated not only many times more asbestos than the instant matter, but also an employer specifically disturbing the asbestos to remove it. *See Dec-Tam Corp.*, 1989 WL 406324, at *1 ("The removal project involved the elimination of asbestos-containing pipe lagging and transite board from the decks and from the holds below the main deck, and removal of asbestos covering ductwork, between windows, underneath stairways, in gypsum board, and between the car deck and the upper passenger deck."). Thus, while the Secretary can technically argue on the basis of *Dec-Tam* that "the accumulation of dust can be evidence of failure to meet the standard," (Sec'y's Br. 30), the Court finds it would severely strain a fair reading of *Dec-Tam* if this assertion was applied to the everyday postal operations occurring at the EP Station. *Cf. Dec-Tam Corp.*, 1989 WL 406324, at *10 (detailing the heavy amount of accumulation of asbestos-containing dust and debris in various areas of the ferry, including photographs of "the accumulation of dust and waste on the floors and ledges of the hold").

But even if *Dec-Tam* supplied a more general principle about asbestos dust accumulation that could be applied to this case, the evidence here shows that, unlike the dust that had accumulated throughout the hold of the ferry in *Dec-Tam*, any dust that had accumulated on the surface of the floors in the basement, work floor, and vestibule of the EP Station did not even contain asbestos. (Tr. 258, 302-03, 786-87; Exs. C-47, at 2-14, 18, 21, 24, 27, 30, 33 & 36; C-48, at 1-8, 11 & 12; C-51, at 10 & 11; R-24, at 9). The only sample that tested positive, Sample 11, was not from an accumulation of dust anywhere on the floor's surface but instead was taken from the quarter-sized hole near the doors in the vestibule. (Tr. 90-91, 283-97, 314-16, 786-88, 798; Exs. C-5, at 1; C-47, at 36; C-48, at 9 & 10; C-51, at 9-11; R-24, at 9). The Secretary's own sampling therefore shows that this case varies significantly from the facts presented in *Dec-Tam*. Accordingly, the Court places little weight on that case in determining whether Respondent was in compliance with the cited standard.

ii. Proposed Additional Measures

The Secretary also argues that Respondent could have instituted two additional measures to keep its surfaces free from asbestos dust and debris: 1) regular waxing of the floors in addition to sweeping, mopping, and vacuuming them (Sec'y's Br. 29 & 30); and 2) repairing the damage to the floors in the vestibule that had been caused by the door pins (*Id.*). The Court addresses each in turn.

1. Waxing

The Secretary argues that Respondent failed to regularly wax the floors in the EP Station and that by so failing it "contradicted USPS's own floor maintenance directives, resulting in asbestos hazards." Sec'y's Br. 29 & 30. As the Court previously noted, there is insufficient evidence in the record to conclude that the floors of the EP Station were waxed with any regularity

at the time of OSHA's investigation. *See* Part III(B)(3)(b)(iv)(3) & note 21, *supra*. Even still, the Court disagrees with the Secretary that lack of waxing "contradicted USPS's own floor maintenance directives" or "result[ed] in asbestos hazards" in the Station. Sec'y's Br. 30.

The "floor maintenance directive" to which the Secretary points cross-references OSHA's own regulations on the care of "asbestos-containing flooring material." (Ex. C-40; *see also* 29 C.F.R. § 1910.1001(k)(7); Ex. C-28, at 51-53, 120 & 121). The Court notes that Respondent was not cited with violating this standard. However, to the extent that the practices described in Subsection (k)(7) can inform Respondent's responsibilities under Subsection (k)(1), the Court finds those practices were not relevant to the Station's floors. These requirements, including any requirements for regular waxing,⁴⁶ relate to "asbestos-containing floor material." However, the asbestos-containing floor planks in the EP Station were completely encapsulated with layers of polyurethane, fiberglass netting, and aluminum foil, on top of which there was a layer of concrete floor patching and a vinyl tile overlay. (Tr. 422, 517, 541, 616, 998-1000, 1025-27; Exs. R-2, at 5-11; R-24, at 5 & 6; *see also* note 16, *supra*). Thus, any waxing of the Station's floors would not have been applied to the asbestos-containing floor material, i.e., the underlying, encapsulated floor planks, but instead to the vinyl tiles on top of the planks. (Tr. 9999-1000). In short, the practices described in Subsection (k)(7), as referenced in the USPS maintenance directives cited by the Secretary, do not apply to encapsulated floors like those in the Station.

⁴⁶ Subsection (k)(7) does not so much prescribe certain activities to care for asbestos flooring as circumscribe how those activities should be performed. *See, e.g.*, 29 C.F.R. § 1910.1001(k)(7)(iii) ("Burnishing or dry buffing may be performed only on asbestos-containing flooring which has sufficient finish so that the pad cannot contact the asbestos-containing material."). However, as the Secretary points out, the USPS's own internal directives seem to acknowledge that a combination of stripping, sealing, and waxing should be applied to asbestos-containing floors to properly maintain them. (Ex. C-28, at 120 & 121).

Moreover, any benefits that regular waxing might offer, like binding the asbestos fibers to prevent them from becoming airborne, were already permanently accomplished when the Station's floors were encapsulated. (Tr. 230, 517-18, 532, 541, 559-60, 615-16, 618-19, 810-11, 953, 999-1000; Exs. C-13, at 4 (recommending encapsulation as a means of abating an alleged asbestos hazard); C-24, at 2; C-28, at 111, 145-47, 244 (defining encapsulation as "the treatment of ACBMs with a material that surrounds or embeds asbestos fibers in an adhesive matrix to prevent the release of fibers"; R-2, R-24, at 5 & 6 (concluding that once the floors were encapsulated "there would be no source of asbestos fibers during routine operations in the Station"))).

The Secretary has therefore not demonstrated that waxing the vinyl tiles on top of the encapsulated floor planks would have done anything further to address the potential accumulation of asbestos-containing dust or debris or that a reasonably prudent employer would regularly wax a vinyl overlay to comply with the standard. *See* Asbestos Standard Preamble, 51 Fed. Reg. at 22699 ("It is OSHA's belief that materials that have been treated in the manner described in the exception (such as bonding or coating) would not generally release airborne concentrations of asbestos above the action level"); *cf.* 2003 Lead Interpretation Letter (stating, in response to whether "sealing the lead in place" represents compliance with the practicability language of the standard, that "[t]he intent of the 'as-free-as-practicable' requirement is to ensure that accumulations of lead dust do not become sources of employee lead exposures. Therefore, any method that achieves this end is acceptable."); 2025 Lead Interpretation Letter ("Alternative methods to cleaning surfaces may be acceptable if they minimize the likelihood of lead becoming airborne. An example is to encapsulate the lead").

2. Damage Repair

The Secretary also points to the damage in the floors in the vestibule area caused by the metal rods from the swinging doors being pushed into the floor. Sec’y’s Br. 29. He argues that USPS did not diligently repair this damage, such that “when OSHA went to the facility, it found asbestos dust and debris in the vestibule area where the floor was damaged.” *Id.* at 30. The Court disagrees with the Secretary’s contentions.

As an initial matter, the Court cannot conclude on the available evidence that all of the “damage” observed in the vestibule area even reached beyond the vinyl tile overlay or concrete floor patching installed on top of the encapsulated floor planks. *See* notes 16 & 17, *supra*. Although the photographs of the vestibule area depict several grooves in the vinyl floor and what could be described as some indentations into the concrete patching underneath the vinyl, the Secretary has not shown that these grooves or indentations reached beyond those layers, through the three layers of encapsulant (aluminum foil, fiberglass netting, and polyurethane adhesive), to the asbestos-containing floor planks underneath.⁴⁷ *See* notes 16 & 17, *supra*. Without such evidence, or direct evidence that asbestos-containing dust or debris tended to accumulate in these grooves and indentations (such as positive sampling), the Court cannot conclude by a preponderance of the evidence that repairing the vinyl tile or concrete patching on top of the encapsulant would have further reduced the accumulation of asbestos-containing dust or debris or that a reasonably prudent employer in Respondent’s position would have taken such measures. *See Smoke-Craft, Inc.*, 530 F.2d at 845; *Assoc. Underwater Servs.*, 24 BNA OSHC at 1250; *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC at 2287.

⁴⁷ As Mr. Johnson explained, “a lot of people, when we remove the tile ... mistake the broken concrete patch ... as broken asbestos tile, but that’s not the case. The asbestos tile is still under the encapsulant. That’s just concrete floor patch.” (Tr. 1000).

This leads the Court to the lone area of the Station where the Secretary *did* prove the existence of asbestos-containing debris: the quarter-sized hole from which the CSHO extracted Sample 11. (Tr. 85, 90-91, 170, 283-97, 314-16, 350-51, 404-05, 431, 436, 468, 471-72, 624-25, 628-29, 634-35, 656-59, 680-81, 786-88, 798; Exs. C-5, at 1; C-47, at 36; C-48, at 9 & 10; C-51, at 9-11; R-24, at 9). The Court finds the presence of asbestos in the quarter-sized hole does not show Respondent failed to keep the surface of its floors as free as practicable from asbestos or that Respondent was required to repair this hole to do so.

The Court first notes that Sample 11, having been obtained from a hole in the floor, does not directly relate to the presence of asbestos on floor's *surface*, which is where the cited standard governs the accumulation of asbestos dust and debris. *See* 29 C.F.R. § 1910.1001(k)(1). The samples that were taken from the surface of the Station's floor all tested negative for the presence of asbestos. (Tr. 258, 302-03, 786-87; Exs. C-47, at 2-14, 18, 21, 24, 27, 30, 33 & 36; C-48, at 1-8, 11 & 12; C-51, at 10 & 11; R-24, at 9).

More to the point, though, is the fact that the CSHO was only able to extract Sample 11 by scraping around inside the hole with a metal tool⁴⁸ for at least a minute, if not longer. (Tr. 405-10, 429-30, 468-70, 479-80, 494-97, 504, 621-22, 624-26, 699-701; *see also* Tr. 789-90, 797-98; Ex. R-24, at 9; note 29, *supra*). This indicates to the Court that any ACMs present in the small, quarter-sized hole had little chance of ever being released, let alone accumulating in any meaningful measure on the surface of the Station's floors, absent an ample and deliberate disturbance of the materials inside the hole.

Moreover, the asbestos fibers found in Sample 11 were initially bound in a tar matrix, which had to be removed by ashing. (Tr. 288-89, 306-11, 334, 788, 790-92, 796-802, 853-55; Ex. R-24, at 9 & 10; note 39, *supra*). The fibers being bound in a tar matrix indicates they were not friable and thus had a low chance of being liberated such that they could accumulate in any

⁴⁸ As the Secretary points out, the witnesses that described CSHO Peters using the metal instrument to extract Sample 11 from the hole near the vestibule door did not provide a uniform description of the instrument. Sec'y's Br. 23. Mr. White and Ms. Bulbul described the instrument as a "flathead screwdriver." (Tr. 405, 469-70). Mr. Collins described the instrument more generically as an approximately four-inch-long metal "pick" or simply a metal "tool." (Tr. 624, 699). Mr. White and Ms. Bulbul added that, after digging around the hole with the screwdriver, the CSHO extracted Sample 11 with a pair of tweezers. (Tr. 405, 468-69). Mr. Collins mentioned seeing these tweezers but did not specifically state that the CSHO used them to extract Sample 11 from the hole. (Tr. 624).

The Secretary argues that neither Collins nor White's testimony on the collection of Sample 11 is credible because they testified to the CSHO using different instruments when digging around in the hole. Sec'y's Br. 22 & 23. The Court does not find the witnesses' characterization of the instrument the CSHO used to be of any significant import in determining their credibility. Both witnesses offered testimony that was sufficiently similar and corroborative to find that the CSHO used *some* metal instrument to collect Sample 11 from the hole. (Tr. 405-10, 429-30, 32-22, 624-26, 699-701). The Secretary's argument also fails to account for the testimony of Ms. Bulbul, who similarly saw the CSHO use a metal instrument to collect the sample. (Tr. 468-70, 479-80, 494-97, 504).

The Court further finds the exact nature of the instrument used to extract Sample 11 is ultimately inapposite to the issues raised in this case. Three witnesses observed the CSHO while he collected Sample 11 from the hole in the floor of the vestibule: Mr. White, Ms. Bulbul, and Mr. Collins. Although their accounts differed to some degree, all three witnesses testified that the CSHO Peters did not use the brush and card method to extract Sample 11 but instead used some metal instrument to dig out the sample from inside the hole. (Tr. 405-10, 429-30, 468-70, 479-80, 494-97, 504, 621-22, 624-26, 699-701). This finding is sufficient to guide the Court's analysis for noncompliance with the cited standard.

meaningful way on the surface of the Station's floors. (Tr. 289, 306-09, 788, 790-92, 796-802, 853-55; Ex. R-24, at 9 & 10; *see also* Ex. C-34,⁴⁹ at 24-26 (designating the original ACM planks installed in the Station as non-friable and assigning the planks a "Risk Assess./Hazard Ranking" of "1b"), *id.* at 56 (indicating that a hazard ranking of 1b means "ACBM Disturbance Potential" is "Low")).

Based on these considerations, the Court finds that the presence of asbestos in Sample 11 is insufficient to show that repair of the quarter-sized hole in the vestibule area was necessary to comply with the cited standard. In fact, based on the significant efforts required to collect Sample

⁴⁹ Because of the tar observed in Sample 11, Mr. Harvey opined that the sample contained an actual piece of the Station's original floor planks, the composition of which he believed was "asphaltic." (Tr. 790-92; Ex. R-24, at 9 & 10). Mr. Crane disagreed with Mr. Harvey's conclusion, stating that the original flooring was actually vinyl, and thus Mr. Robinson's treatment of Sample 11, i.e., simply ashing it prior to examination, was inconsistent with the sample containing an original piece of the flooring. (Tr. 935-37; Ex. C-51, at 11). Both positions are based on the 1997 Survey, which only generically describes the flooring as "floor plank," "black floor plank" or at one point, for purposes of testing, simply "black material." (Ex. C-34, at 6, 20, 24-26 & 40). However, one photograph caption near the end of the Survey describes the original flooring as "VINYL FLOOR TILE; 1'x2' BLACK FLOOR PLANK." (Ex. C-34, at 49).

The Court finds the 1997 Survey provides insufficient information to establish the composition of the original flooring, either as asphaltic/tar, as Mr. Harvey characterized it, or as vinyl, as Mr. Crane characterized it. In turn, the Court cannot conclude whether either expert was correct in his assessment on whether Sample 11 contained a piece of the original floor planking.

However, the original floor planks were the only known ACM in the EP Station, with the fire doors being only presumed to contain asbestos. (Tr. 98, 785-86; Ex. C-34, at 5, 6). And, the CSHO obtained Sample 11 from a hole in the ground, near the original planks. Based on these established facts, the Court does find that the *asbestos* observed in Sample 11, more likely than not, originated from the floor planks, whatever their composition, even if the sample itself was not a piece of the planks. Those planks, as described in the 1997 Survey, contained non-friable asbestos that was unlikely to pose a risk of becoming airborne. (Ex. C-34, at 24-26, 56). The Court cites the Survey here only to support this point.

11,⁵⁰ the Court is not convinced that the quarter-sized hole in the vestibule contributed to any accumulation of asbestos-containing dust or debris on the surface of the Station's floors. *Cf.* Asbestos Standard Preamble, 51 Fed. Reg. at 22699 ("It is OSHA's belief that materials that have been treated in the manner described in the exception (such as bonding or coating) would not generally release airborne concentrations of asbestos above the action level"). Thus, the Secretary has not proven that reasonably prudent employer would have repaired this hole in order to comply with the cited standard.

d. Conclusion

The Court finds Respondent instituted several measures to keep the surface of its floors as free as practicable from asbestos-containing dust and debris. The Secretary has failed to demonstrate that the accumulation of dust on the Station's floors, without more, demonstrated noncompliance with the cited standard. Additionally, the Secretary failed to demonstrate that a reasonably prudent employer in Respondent's position would have employed the additional measures he has proposed or that such measures would have further reduced any accumulation of

⁵⁰ In emphasizing the CSHO's collection methods for obtaining Sample 11, the Court does not intend to ascribe any bad faith to the CSHO's motive or method for collecting the positive sample. As Mr. Crane made clear several times at trial, the point of sampling in an area where ACMs are already known to be present, like the EP Station's floors, is simply "for the purpose of strengthening our knowledge base that [the asbestos is] there" (Tr. 924; *see also* Tr. 945-48, 976-78). In fact, he not only fully endorsed the CSHO's collection method as a means to this end but went further, stating that some CSHOs use knives or other more drastic implements to obtain positive samples. (Tr. 921-22, 947 ("Whatever method is easiest to get it out of the hole would have been appropriate."), 977).

The Court only emphasizes the effort it took for the CSHO to obtain Sample 11 to demonstrate the low likelihood that any ACMs in the hole could be released from the hole absent a deliberate effort to release them. The simple truth is that if the CSHO had dug deep enough into the Station's floors, by using either a screwdriver or a chisel or a jackhammer, any sample he would have obtained after such an effort would almost certainly test positive for asbestos. Respondent's own 1997 Survey confirms as much. However, since OSHA's regulations do not require an employer to remove all ACMs from a workplace, only to keep the surfaces of the workplace as free as practicable from asbestos dust or debris, the Court finds that a lone positive sample, obtained from an obscure location after significant effort by the CSHO, does not prove that an employer failed to fulfill its obligations under the cited standard.

ACM dust or debris on the surface of the Station's floors. Accordingly, the Court finds the Secretary has failed to establish noncompliance with the standard.

3. Employees Were Not Exposed to a Hazardous Condition

“Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable.” *Phoenix Roofing*, 17 BNA OSHC at 1079.

As the Court previously found in analyzing noncompliance with this standard, the Secretary failed to demonstrate that employees at the Station were exposed to any accumulation of asbestos-containing dust or debris on the surface of the floors in the EP Station. (Tr. 258, 302-03, 786-87; Exs. C-47, at 2-14, 18, 21, 24, 27, 30, 33 & 36; C-48, at 1-8, 11 & 12; C-51, at 10 & 11; R-24, at 9). The Court agrees with the Secretary that the “key question is whether the employees were exposed to ACM and PACM without proper engineering controls in place.” Sec’y’s Br. 35 (citing *U.S. Postal Serv.*, 26 BNA OSHC 1022, 1030 (No. 14-0691, 2016) (ALJ)). However, as the Court found above, the Secretary has failed to establish that Respondent’s existing controls, particularly the encapsulation of the Station’s floors, were inadequate or that a reasonably prudent employer would have done more to keep the surface of the Station’s floors free from asbestos dust and debris.

The Secretary also failed to establish that the access to the ACMs in the quarter-sized hole in the vestibule was “reasonably predictable,” given that the materials from that hole were only extracted to the surface of the floors after significant effort from the CSHO to do so. (Tr. 405-10, 429-30, 468-70, 479-80, 494-97, 504, 621-22, 624-26, 699-701; *see also* Tr. 789-90, 797-98; Ex. R-24, at 9; note 50, *supra*). The Court therefore rejects the Secretary’s assertion that “[g]iven the

asbestos debris found in the vestibule, employees were easily within the ‘zone of danger’ while performing their assigned work duties.” Sec’y’s Br. 35.

The Secretary has failed to demonstrate exposure to the hazard.

4. The Secretary Failed to Establish Knowledge

Respondent’s knowledge of the violation may be established by showing the employer knew, or with reasonable diligence could have known, of the violative condition. 29 U.S.C. § 666(k); *Jacobs Field Servs. N.A.*, 25 BNA OSHC at 1218.

Because the Court found the Secretary failed to establish noncompliance with the standard, there was no underlying violative condition, and the Secretary therefore cannot prove knowledge, actual or constructive, of the same.

The Secretary therefore failed to establish the knowledge element.

5. Conclusion

Based on the foregoing, the Court VACATES Citation 2, Item 1.⁵¹

D. Citation 2, Item 2 – Presence, Location & Quantity Standard

Citation 2, Item 2 alleged a repeat-serious violation of 29 C.F.R. § 1910.1001(j)(3)(i), which states:

(3) Duties of employers and building and facility owners.

(i) Building and facility owners shall determine the presence, location, and quantity of ACM and/or PACM at the work site. Employers and building and facility owners shall exercise due diligence in complying with these requirements to inform employers and employees about the presence and location of ACM and PACM.

The Secretary alleged that the violation of 29 C.F.R. § 1910.1001(j)(3)(i) occurred as follows:

⁵¹ Given that the Secretary failed to establish three elements of his case, the Court sees no need to address Respondent’s affirmative defense of unpreventable employee misconduct with regard to this violation. Resp’t’s Br. 33 & 34.

29 CFR 1910.1001(j)(3)(i): the building or facility owner did not determine the presence, location, and quantity of ACM or PACM at the work site and inform employees about the presence and location of ACM and PACM:

- a) At the sorting and distribution area in East Portland Station Post Office, located at 1020 SE 7th Avenue, Portland, OR 97214: on or about and at times prior to 2-10-2022, where floor tiles containing asbestos were visibly deteriorated and disturbed by contact with a door locking mechanism in the vestibule, the employer attempted repairs but failed to determine the potential amount of released asbestos that employees may have been exposed to.

Citation at 9.

1. The Standard Applied

As the Court previously concluded, OSHA’s asbestos standards applied to Respondent’s EP Station by virtue of the fact that ACMs were installed in the facility. *See* Part IV(B)(1), *supra*. Respondent does not contest that this standard applied to the EP Station.

The Court finds the standard applied.

2. The Secretary Failed to Establish Noncompliance

The cited standard places two obligations on an employer: 1) to “determine the presence, location, and quantity of ACM and/or PACM at the work site”; and 2) to “exercise due diligence in complying with these requirements to inform employers and employees about the presence and location of ACM and PACM.”

a. Determination of Presence, Location & Quantity

Here, Respondent argues, and the Secretary does not refute, that Respondent fulfilled its first obligation to “determine the presence, location, and quantity of ACM and/or PACM at the work site” when it conducted the 1997 Survey. Resp’t’s Br. 34-35. The Court agrees. *See All-Erection & Crane Rental Corp.*, 24 BNA OSHC 1353, 1356 (No. 09-1451, 2014) (strongly suggesting, though not explicitly holding, that conducting an asbestos survey is sufficient to

comply with the first part of the cited standard); *cf.* OCCUPATIONAL SAFETY & HEALTH ADMIN., Letter of Interpretation RE: “Duty of building owners to determine the presence, location, and quantity of ACM and PACM,” (Nov. 17, 1999) (available at <https://www.osha.gov/laws-regs/standardinterpretations/1999-11-17>) (suggesting that an asbestos survey in the workplace is sufficient to comply with the standard so long as testing is done to confirm materials are ACMs or all suspected ACMs are treated as ACMs); *see also* Ex. C-34, at 5-7.

b. Failure to Inform Employees

The Secretary argues that a violation nonetheless occurred under the second obligation imposed by the standard because, in his view, Respondent’s “employees [at the EP Station], including the custodian, lacked basic awareness of where the asbestos was located and how much was present.” Sec’y’s Br. 37. Moreover, the Secretary continues, Safety Talk 127 was inadequate to convey the information required by the standard because it “is a generalized safety talk, that is not specific to” the EP Station, and “fails to notify employees of where the asbestos is located *at East Portland Station* and *how much is present*.” *Id.* at 37-38 (emphasis in original).

At the outset of its analysis, the Court notes that the Secretary’s arguments misapprehend the requirements of the second obligation imposed by the standard. While the first part of the standard requires a determination of “presence, location, *and* quantity” of asbestos in a workplace, the second part only requires the employer to “inform employers and employees about the *presence and location*” of the asbestos. 29 C.F.R. § 1910.1001(j)(3)(i) (emphasis added). There is no requirement that the employer inform its employees about the quantity of asbestos in the workplace, and the Secretary’s arguments on that front lack any force in demonstrating noncompliance with the standard.

Moreover, the Secretary does not argue that Respondent's employees were not informed about the mere presence of ACMs/PACMs in the EP Station.⁵² Thus, whether or not Respondent complied with the standard hinges on whether the Secretary has established that Respondent failed to exercise its due diligence in informing its employees as to the location of asbestos in the Station.

i. Respondent Acted with Due Diligence

The Court finds Respondent acted with due diligence in informing its employees as to the location of asbestos in the station. Although the standard does not define the term “due diligence,” the Court considers it taking on a similar meaning as the term “reasonable diligence,” which requires the Court to consider all of the Respondent's efforts together in determining whether it complied with the cited standard. *See Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 735 (5th Cir. 2016) (referring to “reasonable due diligence”); *Martin v. OSHRC (Milliken & Co.)*, 947 F.2d 1483, 1485 (11th Cir. 1991) (“What constitutes reasonable diligence will vary with the facts of each case.”); *see also Due diligence*, Black's Law Dictionary (12th ed. 2024) (equating the term “due diligence” with “reasonable diligence” and defining as the “diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation” (definition 1)); *see also Reasonable diligence* (defining “reasonable diligence” as “[a] fair degree of diligence expected from someone of ordinary prudence under circumstances like those at issue” (definition 1)).

To start, Safety Talk 127, which was administered to employees during at least three sessions each year, directly addressed the topic of asbestos in the workplace. (Tr. 128-29, 397-98,

⁵² Even though the Secretary has not argued for noncompliance on this basis, the Court notes that, though the record is somewhat limited on the point, there appears to have been at least a general awareness among employees that ACMs were present somewhere in the EP Station. (Tr. 349-50 (Ms. Walton, shop steward for the EP Station, stating that asbestos was an “ongoing issue” for which she had received complaints from employees in the past)). Moreover, given that the Court finds the Station's employees were adequately informed of the location of ACMs in the Station, they were necessarily informed of its presence.

424-25, 451, 465, 584, 614-15, 714, 726-27; Exs. C-27, C-35). More specifically, Safety Talk 127 addressed the nature and hazard associated with asbestos, where it might be found in a workplace including “[v]inyl floor tiles,” and how to “[s]afely work[] around asbestos.” (Ex. C-27). As the Secretary correctly points out, the custom among managers at the EP Station was to read the information in Safety Talk 127 verbatim to employees, even though it does not by itself specifically address the location of asbestos in the EP Station. (Tr. 397-98, 424-25, 433-34, 475, 638-39). However, multiple managers confirmed that the information in the Safety Talk 127 document is supplemented with additional verbal information when managers administer it to the Station’s employees. (Tr. 424-25, 433-34, 475-77, 615, 635-36, 638-39; *see also* note 23, *supra*). This additional information included the location of asbestos in the Station. (Tr. 424-25, 433, 475-77, 615, 635-36, 638-39).

In addition to Safety Talk 127, multiple “A” signs are posted throughout the EP Station to indicate the presence of asbestos at those locations.⁵³ (Tr. 53, 349, 372, 425, 578, 635-36, 842-43; Ex. R-24, at 14). The Station’s employees also had access to the 1997 Survey, which includes detailed information on the location of asbestos in the Station. (Tr. 465, 515-16, 540, 572, 626-27, 649; Ex. C-34, at 5-7, 23-28).

The Court finds, taken together, Respondent’s efforts amount to “due diligence ... to inform ... employees about the presence and location of ACM and PACM,” as required by the cited standard.

⁵³ Although the record is again limited on the point, the only non-management employee to testify at the hearing, Ms. Walton, was aware of the existence and meaning of these “A” signs. (Tr. 349).

ii. *The Secretary's Arguments Fail*

Against Respondent's evidence, the Secretary argues that the CSHO's interviews with employees during his inspections indicated that some employees did not know where asbestos was present in the Station. Sec'y's Br. 37. Additionally, the Secretary points out that Safety Talk 127 is generalized and does not specifically identify the location of asbestos in the EP Station. *Id.* at 37 & 38. Finally, the Secretary argues that some employees were not given Safety Talk 127 and that Respondent has only provided undated training records to indicate the employees who attended the Talk. *Id.* at 38. The Court is not persuaded by any of these arguments.

As to his first argument, the Secretary cites only vague, hearsay testimony from the CSHO, that certain unidentified employees could not tell him where asbestos was located in the Station during one of his inspections. (Tr. 57 ("I asked where [the asbestos] was. Nobody seemed to know.")). The Secretary also cites the CSHO's inspection notes, which, to the extent they are legible, contain arguably conflicting evidence on the subject.⁵⁴ The Court does not find this evidence probative or reliable and therefore ascribes it little weight. Moreover, even if some unnamed employees were in fact unable to recall the location of asbestos in the Station at the exact moment they were asked by the CSHO, the Court finds this would not, without more, establish inadequate instruction from Respondent on the location of asbestos in the Station. *Cf. O'Brien Concrete Pumping, Inc.*, 18 BNA OSHC 2059, 2062 (No. 98-0471, 2000) ("Not only is it questionable to find significance in what the employees did *not* say, but the sufficiency of an employer's training should not be measured solely by its employees' subjective assessment or, as in this case, the lack of such an assessment." (emphasis in original)); *Shelly & Sands, Inc.*, No. 17-

⁵⁴ Page 4 of these notes contains the statement "AB [asbestos]: never was told" but also "maybe under the floor." (Ex. C-2, at 4). The CSHO did not address these potentially contradictory statements in his testimony.

0190, 2021 WL 488127, at *2 (OSHRC, Feb. 1, 2021) (“[I]t is the Secretary who bears the burden of establishing that [an employer’s work rule] was inadequately communicated to the foreman and the C[SH]O’s vague testimony regarding what the foreman may or may not have believed at the time of the inspection fails to meet that burden.”).

As to the Secretary’s second argument, the Secretary correctly points out that Safety Talk 127 is generic and does not specify the location of asbestos in the EP Station itself. Sec’y’s Br. 37 & 38; Ex. C-27. However, as the Court previously noted, managers at the EP Station would verbally supplement the content of Safety Talk 127 with Station-specific information, including the location of asbestos in the facility. (Tr. 424-25, 433-34, 475-77, 615, 635-36, 638-39; *see also* note 23, *supra*). Because the standard does not prescribe any specific method to inform employees of the location of asbestos in a workplace, the Court finds this verbal communication sufficient to “exercise due diligence” under the standard. *Cf. Angel Bros. Enters.*, No. 16-09540, 2020 WL 4514841, at *5 (OSHRC, July 28, 2020) (oral communication can be sufficient to show a rule was “clearly and effectively communicated to employees” (citing *GEM Indus., Inc.*, 17 BNA OSHC 1861, 1863 n.5 (No. 93-1122, 1996))), *aff’d*, 18 F.4th 827 (5th Cir. 2021); *cf. also, e.g.*, 29 C.F.R. § 1910.1053(f)(2)(i) (requiring a written control plan for employees working with respirable silica that includes safety measures to address the work).

Finally, as to the Secretary’s assertion that not all employees received Safety Talk 127, the only relevant testimony to which he points is Ms. Walton’s conclusory assertion that this case was based on her perceived timing of when safety talks were normally given. Sec’y’s Br. 38, citing Tr. 371. The Court does not give determinative weight to this brief testimony over the weight of evidence suggesting that Safety Talk was given at least three times a year specifically to ensure that all employees were given the Talk. *See* note 22, *supra*. Moreover, the Court does not find

the Secretary’s reliance on Respondent’s undated training records (Ex. C-35) to be persuasive because nothing in the cited standard required Respondent to document or otherwise record its due diligence to inform its employees of the presence or location of asbestos in the Station. *Cf.* 29 C.F.R. § 1910.266(i)(10)(i) (requiring a “written certification record” for mandatory training);⁵⁵ 29 C.F.R. § 1910.119(g)(3) (requiring an employer to “prepare a record which contains the identity of the employee, the date of training, and the means used to verify that the employee understood the training.”); *cf. also Furmanite Am., Inc.*, 25 BNA OSHC 1028, 1034 (No. 13-0307, 2014) (ALJ) (“[W]hether the ‘training’ ... was documented is not an element of the cited standard—the standard only requires Respondent to train its employees in work practices necessary to safely perform their respective jobs.”).

For all these reasons, the Court finds the Secretary failed to establish noncompliance with the cited standard.

3. The Secretary Failed to Establish Exposure and Knowledge

“Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable.” *Phoenix Roofing*, 17 BNA OSHC at 1079. Meanwhile, Respondent’s knowledge of the violation may be established by showing the employer knew, or with reasonable diligence could have known, of the violative condition. 29 U.S.C. § 666(k); *Jacobs Field Servs. N.A.*, 25 BNA OSHC at 1218.

Because the Secretary failed to establish noncompliance with the standard, the Court finds

⁵⁵ The Court notes that OSHA’s asbestos standard uses both the words “inform” and “train” in imposing various requirements under the standard. *Compare e.g.*, 29 C.F.R. § 1910.1001(j)(3)(i) (requiring employers to “inform employers and employees about the presence and location of ACM and PACM” (emphasis added)), *with, e.g., id.* § 1910.1001(j)(1)(iii) (requiring employers to ensure “each employee ... is trained in accordance with the requirements” of the HazCom standard (emphasis added)). As presented by the parties, nothing turns on whether these two terms have distinct meanings. The Court cites these training standards only to illustrate that OSHA makes a recordkeeping requirement explicit when a given standard imposes such an obligation.

there was no violative condition to which the Station's employees could be exposed. Moreover, because there was no underlying violative condition, the Secretary has therefore failed to prove knowledge, actual or constructive, of the same.

4. Conclusion

Based on the above, the Court VACATES Citation 2, Item 2.

E. Citation 2, Item 3 – Housekeeping Training Standard

Citation 2, Item 3 alleged a repeat-serious violation of 29 C.F.R. § 1910.1001(j)(7)(iv), which states:

The employer shall also provide, at no cost to employees who perform housekeeping operations in an area which contains ACM or PACM, an asbestos awareness training course, which shall at a minimum contain the following elements: health effects of asbestos, locations of ACM and PACM in the building/facility, recognition of ACM and PACM damage and deterioration, requirements in this standard relating to housekeeping, and proper response to fiber release episodes, to all employees who perform housekeeping work in areas where ACM and/or PACM is present. Each such employee shall be so trained at least once a year.

The Secretary alleged that the violation of 29 C.F.R. § 1910.1001(j)(7)(iv) occurred as follows:

29 CFR 1910.1001(j)(7)(iv): The employer did not provide an annual asbestos awareness training course covering the requirements specified in this standard related to housekeeping to all employees who perform housekeeping work in areas where ACM and/or PACM is present:

a) On or about 11/29/2022 and at times prior thereto, at the sorting and distribution area of the East Portland Station Post Office, located at 1020 SE 7th Avenue, Portland, OR 97214, where floor tiles known to contain asbestos were visibly deteriorated and disturbed by contact with postal transport equipment, employees performing housekeeping work were exposed to asbestos hazards because the employer failed to ensure that they received annual asbestos awareness training containing all of the required elements specified in this standard, including the location of ACM/PACM in the building, recognition of ACM/PACM damage and deterioration, and the requirements of this standard relating to housekeeping.

Citation at 10.

1. The Standard Applied

As the Court previously concluded, OSHA's asbestos standards applied to Respondent's EP Station by virtue of the fact that ACMs were installed in the facility. *See* Part IV(B)(1), *supra*. Respondent has not contested the applicability of the standard for this Item.

The Court finds the cited standard applied.

2. The Secretary Failed to Establish Noncompliance

a. The Parties' Arguments

In arguing for noncompliance with this standard, the Secretary argues that Respondent only produced records that the Station's custodian would receive annual training at some point in the future (February 2023). Sec'y's Br. 39-40. He also argues that Respondent failed to produce training records showing the custodian received VILT training, "showing that USPS either violated their own record keeping policies or the training never happened." *Id.* at 40. Finally, the Secretary attacks the sufficiency of Safety Talk 127 in complying with the standard and again argues that because Respondent's training records are undated they "don't show that the Custodian received the training *annually*." *Id.* (emphasis in original).

For its part, Respondent argues that the Secretary has failed to provide reliable evidence to establish that the requisite training did not occur. Resp't's Br. 36. It argues that the Secretary's only evidence is vague and unsubstantiated hearsay statements from the CSHO made to him by unnamed employees during one of his inspections. *Id.* at 37. Respondent goes on to argue that the Secretary "relies on the absence of evidence (i.e., the absence of training records) and the CSHO's flawed determination about compliance to establish that Respondent violated the cited standard." *Id.* Respondent then expounds on what it views as the flaws in the evidence provided by the Secretary. *Id.* at 38 & 39. It also argues that, notwithstanding the flaws in the Secretary's

initial case, Safety Talk 127 was sufficient to meet the requirements of the standard, and there is sufficient evidence to show that the Station's custodian received this training. *Id.* at 40-42.

b. The Secretary Failed to Produce Initial Evidence of a Violation

The Court agrees with Respondent and finds the Secretary failed to provide sufficient evidence of a violation to even require Respondent to produce evidence of its training. As the bearer of the burden of production, the Secretary was required, in the first instance, to produce sufficient, credible evidence that Respondent violated the cited standard. *See Tourgeman v. Nelson & Kennard*, 900 F.3d 1105, 1108 n.5 (9th Cir. 2018) (citing *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005)); *Bunge Corp. v. Sec'y of Labor*, 638 F.2d 831, 838 (5th Cir. 1981) (citing *Hercules, Inc. v. EPA*, 598 F.2d 91, 107 n.26 (D.C. Cir. 1978)). Thus, before delving into the sufficiency of Respondent's evidence that might *disprove* the existence of a violation, as the Secretary does in his brief, the Court must first examine the sufficiency of the Secretary's initial evidence to establish that a violation even occurred.

The CSHO was the only witness offered by the Secretary to directly address whether the requisite training occurred.⁵⁶ In response to the Court's own questions, the CSHO offered the following brief exchange:

Court: Did you – did you ask [the custodian] about the training?

CSHO Peters: Yes.

Court: Okay. What was his response?

CSHO Peters: He said he had not been trained in the last year.

(Tr. 74-75).

⁵⁶ The Secretary points to testimony from Mr. Collins indicating that he did not give the custodian "custodian-specific asbestos awareness training." (Tr. 648). The Court finds this testimony at most establishes that Mr. Collins did not personally provide the custodian with VILT training on asbestos. (Tr. 593 (Q: So the asbestos awareness course that the Postal Service administers to custodian to comply with the OSHA regulations is called Asbestos Awareness VILT; is that right? A: Correct.)). Mr. Collins made clear earlier in his testimony that he administered Safety Talk 127 directly to the custodian. (Tr. 619-20).

The Court does not find this hearsay testimony reliable. It is not clear from the CSHO's testimony how the question to the custodian was phrased, whether the custodian understood the question, or whether the question related to the type of training at issue in the cited standard. And, even if the custodian's answer was exactly as the CSHO testified, his answer was vague at best.

The remainder of the Secretary's evidence relates to the CSHO's interpretation of the training records he received in response to his request for documents from the EP Station. (Tr. 102-04; Exs. C-26 & C-35). The Court first notes that nothing in the cited standard even requires Respondent to maintain training records, and so the Court does not ascribe much weight to the existence or sufficiency of the training records provided by Respondent here. *See, e.g., Furmanite Am., Inc.*, 25 BNA OSHC at 1034; *cf. also* note 55, *supra*.

In any event, the training documents do not, on their face, demonstrate that no training occurred in 2022, as the Secretary has alleged. *See* Citation at 10. Both Exhibit C-26, the custodian-specific training records for the Portland-area USPS facilities, and C-35, the training records for the EP Station's employees, indicate the Station's custodian, Mr. Miranda, was scheduled to receive asbestos training on February 13, 2023. (Exs. C-26 & C-35). Going back a year from that date, to February 13, 2022, the custodian could have received the requisite training at any time forward (comprising most of 2022) to be in compliance with the standard. Given that the record is silent on whether the CSHO ever attempted to obtain follow-up information on the actual meaning of these records,⁵⁷ the Court does not find that the training records prove noncompliance with the standard. *Cf. Caterpillar Tractor Co.*, 12 BNA OSHC 1768, 1769 (No.

⁵⁷ The record does affirmatively establish that the CSHO never followed up on the meaning or purported deficiencies in other training documents, like Safety Talk 127. (Tr. 156, 159-62). Instead, the CSHO "simply asked [Respondent's management] for ... what they needed to provide" and "any documentation that would refute the complaint." (Tr. 161, 185); *see also Tex. Underground Utils., Inc.*, No. 20-1565, 2023 WL 5849502, at *15 (OSHR CALJ, Aug. 4, 2023) (finding the Secretary failed her burden of proof by failing to ask questions at trial that might reveal lack of on-the-job training or getting printed materials).

80-4061, 1986) (“Normally, where the record in a case lacks sufficient evidence on a disputed issue, we would resolve that issue against the party having the burden of proof.”).

c. Alleged Deficiencies in Safety Talk 127

Even assuming the Secretary had set forth sufficient evidence to require Respondent to produce evidence of its training, Respondent has provided sufficient evidence to conclude that the Station’s custodian received Safety Talk 127⁵⁸ at least once during the year preceding the time period cited by the Citation, i.e., “[o]n or about 11/29/2022.” (Citation at 10; *see also* Tr. 619-20 (Mr. Collins stating that he conducted the talk with Mr. Miranda directly at least annually when he was acting manager of the Station); Tr. 397-98, 424-25, 433-34, 475-77, 638-39, 714, 726; Exs. C-26, C-35; note 22, *supra*.)). “If [an] employer rebuts the allegation of a training violation ‘by showing that it has provided the type of training at issue, the burden shifts to the Secretary to show some deficiency in the training provided.’” *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2126-27 (No. 96-0606, 2000), *aff’d*, 255 F.3d 122 (4th Cir. 2001) (quoting *Am. Sterilizer Co.*, 18 BNA OSHC 1082, 1086 (No. 91-2494, 1997)).

Here, in arguing that Safety Talk 127 was insufficient to comply with the cited standard, the Secretary incorrectly argues that “[t]his generalized ‘safety talk’ was simply read out loud to employees.” Sec’y’s Br. 40. However, as the Court detailed above, although the content of Safety Talk 127 was read verbatim to employees, managers would supplement this content with information specific to the EP Station. (Tr. 424-25, 433-34, 475, 615, 619-20, 635-36, 638-39;

⁵⁸ In arguing noncompliance with the cited standard, the Secretary vaguely touches upon the VILT training, which the Court briefly described above. *See* Sec’y’s Br. 40; Part III(B)(3)(b)(v)(2), *supra*. However, Respondent does not address VILT training at all. Additionally, despite some testimony at trial on a possible asbestos-related component of the CTC training, neither party mentions this training with regard to this violation. The Court therefore only considers the sufficiency of Safety Talk 127. *See Jenkins v. Cnty. of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005) (arguments not raised or addressed by the parties are considered abandoned).

Ex. C-27; *see also* note 23, *supra*). Mr. Collins did this individually with the Station’s custodian. (Tr. 619-20).

The Secretary also states that Safety Talk 127 “lacks information required by the standard,” and then simply restates the requirements of the standard without relating them to anything specific in the content of Safety Talk 127. Sec’y’s Br. 40. The Court rejects this circular and conclusory argument. *See U.S. v. Stoterau*, 524 F.3d 988, 1003 (9th Cir. 2008) (“[C]ontentions [that] are general, mentioned only in passing, and are unsupported by meaningful argument ... are waived.”).

Finally, the Secretary argues that the training records for Safety Talk 127 are “undated, and don’t show that the [c]ustodian received the training annually.” Sec’y’s Br. 40. However, as the Court previously noted, nothing in the cited standard requires Respondent to keep training records at all, and the Court therefore does not ascribe dispositive weight to the content of the training records provided. *See Furmanite Am., Inc.*, 25 BNA OSHC at 1034; note 55, *supra*.

Accordingly, even if the Secretary had produced sufficient evidence of a violation in the first instance, he has still failed to prove noncompliance by demonstrating any inadequacy in the training Respondent provided to the Station’s custodian.

d. Conclusion

The Secretary has failed to produce sufficient evidence in the first instance to demonstrate Respondent’s noncompliance with the cited standard. Additionally, the Secretary failed to demonstrate any deficiencies in the training Respondent provided to its custodian. Accordingly, the Court finds the Secretary has failed to establish noncompliance with the standard.

3. The Secretary Failed to Establish Exposure or Knowledge

“Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable.” *Phoenix Roofing*, 17 BNA OSHC at

1079. Meanwhile, Respondent's knowledge of the violation may be established by showing the employer knew, or with reasonable diligence could have known, of the violative condition. 29 U.S.C. § 666(k); *Jacobs Field Servs. N.A.*, 25 BNA OSHC at 1218.

As the Secretary failed to demonstrate an underlying violation of the cited standard, he has likewise failed to demonstrate exposure to, or knowledge of, any violation or violative condition.

4. Conclusion

Based on the above, the Court VACATES Citation 2, Item 3.

F. Citation 3, Item 1 – Hazardous Chemical List Standard

Citation 3, Item 1 alleged a repeat-other-than-serious violation of 29 C.F.R. § 1910.1200(e)(1)(i), which states:

(e) Written hazard communication program.

(1) Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, safety data sheets, and employee information and training will be met, and which also includes the following:

(i) A list of the hazardous chemicals known to be present using a product identifier that is referenced on the appropriate safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas) ...

The Secretary alleged that the violation of 29 C.F.R. § 1910.1200(e)(1)(i) occurred as follows:

29 CFR 1910.1200(e)(1)(i): The employer did not compile a list of hazardous chemicals known to be present using a product identifier that was referenced on the appropriate safety data sheet.

a) On or about 2-10-2022 and at times prior thereto, at the sorting and distribution area in East Portland Post Office, located at 1020 SE 7th Avenue, Portland, OR 97214, where floor tiles known to contain asbestos were visibly deteriorated, the employer did not include asbestos on a list of hazardous chemicals known to be present using a product identifier that is referenced on the appropriate safety data sheet, such as CAS 1332-21-4.

Citation at 11.

1. The HazCom Standard Did Not Apply

The Secretary argues that the cited standard applies based on the presence of asbestos in the EP Station and “because employees *may* encounter it.” Sec’y’s Br. 43 (emphasis in original). Respondent counters, in short, that the standard’s application is limited by the definition of “use” under 29 C.F.R. § 1910.1200(c) and thus does not apply to the ACMs present in the EP Station. Resp’t’s Br. 42-43. Respondent also argues the standard did not apply because the asbestos in the Station’s floors was modified by a binding agent when the floors were encapsulated. *Id.* at 43-44.

After a careful review of the relevant provisions, the Court agrees with Respondent and finds the HazCom standard does not apply to the asbestos in the EP Station because of the limitations set forth in 29 C.F.R. § 1910.1200(b)(2) and (c). However, the Court also finds Respondent cannot claim the exception for surfaces modified by a binding agent for this Item. The Court addresses each issue in turn.

a. Applicability Provisions of the HazCom Standard

29 C.F.R. § 1910.1001(j)(1)(i) states, in relevant part, “employers shall comply with all requirements of the Hazard Communication Standard ... (§ 1910.1200) for asbestos.” Thus, the HazCom standard’s applicability to asbestos in a given workplace is determined by the applicability of § 1910.1200.

The “Scope and application” section of 29 C.F.R. § 1910.1200(b)(1) states, in relevant part: “This section requires ... all employers to provide information to their employees about the hazardous chemicals to which they are exposed by means of a hazard communication program, labels and other forms of warning, safety data sheets, and information and training.”

Subsection (b)(2) clarifies the application of the standard as follows: “This section applies to any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency.” (emphasis added). Thus, there are two scenarios where the section applies when a covered chemical, like asbestos, is present in the workplace: 1) when “employees may be exposed [to the chemical] under normal conditions of use”; or 2) when “employees may be exposed [to the chemical] ... in a foreseeable emergency.” *Id.*

i. Exposed Employees

Before addressing whether either of the conditions under applicability provisions are satisfied, the Court notes that it is not entirely clear from the record which of the Station’s employees were allegedly exposed by either of Respondent’s HazCom violations. The Court addresses this issue first because the applicability provisions of the HazCom standard specifically incorporate employee exposure as a predicate to applicability. *See* 29 C.F.R. § 1910.1200(b)(1) (requiring employers to supply information “about the hazardous chemicals to which [employees] are exposed ...” (emphasis added)); *id.* § (b)(2) (HazCom standard applies when “any chemical is known to be present in the workplace in such a manner that employees may be exposed ...” (emphasis added)); *id.* § (c) (definition of “employee” requires “a worker who may be exposed to hazardous chemicals ...” (emphasis added); *see also id.* (defining “exposure or exposed” as “an employee is subjected in the course of employment to a hazardous chemical, and includes potential (e.g., accidental or possible) exposure”).

At the hearing, the CSHO, while discussing the Violation Worksheet for Item 1, stated that he calculated the number of employees exposed as “how many people I could reasonably assume were being exposed to that hazard that needed to see that list.” (Tr. 139). In turn, the Violation

Worksheet for this Item contains conflicting numbers for potential exposure, listing “25” on the first page but then only one on the second page. (Ex. C-13, at 14 & 15).

For Item 2, the CSHO stated in a circular fashion at trial that the number of employees exposed was “the number of people who were exposed to the hazard, which was a lack of safety data sheet for asbestos in the building they were working in.” (Tr. 145). The Violation Worksheet for Item 2 again lists conflicting numbers of exposed employees, stating “25” on the first page but then “77” on the second. (Ex. C-13, at 17 & 18).

In briefing Item 1, the Secretary appears to argue that *every* employee was exposed to the hazard of not having the hazardous chemical sheet for asbestos because the employees “were working in a facility where they *may* encounter asbestos.”⁵⁹ Sec’y’s Br. 44-45 (emphasis in original). For Item 2, the Secretary again argues that “[e]very employee at [EP] Station was ... exposed to the cited condition, *particularly the custodial worker.*” *Id.* at 47 (emphasis added). The Court cannot discern from these disparate numbers and arguments how the Secretary intended to charge the HazCom violations.

Fortunately, the HazCom standard itself limits the potential scope of the alleged violations here. The relevant part of the standard applies to “employees [who] may be exposed under normal conditions of use or in a foreseeable emergency.” 29 C.F.R. § 1910.1200(b)(2). The standard defines “employee” as “a worker who may be exposed to hazardous chemicals under normal operating conditions or in foreseeable emergencies.” *Id.* § (c). However, this definition goes on to exempt a large class of workers as follows: “Workers such as office workers or bank tellers who encounter hazardous chemicals only in non-routine, isolated instances are not covered.” *Id.*

⁵⁹ Given that the Station employed approximately 70 to 80 people at the time of the alleged violation, this number only arguably comports with the number listed on page 2 of the Violation Worksheet for Item 2. (Tr. 340, 391, 485, 611, 642-43; Exs. C-12, at 6; C-13, at 18; C-35).

(emphasis added). Under this limitation, the Court finds the vast majority of employees at the Station, including the clerks, sorters, carriers, and supervisors were not covered “employees” because their roles were akin to those of “office workers or bank tellers.” (Tr. 48, 340, 345, 391, 485, 611, 642-43, 671-72). In fact, only one employee, the custodian, could arguably fit the definition of a worker who was exposed to asbestos under “normal operating conditions” or “normal conditions of use,”⁶⁰ given that he cleaned the floors where the ACMs were potentially present. See 29 C.F.R. § 1910.1001(j) (“[E]mployees engaged in housekeeping activities in ... public and commercial buildings with installed asbestos containing materials may be exposed to asbestos fibers.”); see also Sec’y’s Br. 47 (emphasizing “particularly the custodial worker” as a potential employee exposed by the alleged violation). The Court will therefore analyze whether the custodian was exposed to asbestos in the Station “under normal conditions of use,” i.e., during his regularly assigned cleaning duties of sweeping, mopping, and vacuuming the floors in the Station.⁶¹

⁶⁰ The Court finds no functional difference between the term “normal operating conditions” used in the HazCom standard’s definition of “employee” under Section (c) and the term “normal conditions of use” found in Section (b)(2). See *Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006, 1016 (9th Cir. 2017) (when interpreting agency regulations, courts should “read ... regulations in harmony” and “where possible, provisions of a regulation should be read so as to not create a conflict” (quoting *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 370 (1986))). The fact that both terms are coupled with “foreseeable emergency” bolsters the Court’s conclusion that they were intended to have the same meaning.

⁶¹ In taking this approach, the Court notes that there is limited evidence in the record on the roles of the non-custodial employees at the Station, although the duties of some roles like customer service clerk or supervisor can be inferred. However, even if the Court is incorrect in focusing its analysis on the Station’s custodian, the Court finds that the conclusions reached below with regard to him are equally applicable, if not more so, to any other employee at the Station because the evidence presented here shows that only the custodian had any regularly assigned duties that implicated the ACMs known to be present in the Station’s floors. In other words, based on the available evidence, the Station’s custodian was the employee most likely to encounter asbestos under normal operating conditions or normal conditions of use, with every other employee being less likely to satisfy that condition. Thus, even if the Station’s non-custodial workers are insufficiently similar to “office workers or bank tellers” to be exempt from coverage under the HazCom standard’s definition of “employee,” the proceeding analysis would similarly apply to those employees because there is no evidence that those employees “handled” asbestos under normal operating conditions at the Station.

ii. *Normal Conditions of Use*

Subsection (c) of the HazCom standard currently defines “use” as “to package, handle, react, emit, extract, generate as a byproduct, or transfer.” Of these terms, only package, handle, react, and transfer were operative at the time of the alleged violation.⁶² The Court finds no substantive evidence that the Station’s custodian packaged,⁶³ reacted,⁶⁴ or transferred⁶⁵ asbestos during normal operating conditions at the Station. The Court thus focuses on whether the custodian “handled” asbestos during normal operations. The Court finds he did not.

To “handle” means “to touch, feel, hold, take up, move, or otherwise affect with the hand: use the hands upon” or “to manage in using with the hands.” Webster’s Third New International Dictionary 1027 (1986) (definitions 2(1)(a) & (b)); *see also Roy Rock, LLC*, No. 18-0068, 2021 WL 3624785, at *2 (OSHRC, July 22, 2021) (“[O]ur precedent makes it clear that an undefined term’s meaning can be determined by consulting a contemporaneous dictionary.”). The Court

⁶² “Emit,” “extract,” and “generate as a byproduct” were not added to the definition of “use” until 2024 and thus are not implicated by the alleged violations in this case, which took place in 2022 and 2023. Hazard Communication, 89 Fed. Reg. 44144-01, 44357 (May 20, 2024) (to be codified at 29 C.F.R. pt. 1910).

⁶³ “Package” has been included in the HazCom standard’s definition of “use” since 1983. *See* Hazard Communication, 48 Fed. Reg. 53280-01, 53342 (Nov. 25, 1983) (to be codified at 29 C.F.R. pt. 1910). Relevant dictionary definitions of “package” contemporaneous to that time were “to make into a package” or “to enclose in a package or protective covering.” Webster’s Third New International Dictionary 1618 (1986) (definitions 2(1) & (2)); *see also Roy Rock, LLC*, No. 18-0068, 2021 WL 3624785, at *2 (OSHRC, July 22, 2021) (“[O]ur precedent makes it clear that an undefined term’s meaning can be determined by consulting a contemporaneous dictionary.”). The Court finds no evidence that the custodian packaged asbestos during normal operations at the Station.

⁶⁴ “React” has been included in the HazCom standard’s definition of “use” since 1983. *See* Hazard Communication, 48 Fed. Reg. at 53342. Relevant dictionary definitions of “react” contemporaneous to that time were “to undergo chemical reaction” or “to bring about a chemical reaction in.” Webster’s Third New International Dictionary 1888 (1986) (definition 5); *see also Roy Rock, LLC*, 2021 WL 3624785, at *2. The Court finds no evidence that the custodian reacted asbestos during normal operations at the Station.

⁶⁵ “Transfer” has been included in the HazCom standard’s definition of “use” since 1983. *See* Hazard Communication, 48 Fed. Reg. at 53342. Relevant dictionary definitions of “transfer” contemporaneous to that time were “to carry or take from one person or place to another,” “to move or send to a different location esp. for business ... purposes,” or “to cause to pass from one person or thing to another: transmit.” Webster’s Third New International Dictionary 2426-27 (1986) (definitions 1(a), (b) & (c)); *see also Roy Rock, LLC*, 2021 WL 3624785, at *2. The Court finds no evidence that the custodian transferred asbestos during normal operations at the Station.

does not find any affirmative evidence that the custodian at the EP Station touched, felt, held, moved, affected, or managed asbestos with his hands under normal operating conditions at the Station. In fact, the evidence suggests the opposite.

The HEPA vacuum, which the custodian presumably used his hands to operate and empty the filter of, tested negative for the presence of asbestos. (Tr. 64-65, 69, 164-65, 75-77, 258, 302-03, 395, 567-68, 581, 613-14, 647, 787; Exs. C-6, C-47, at 2, 3 & 18; C-48, at 2; R-24, at 9). Although the record does not demonstrate the exact way the custodian swept or mopped the floors, presumably he used his hands for these tasks. However, the Secretary's own sampling evidence again showed that there was no asbestos on the surface of the floors where he regularly mopped, swept, and vacuumed. (Tr. 258, 302-03, 786-87; Exs. C-47, at 21, 24, 27, 30, 33 & 36; C-48, at 3-8, 11-12; R-24, at 9). The only positive sample of asbestos, Sample 11, was obtained from the quarter-sized hole in the vestibule, an area where the custodian may have mopped and swept but did not vacuum. (Tr. 90-91, 283-97, 314-16, 614, 786-88, 798; Exs. C-47, at 36; C-48, at 9 & 10; C-51, at 9-11; R-24, at 9). There is no evidence that the custodian used his hands to hold or move any materials from inside this hole at all, let alone under normal operating conditions. And, as the Court previously found, any ACMs inside this hole were unlikely to be liberated absent a deliberate effort to do so. *See* Part IV(C)(2)(c)(ii)(2) & note 50, *supra*.

The Secretary has therefore failed to demonstrate the applicability of the standard by way of showing that any employee at the EP Station was "exposed [to asbestos] under normal conditions of use."

iii. Foreseeable Emergency

The HazCom standard can also apply if asbestos is present at the EP Station "in a manner that employees may be exposed ... in a foreseeable emergency." 29 C.F.R. § 1910.1200(b)(1).

The standard defines “foreseeable emergency” as “any potential occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment which could result in an uncontrolled release of a hazardous chemical into the workplace.” 29 C.F.R. § 1910.1200(c). In other words, “[a] ‘foreseeable emergency’ is one which employers would normally plan for as a presumed potential occurrence determined by the nature of the operation, i.e. equipment failure or rupture of containers.” Hazard Communication, 48 Fed. Reg. at 53335.

The Court finds no evidence of any potential occurrence that could lead to the uncontrolled release of asbestos at the EP Station, absent a complete failure of the encapsulation on the Station’s floors coupled with the simultaneous pulverization of the asbestos tiles underneath the encapsulation. The Secretary has not shown that any such an event is likely or even foreseeable, i.e., “one which employers would normally plan for as a presumed potential occurrence” Hazard Communication, 48 Fed. Reg. at 53335.

The Court therefore finds the Secretary also failed to demonstrate the applicability of the standard by way of showing that employees at the EP Station were “exposed [to asbestos] ... in a foreseeable emergency.” 29 C.F.R. § 1910.1200(b)(1).

b. Bonding Agent Exception Not Available

In addition to claiming that the Secretary has failed to demonstrate the applicability of the HazCom standard to the asbestos in the EP Station, Respondent also claims an exception to the applicability of the standard provided by 29 C.F.R. § 1910.1001(j)(6)(i). This Section states, in relevant part:

The provisions for labels and for safety data sheets required by paragraph (j) of this section [applying the HazCom standard to asbestos] do not apply where:

- (i) Asbestos fibers have been modified by a bonding agent, coating, binder, or other material provided that the manufacturer can demonstrate that during any reasonably foreseeable use, handling, storage, disposal,

processing, or transportation, no airborne concentrations of fibers of asbestos in excess of the TWA permissible exposure level and/or excursion limit will be released ...

The Court finds the claimed exception is not available to Respondent for this Item related to a list of hazardous chemicals in the workplace. The claimed exception only applies to the “provisions for labels and for safety data sheets required by paragraph (j).” Both Section 1910.1001(j) and the cross-referenced 29 C.F.R. § 1910.1200 make clear that the requirement for employers to maintain a list of hazardous chemicals present in the workplace is distinct from the requirement that the employers maintain safety data sheets for those chemicals. Section 1910.1001(j)(iii) separates out the requirements of “includ[ing] asbestos in the hazard communication program established to comply with ... § 1910.1200” and “ensur[ing] that each employee has access ... to safety data sheets [for asbestos] ...” In turn, Section 1910.1200 also makes clear that safety data sheets are only one requirement of the written program required by the HazCom standard: after referencing the requirements of Subsection (g) for safety data sheets, the standard goes on to state that any such program “shall ... also include ... (i) A list of hazardous chemicals known to be present [in the workplace or work areas]” (emphasis added).

Thus, Respondent cannot claim this exception with regard to its obligation to maintain a list of hazardous chemicals present at the Station.

c. Conclusion

In sum, the Secretary has failed to demonstrate the applicability of the standard because he has failed to demonstrate that the Station’s “employees may be exposed [to asbestos] under normal conditions of use or in a foreseeable emergency,” as required by 29 C.F.R. § 1910.1200(b)(2). As to the exception to applicability under 29 C.F.R. § 1910.1001(j)(6)(i), Respondent cannot claim this exception for the cited standard.

2. The Secretary Established Noncompliance

If, however, the cited standard was applicable to the asbestos in the EP Station, the Secretary has established the element of noncompliance. Respondent does not dispute that asbestos was not included on any list of hazardous chemicals maintained at the EP Station. Instead, Respondent cites to several letters of interpretation issued by OSHA which Respondent argues exempted it from the requirements of 29 C.F.R. § 1910.1200(e)(1)(i) because the installation of the asbestos in the Station pre-dated the promulgation and effective date of the HazCom standard in 1986. Resp't's Br. 45 & 46. However, all of the letters cited by Respondent relate to an employer's obligation to have safety data sheets for the chemicals present in a workplace. *See* OCCUPATIONAL SAFETY & HEALTH ADMIN., Letter of Interpretation RE: "Requirements for manufacturers, who are no longer in business or have discontinued product line, to provide MSDSs and product information," (May 27, 2024) (available at <https://www.osha.gov/laws-regs/standardinterpretations/2004-05-27-3>); OCCUPATIONAL SAFETY & HEALTH ADMIN., Letter of Interpretation RE: "MSDSs for chemicals purchased prior to 1985," (Oct. 6, 1995) (available at <https://www.osha.gov/laws-regs/standardinterpretations/1995-10-06-0>); OCCUPATIONAL SAFETY & HEALTH ADMIN., Letter of Interpretation RE: "Asbestos and the Hazard Communication Standard," (Dec. 26, 1989) (available at <https://www.osha.gov/laws-regs/standardinterpretations/1989-12-26-0>).

As the Court detailed above, the HazCom standard's requirements of maintaining safety data sheets and a list of hazardous chemicals are distinct (*see* Part IV(F)(1)(b), *supra*), and any argument that Respondent was exempt from maintaining appropriate safety data sheets for the Station is therefore not supported by the interpretation letters on which it relies. Likewise, Respondent's affirmative defense of infeasibility, which rests on its alleged inability to obtain

safety data sheets for asbestos that was manufactured by an out-of-business company, is inapposite with regard to its separate obligation to maintain a list of hazardous chemicals at the Station that includes asbestos.⁶⁶

The Court therefore finds the Secretary has demonstrated noncompliance with the cited standard, and Respondent's affirmative defense fails as to this Item.

3. Employees Were Not Exposed to a Hazardous Condition

"Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing*, 17 BNA OSHC at 1079.

As the Court previously noted, exposure is written into the HazCom standard's applicability provisions, which limits the applicability of the standard to "employees that may be exposed under normal conditions of use or in a foreseeable emergency." 29 C.F.R. § 1910.1200(b)(2); *see also* See Part IV(F)(1)(a)(i), *supra*. Thus, for the same reasons that the Court found the HazCom standard inapplicable, the Court likewise finds the Secretary has failed to demonstrate that the Station's employees were actually exposed or that exposure was reasonably predictable. *See* Part IV(F)(1)(a), *supra*. The Secretary's emphasis on the positive asbestos sample obtained from the quarter-sized hole in the vestibule does alter that conclusion, for reasons the

⁶⁶ The Court recognizes that the hazardous chemical listing requirement goes on to state that each hazardous chemical should be listed "using a product identifier that is referenced on the appropriate safety data sheet" 29 C.F.R. § 1910.1200(e)(1)(i). Respondent's arguments with regard to the HazCom violations allege only that it could not comply because it could not obtain a safety data sheet. It is not arguing, for example, that it could only partially comply with the listing requirement because no product identifier was available; and, indeed, it is uncontroverted that Respondent did not list asbestos at all, even in an incomplete form. Thus, while the Court acknowledges some tension with its holding that the unavailability of safety data sheet is inapposite to the chemical listing requirement, it need not delve any further based on the arguments and evidence presented here. It may well be, however, that in an instance where there is no safety data sheet available at all for a given chemical there is no "appropriate" safety data sheet and thus simply including the chemical in the list is sufficient.

Court already elucidated in vacating Item 1 of Citation 2. *See* Part IV(C)(2)(c)(ii)(2) & note 50, *supra*.

The Court finds there was no employee exposure to a hazardous condition.

4. The Secretary Established Knowledge

Respondent's knowledge of the violation may be established by showing the employer knew, or with reasonable diligence could have known, of the violative condition. 29 U.S.C. § 666(k); *Jacobs Field Servs. N.A.*, 25 BNA OSHC at 1218. The Secretary can prove knowledge of a corporate employer through the knowledge, actual or constructive, of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Here, the Secretary has shown that at least one USPS supervisor, Ms. Padilla, had actual knowledge that asbestos was not included on a hazardous chemical list maintained at the EP Station. (Tr. 539-40; Ex. C-60, at 80-81). Respondent has not contested this element of the Secretary's case.

Accordingly, the Court finds the Secretary has established actual knowledge.

5. Conclusion

Based on the foregoing, the Court concludes that the HazCom standard does not apply to the asbestos in the EP Station because the Secretary has failed to show that "employees may be exposed [to asbestos] under normal conditions of use or in a foreseeable emergency." For the same reasons, the Secretary has failed to demonstrate employee exposure to the hazard.

However, if the cited standard did apply, the Secretary has demonstrated the elements of noncompliance and knowledge, and Respondent has failed to carry its burden with regard to its defense of infeasibility for this Item.

Because the Secretary failed to establish two elements of a violation, the Court VACATES Citation 3, Item 1.

G. Citation 3, Item 2 – Safety Data Sheets Standard

Citation 3, Item 2 alleged a repeat-other-than-serious violation of 29 C.F.R. § 1910.1200(g)(8), which states:

The employer shall maintain in the workplace copies of the required safety data sheets for each hazardous chemical, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s). (Electronic access and other alternatives to maintaining paper copies of the safety data sheets are permitted as long as no barriers to immediate employee access in each workplace are created by such options.)

The Secretary alleged that the violation of 29 C.F.R. § 1910.1200(g)(8) occurred as follows:

29 CFR 1910.1200(g)(8): The employer did not ensure that Safety Data Sheets were readily accessible during each work shift to employees when they were in their work area(s):

a) On or about 2-10-2022 and at times prior thereto, at the sorting and distribution area in East Portland Station Post Office, located at 1020 SE 7th Avenue, Portland, OR 97214, where floor tiles known to contain asbestos were visibly deteriorated, the employer did not include asbestos, CAS 1332-21-4. among the safety data sheets provided for employee use at the worksite.

Citation at 12.

1. The HazCom Standard Did Not Apply

a. Normal Use or Foreseeable Emergency

The Court finds the cited standard did not apply for the same reasons it found that the standard did not apply for Item 1 of Citation 3, namely the Secretary has failed to show that any EP Station “employees may be exposed [to asbestos] under normal conditions of use or in a foreseeable emergency,” as required by 29 C.F.R. § 1910.1200(b)(2). *See* Part IV(F)(1)(a), *supra*.

b. Bonding Agent Exception Applies

For this Item, the Court also finds that Respondent has properly claimed the exception provided by 29 C.F.R. § 1910.1001(j)(6)(i). Again, this Section states as follows:

The provisions for labels and for safety data sheets required by paragraph (j) of this section [applying the HazCom standard to asbestos] do not apply where:

(i) Asbestos fibers have been modified by a bonding agent, coating, binder, or other material provided that the manufacturer can demonstrate that during any reasonably foreseeable use, handling, storage, disposal, processing, or transportation, no airborne concentrations of fibers of asbestos in excess of the TWA permissible exposure level and/or excursion limit will be released ...

Thus, the exception explicitly exempts employers from “[t]he provisions for ... safety data sheets,” like the standard cited here.

Because this is an exception to the application of the standard, Respondent bears the burden of demonstrating that it applies. *See United States v. First City Nat’l Bank of Houston*, 386 U.S. 361, 366 (1967); *Rheem Mfg. Co. v. Rheem*, 295 F.2d 473, 475 (9th Cir. 1961) (the party “urging ... the favorable construction of an exception from a statute of general application has the burden of bringing himself clearly within it.”); *Cent. Fla. Equip. Rentals, Inc.*, 25 BNA OSHC at 2153 n.11. The Court finds Respondent has fulfilled that burden with regard to Item 2.

Mr. Johnson, whose company NAFES encapsulated the floors in the EP Station, detailed the encapsulation process performed on the Station’s original asbestos-containing floors. This process involved applying three layers of encapsulants (an adhesive polyurethane membrane, fiberglass netting, and aluminum foil) on top of the floors, as well as additional layers of patching concrete and vinyl tiles. (Tr. 998-1000; Ex. R-2). According to Mr. Johnson, once these layers are applied to the floors they are “complete[ly] encapsulated” and become a “non-disturbance situation.” (Tr. 998-99).

Ms. Padilla also characterized the encapsulation as an “encasement system” and an “overlay system,” and Mr. Harvey opined that the encapsulation eliminated any “source of asbestos fibers during routine operations in the Station.” (Tr. 541; R-24, at 6). Additional materials, including OSHA’s own proposed abatement for Citation 2, Item 1, confirm that the encapsulation performed on the Station’s floors involved the floors being “modified by a bonding agent, coating, binder, or other material” which reduced, if not outright eliminated, the potential for the asbestos in the floor to become airborne.⁶⁷ (Exs. C-13, at 4 (recommending encapsulation as a means of abatement); C-24, at 2 (recognizing encapsulation as a means of abatement); C-28, at 11, 145-47, 422 (defining encapsulation as “the treatment of ACBMS with a material that surrounds or embeds asbestos fibers in an adhesive matrix to prevent the release of fibers”)).

Based on the above, the Court finds that the encapsulated floors were “modified by a bonding agent, coating, binder, or other material” and thus they fell under the exception provided by 29 C.F.R. § 1910.1001(j)(6)(i). Respondent has thus demonstrated that the standard charged in Item 2 of Citation 3, 29 C.F.R. § 1910.1200(g), did not apply to the asbestos in the Station’s floors.

2. The Secretary Failed to Establish Noncompliance

The Secretary argues that Respondent admitted it was not in compliance with the cited standard. Sec’y’s Br. 46. He also argues that Respondent cannot claim the 1997 Survey was a valid substitute for a safety data sheet and that Respondent did not undertake any efforts to obtain a safety data sheet for the asbestos tiles installed in the EP Station. Sec’y’s Br. 46 & 47; *see also* note 15, *supra*.

⁶⁷ For this reason, the Court finds that there is no evidence that any measurable amount of asbestos would become airborne in the Station after the encapsulation, let alone “concentrations of fibers of asbestos in excess of the TWA permissible exposure level and/or excursion limit” such that the exception would not apply. *See* Asbestos Standard Preamble, 51 Fed. Reg. at 22699 (“It is OSHA’s belief that materials that have been treated in the manner described in the exception (such as bonding or coating) would not generally release airborne concentrations of asbestos above the action level”).

Respondent argues that it could not comply with the cited standard because the asbestos in the facility was installed in 1936, the manufacturer of the tiles had since gone out of business, and it could not obtain a safety data sheet from a manufacturer that no longer exists. Resp't's Br. 45 & 46. Respondent cites to several interpretation letters issued by OSHA in support of its argument. *See id.* (citing OCCUPATIONAL SAFETY & HEALTH ADMIN., Letter of Interpretation RE: "Requirements for manufacturers, who are no longer in business or have discontinued product line, to provide MSDSs and product information," (May 27, 2024); OCCUPATIONAL SAFETY & HEALTH ADMIN., Letter of Interpretation RE: "MSDSs for chemicals purchased prior to 1985," (Oct. 6, 1995)).

To address Respondent's argument, the Court must recount a brief portion of the regulatory history of safety data sheets under the HazCom standard. Prior to the promulgation of the standard, manufacturers or distributors of covered chemicals were generally under no obligation to prepare safety data sheets, even if some did so voluntarily. *See Hazard Communication*, 48 Fed. Reg. at 55306; *see also* Letter of Interpretation RE: "MSDSs for chemicals purchased prior to 1985," (Oct. 6, 1995). In promulgating the safety data sheet requirements of the HazCom standard, OSHA placed primary responsibility on the manufacturer or importer of a covered chemical to "obtain or develop" the sheet for each chemical it manufactures or imports and then "disseminat[e] this information to ... downstream employers" 29 C.F.R. § 1910.1200(g)(1), (6); *Hazard Communication* 48 Fed. Reg. at 53306. Thus, it was only with the promulgation of the HazCom standard in 1983 that a requirement was imposed on chemical manufacturers and distributors to develop safety data sheets for all covered chemicals in the first instance. *Hazard Communication* 48 Fed. Reg. at 53306. Only then could OSHA, for the first time, impose an obligation on

employers to maintain safety data sheets for chemicals present in their workplaces. Hazard Communication, 48 Fed. Reg. 53306; *see also* 29 C.F.R. § 1910.1200(g)(1).

“Regulations cannot be applied retroactively unless Congress has so authorized the administrative agency and the language of the regulations requires this result.” *Scamihorn v. Gen. Truck Drivers*, 282 F.3d 1078, 1083 (9th Cir. 2002) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). Here, it is undisputed that the tiles in the EP Station were installed in 1936, which predated the promulgation of the HazCom standard’s requirements for safety data sheets. (Ex. C-34, at 5 & 11). At that time, the manufacturer or distributor of the tiles had no responsibility to develop safety data sheets or disseminate them to Respondent, and so Respondent had no obligation to maintain copies of the sheets at the Station. *See* Hazard Communication, 48 Fed. Reg. at 55306. As nothing indicates that the HazCom regulations regarding safety data sheets were meant to be applied retroactively, the Court finds the Secretary cannot prove noncompliance for the asbestos planks in the Station, which were purchased and installed prior to the promulgation of the cited standard. *See Scamihorn v. Gen. Truck Drivers*, 282 F.3d at 1083; *see also* Letter of Interpretation RE: “MSDSs for chemicals purchased prior to 1985,” (Oct. 6, 1995) (“Manufacturing employers were not legally required to obtain, maintain, and make available upon request copies of [safety data sheets] until May 26, 1985 ... Thus, the employer is under no legal obligation to do so for hazardous chemicals purchased prior to 1985.”).

Accordingly, the Secretary has failed to demonstrate noncompliance with the cited standard.⁶⁸

⁶⁸ Given this result, the Court finds no reason to address Respondent’s infeasibility defense with regard to this violation, which relies on a similar line of argument as its argument for noncompliance. *See* Resp’t’s Br. 46 & 47.

3. Employees Were Not Exposed to a Hazardous Condition

“Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable.” *Phoenix Roofing*, 17 BNA OSHC at 1079.

As the Court previously noted, exposure is written into the HazCom standard’s applicability provisions, which limits the applicability of the standard to “employees that may be exposed under normal conditions of use or in a foreseeable emergency.” 29 C.F.R. § 1910.1200(b)(2); *see also* Part IV(F)(1)(a)(i), *supra*. Thus, for the same reasons that the Court found the HazCom standard inapplicable, the Court likewise finds the Secretary has failed to demonstrate that the Station’s employees were actually exposed or that exposure was reasonably predictable. *See* Part IV(F)(1)(a), *supra*. The Secretary’s emphasis on the positive asbestos sample obtained from the quarter-sized hole in the vestibule does not alter that conclusion, for reasons the Court already elucidated in vacating Item 1 of Citation 2. *See* Part IV(C)(2)(c)(ii)(2) & note 50, *supra*.

The Court finds there was no employee exposure to the hazard.

4. The Secretary Established Knowledge

Respondent’s knowledge of the violation may be established by showing the employer knew, or with reasonable diligence could have known, of the violative condition. 29 U.S.C. § 666(k); *Jacobs Field Servs. N.A.*, 25 BNA OSHC at 1218. The Secretary can prove knowledge of a corporate employer through the knowledge, actual or constructive, of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC at 1286.

Here, the Secretary has shown that at least one USPS supervisor, Ms. Padilla, had actual knowledge that no safety data sheet for asbestos was maintained at the EP Station. (Tr. 539-40; Ex. C-60, at 80-81). Respondent has not contested this element of the Secretary's case.

The Court finds the Secretary has established actual knowledge.

5. Conclusion

For the reasons detailed above, the Secretary has failed to establish the applicability, noncompliance, and exposure elements of the cited standard. Accordingly, the Court VACATES Citation 3, Item 2.

V. CLASSIFICATIONS & PENALTIES

Because the Court is vacating all of the Citation items, it will not address the Secretary's classifications or proposed penalties for the alleged violations, or Respondent's cursory arguments related to each. Resp't's Br. 48-50.

ORDER

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. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1, is VACATED, and therefore NO PENALTY is assessed.
2. Citation 2, Item 1 is VACATED, and therefore NO PENALTY is assessed.
3. Citation 2, Item 2 is VACATED, and therefore NO PENALTY is assessed.
4. Citation 2, Item 3 is VACATED, and therefore NO PENALTY is assessed.
5. Citation 3, Item 1 is VACATED, and therefore NO PENALTY is assessed.
6. Citation 3, Item 2 is VACATED, and therefore NO PENALTY is assessed.

SO ORDERED.

/s/ Christopher D. Helms

Christopher D. Helms
Judge, OSHRC

Dated: September 28, 2026
Denver, Colorado