**In the Matter of:**

**WILLIAM T. KNOX,**

**COMPLAINANT,**

**v.**

**UNITED STATES DEPATMENT OF THE INTERIOR,**

**RESPONDENT.**

**ARB CASE NO. 07-105**

**ALJ CASE NO. 01-CAA-003**

**DATE: August 30, 2007**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***
Daniel P. Meyer, Esq., *Public Employees for Environmental Responsibility, Washington, D.C.*, and Richard E. Condit, Esq., Washington, D.C.

***For the Respondent:***
Donald S. Harris, Esq., and Jacqueline Jackson, Esq., *United States Department of the Interior*, Washington, D.C.

## FINAL DECISION AND ORDER ON REMAND

William T. Knox filed a whistleblower complaint against his employer, the United States Department of the Interior (DOI). He claimed that DOI had violated the employee protection provisions of the Clean Air Act (CAA).[1] After an evidentiary

[1] 42 U.S.C.A. § 7622 (West 1995). Regulations that implement the CAA are set out at 29 C.F.R. Part 24 (2007). Knox also sought relief under the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998). Sovereign immunity bars Knox's TSCA claim.

hearing, a United States Department of Labor Administrative Law Judge (ALJ) concluded that DOI had violated the CAA. But on DOI's appeal, we dismissed Knox's complaint.[2] Knox then appealed to the United States Court of Appeals for the Fourth Circuit. That court remanded the case to us for further proceedings.[3] After we reexamined the case according to the court's instructions, we dismissed Knox's complaint. Knox appealed that decision to the Fourth Circuit, and the court again remanded with instructions.[4] Having reexamined this record pursuant to the court's instructions, we again conclude that Knox's complaint must be dismissed.

## JURISDICTION AND STANDARD OF REVIEW

The CAA authorizes the Secretary of Labor to hear complaints of alleged discrimination because of protected activity and, upon finding a violation, to order abatement and other remedies.[5] The Secretary has delegated authority for review of an ALJ's initial decision to the Administrative Review Board (ARB or the Board).[6] Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the CAA. The ARB engages in de novo review of the ALJ's recommended decision.[7]

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*See Johnson v. Oak Ridge Operations Office, U.S. Dep't of Energy*, ARB No. 97-057, ALJ Nos. 95-CAA-020, 021, and 022, slip op. at 9-10 (ARB Sept. 30, 1999).

[2] *Knox v. U.S. Dep't of the Interior*, ARB No. 03-040, ALJ No. 01-CAA-003 (ARB Sept. 30, 2004).

[3] *Knox v. U.S. Dep't of the Interior*, 434 F.3d 721 (4th Cir. 2006).

[4] *Knox v. U.S. Dep't of Labor*, No. 06-1726, 2007 WL 1493967 (4th Cir. May 23, 2007).

[5] 42 U.S.C.A. § 7622 (b).

[6] 29 C.F.R. § 24.8. *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

[7] *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. U.S. Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 97-CAA-002, 97-CAA-009, slip op. at 15 (ARB Feb. 29, 2000).

## DISCUSSION

### The Legal Framework

The CAA prohibits employers from retaliating when their employees engage in certain protected activities:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) –
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> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan . . . [or,]
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.[8]

To prevail on his CAA complaint, Knox must establish by a preponderance of the evidence that he engaged in one of these protected activities. He must also prove by a preponderance of evidence that DOI was aware of the protected activity, that he suffered adverse employment action, and that the protected activity was the reason for the adverse action.[9] Under our jurisprudence, an employee engages in CAA-protected activity when he or she expresses a concern to the employer, and reasonably believes, that the employer has either violated Environmental Protection Agency (EPA) regulations implementing the CAA or has emitted or might emit, at a risk to the general public, potentially hazardous materials into the ambient air.[10]

We recently decided that under the Fourth Circuit's standard for CAA-protected activity, Knox proved that he reasonably believed that DOI was emitting asbestos, a

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[8] 42 U.S.C.A. § 7622(a)(1), (3). *See also* 29 C.F.R. §§ 24.2(a), 24.3(a), 24.4(d)(3).

[9] *Seetharaman v. Gen. Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-021, slip op. at 5 (ARB May 28, 2004).

[10] *Knox v. U.S. Dep't of the Interior*, ARB No. 06-089, ALJ No. 01-CAA-003, slip op. at 3 (ARB Apr. 28, 2006); *Kemp v. Volunteers of America of Pa., Inc.*, ARB No. 00-069, ALJ No. 00-CAA-006, slip op. at 4-6 (ARB Dec. 18, 2000).

potentially hazardous material, into the ambient air. But we also found that he did not express this concern to DOI managers. Thus, since they were not aware of Knox's concern, the managers could not have retaliated because of it. Therefore, we dismissed Knox's complaint.[11] The Fourth Circuit affirmed our finding that DOI could not have retaliated based on Knox's concerns about asbestos emissions. But the Court noted that since Knox also had informed then DOI Secretary Babbitt that "[o]ver the years, . . . EPA Laws . . . had been violated," he had presented some evidence that "arguably tends to establish that he informed DOI officials about his concern that EPA-work practice standards had been violated."[12] Therefore, the court instructed us to reconsider the record and, in effect, decide if Knox adequately proved that he reasonably believed that DOI was violating EPA regulations and thus engaged in CAA-protected activity.

Knox was worried about asbestos at the Harper's Ferry Job Corps Center. Therefore, we focus on EPA regulations pertaining to asbestos, promulgated pursuant to the CAA, that Knox reasonably could have believed DOI violated or was about to violate. The CAA authorizes the EPA Administrator to establish emissions standards for hazardous air pollutants and to regulate their emission.[13] Asbestos is one of these pollutants.[14] Since asbestos is not necessarily emitted through a conveyance designed and constructed to capture it, but is also emitted, for instance, when building renovation or demolition occurs, the CAA authorizes the EPA Administrator, in lieu of emission standards, to promulgate "work practice" standards to control asbestos pollution.[15] The work practice standards, found at 40 C.F.R. Subpart M, include regulations pertaining to asbestos mills, road construction and maintenance, manufacturing, demolition and renovation activity, spraying, fabricating, insulating, and waste disposal.[16] Thus, we examined the record to determine which of the asbestos regulations Knox could reasonably have believed DOI violated.

**Record Evidence Relevant to Knox's Asbestos Concerns**

Knox began working at the National Park Service Job Corps Center in Harper's Ferry, West Virginia, on November 21, 1999.[17] Part of Knox's duties included acting as

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11 *Knox v. U.S. Dep't of the Interior,* ARB No. 06-089, slip op. at 5-6.

12 *Knox,* No. 06-1726, slip op. at 3.

13 42 U.S.C.A. § 7412 (c), (d).

14 42 U.S.C.A.. § 7412 (b).

15 42 U.S.C.A. § 7412 (h).

16 40 C.F.R. §§ 61.142-61.155.

17 Respondent's Exhibit (RX) 46.

the Center's safety officer.[18] In December 1999 while accompanying Raymond Sooy, a Department of Labor official responsible for inspecting Job Corps Centers for compliance with Department of Labor Occupational Safety and Health Administration (OSHA) regulations, Knox found an "Asbestos Survey Report" dated September 8, 1993. This report, together with two OSHA "Unsafe or Unhealthful Conditions" notices, issued on April 15, 1999 (after a previous OSHA inspection in January 1999) and December 17, 1999 (Sooy's investigation report), caused Knox to believe that an "asbestos problem" existed at the Job Corps Center.[19]

The Survey Report had been prepared by AAS Environmental, Inc., an environmental engineering consulting company that had inspected the Job Corps Center on June 3, 1993. The report indicated that some vinyl floor tile, mastic beneath the tile, sheet flooring, and roofing material in several buildings contained asbestos.[20] According to the report, however, this asbestos was "not friable or likely to become friable and, as such, should not be considered hazardous unless sanded, drilled or otherwise damaged."[21] Similarly, asbestos found in some of the drywall was determined to be "non-hazardous" so long as the drywall remained in good condition.[22] The report indicated that removal of the asbestos was "not necessary," but further advised that if any of the material containing the asbestos were to be disturbed during renovation or demolition, a licensed asbestos removal contractor should first remove and properly dispose of it.[23]

Shortly after finding out about the asbestos, Knox told his supervisor, Valerie Flemming, that there was "an asbestos problem" at the Center.[24] Then, on January 4,

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[18] RX 45.

[19] RX 1; Complainant's Exhibit (CX) 119; ALJ Exhibit (ALJX) 1.

[20] RX 1 at 1-3.

[21] RX 1 at 29.

[22] RX 1 at 30.

[23] RX 1 at 29-33. The report also reminded DOI about 29 C.F.R. §§ 1910.1001 and 1926.58 (1999). These OSHA regulations require employers to medically monitor employees and construction workers who might be exposed to asbestos. RX 1 at A-23 through A-32. These regulations implement both the Occupational Safety and Health Act (OSH Act) and the Contract Work Hours and Safety Standards Act (CWHSSA). *See* 29 U.S.C.A. §§ 651, 653, 655, 657 (West 1999) and 40 U.S.C.A. § 333 (West 1997). The two OSHA "Notice of Unsafe or Unhealthful Conditions" also contained this, and only this, reference to asbestos regulations.

[24] Hearing Transcript (HT) at 1279; ALJX 1; RX 55.

2000, Knox faxed Gloria Brown, DOI's Regional Safety Officer. Knox referred to the 1993 "Asbestos Survey Report" and the two OSHA "Unsafe or Unhealthful Conditions" notices. He wrote, "According to 29 C.F.R. 1926.1101 on asbestos from pages 496 to 561 laws, rules, and Guidelines have been violated."[25] And citing another OSHA regulation, he informed Brown that he wanted to be assured that DOI would provide a "competent person . . . who is capable of identifying existing asbestos hazards in the work place and selecting the appropriate control strategy."[26] Knox also informed Brown that he had talked to Ben Hutzler, a maintenance worker at the Center. Knox said that Hutzler told him that he, Hutzler, without protective gear, had removed tile and drywall that "might have had asbestos."[27]

On January 6, 2000, Knox, Flemming, Brown, and other DOI management officials met in Washington, D.C. Knox explained to the group "what the asbestos problem was, who was exposed and that no one was ever told about the asbestos problem at the Center."[28] As a result of this meeting, Brown and Gentry Davis, the DOI Deputy Regional Director for safety, met with Knox at the Jobs Corps Center and inspected the facilities for asbestos.[29] After this inspection, a DOI risk management officer recommended that the Job Corps Center conduct a new survey, establish an abatement plan, and provide asbestos training for Knox.[30] The inspection also revealed that the area where Hutzler had worked did not contain asbestos.[31]

Soon thereafter, when Flemming and Jay Weisz, the Center's Director, asked him about his meeting with Brown and Davis, Knox told them that he felt that employees of the Center "were in a dangerous working environment."[32] Weisz verified that Knox told

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[25] 29 C.F.R. § 1926.1101 was formerly 29 C.F.R. § 1926.58. 59 Fed. Reg. 41,131 (August 10, 1994).

[26] Knox cited 29 C.F.R. § 1926.32(f), another regulation that implements the CWHSSA. The regulation defines a "competent person" as "one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them."

[27] CX 119.

[28] ALJX 1; RX 55; HT at 1290.

[29] ALJX 1.

[30] RX 8.

[31] HT at 4213.

him that he believed that employees at the Center had been exposed to asbestos but that Knox did not specify any CAA violations.[33] The new asbestos survey, conducted at the Job Corps Center on February 4, 2000, demonstrated that though asbestos existed, it was nonfriable and therefore "not considered to be harmful" if not disturbed.[34]

Knox also expressed his concerns elsewhere. On January 30, 2000, Knox filed an action with the U.S. Merit Systems Protection Board alleging that he had been harassed "for exposing the Asbestos Problem, which management knew about all along and chose to ignore." He claimed that DOI violated the Asbestos Hazard Emergency Response Act (AHERA)[35] and engaged in "unfair labor practices" and "prohibited practices under the disabled American Veterans Affirmative Action program."[36] And on February 2, 2000, supplementing an earlier filing with the Office of Special Counsel, Knox complained about "serious problems" at the Center such as "the asbestos problem." He said students, staff, and contractors had been exposed and that they had "never received training in accordance with OSHA Requirements."[37]

Then, on March 7, 2000, Knox faxed a letter to DOI Secretary Bruce Babbitt. He contended that "I am being harassed and am paying the price for exposing the asbestos problem, which management knew all about and chose to ignore." And, as noted earlier, Knox also alleged that "[o]ver the years, … EPA Laws … had been violated" at the Center.[38]

DOI appears to have listened to Knox's concerns. On March 9, at Brown's request, a DOI Industrial Hygienist, after reviewing the 1993 Survey report and the February 2000 report, met with employees to discuss the reports' findings (not friable, not hazardous) and to allay concerns.[39] Even so, on or about March 10, Knox again met

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[32] ALJX 1; RX 55.

[33] HT at 180, 204-205, 213.

[34] RX 21a, 33, 43.

[35] AHERA is Title II of the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (West 1998).

[36] RX 55.

[37] *Id.*

[38] ALJX 1. Secretary Babbitt apparently forwarded this letter to the U.S. Department of Labor. The letter eventually became the complaint that initiated this case. *See* ALJX 3; HT at 5.

[39] RX 33.

with Brown and Davis to discuss the asbestos issue.[40] Brown testified that Knox talked about and quoted OSHA regulations, but not CAA regulations.[41] Knox's last day of work at the Job Corps Center was on March 16, 2000.[42]

On March 20, 2000, further recognizing Knox's concerns, DOI management officials authorized that air monitoring for possible asbestos exposure of employees at the Jobs Corps Center be scheduled and that an occupational physician meet with concerned Center employees to answer any questions they may have about potential asbestos exposure.[43] The results of personal air sampling on Center employees conducted on April 4, 2000, revealed that employees were not exposed to asbestos. An occupational physician also met with Center employees on April 5, 2000, and informed them about the results of the asbestos survey and air monitoring and answered their questions about potential asbestos exposure.[44]

**The Record Does Not Demonstrate that Knox Reasonably Believed DOI Violated Any EPA Asbestos Regulations.**

We take a moment to review. The court instructed us to examine the record and determine whether Knox reasonably believed that DOI violated an EPA-work practice standard. Since Knox was concerned solely with asbestos, we noted the EPA asbestos regulations pertaining to asbestos mills, road construction and maintenance, manufacturing, demolition and renovation activity, spraying, fabricating, insulating, and asbestos waste disposal sites.[45] The record does not contain testimony or documents that expressly refer to any of the EPA standards, though Knox's March 7 fax to then DOI Secretary Babbitt vaguely refers to "EPA Laws." The record contains nothing that implicates the asbestos regulations pertaining to asbestos mills, roads, manufacturing, spraying, fabricating, insulating, or waste disposal.

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[40] RX 29.

[41] HT at 2922.

[42] CX 100. Weisz fired Knox effective March 16. Weisz thought that Knox was a probationary employee and thus could be fired at will. RX 31. When DOI discovered that he was a permanent employee, it reinstated Knox on March 18, 2000. RX 48. Nevertheless, Knox did not return to work at the Job Corps Center. The record indicates that he began work again for DOI as an Engineering Equipment Operator at Greenbelt Park, Maryland, on September 29, 2000. RX 49.

[43] RX 33.

[44] RX 38, 41, 43.

[45] 40 C.F.R. §§ 61.142-61.155.

But as we will presently discuss, Knox presented some evidence that could suggest that he believed that DOI violated 40 C.F.R. §§ 61.145, 61.150, the regulations that cover reporting, handling, and disposing of asbestos before and during building demolition and renovation. The Fifth Circuit Court of Appeals has nicely summarized these regulations.[46] First, these standards apply only to buildings containing specific kinds and large amounts of asbestos. We will assume without finding that Knox proved that the required kind and amount of asbestos at some of the Job Corps Center buildings existed. Furthermore:

> [The standards regulate] in minute detail, the handing of asbestos in building renovation sites. For example, material containing asbestos must be wetted during removal, kept sufficiently wet after removal to prevent the release of asbestos fibers, and stored in leak-tight containers until properly disposed. A foreman or management-level officer, trained in complying with these work place standards, must be present at any site before workers may handle material containing asbestos.[47]

***The 1993 "Asbestos Survey Report"***

The 1993 "Asbestos Survey Report" that Knox found while accompanying Sooy in December 1999 is part of this record.[48] This report caused Knox to believe that an "asbestos problem" existed because it indicated that non-friable asbestos was present in some vinyl floor tile and mastic beneath the tile, and in some of the sheet flooring, roofing material, and drywall in several buildings. The report stated that this asbestos was not a hazard "unless sanded, drilled or otherwise damaged." Therefore, warned the report, if this asbestos were to be disturbed during renovation or demolition, it should first be removed and properly disposed of by a licensed asbestos removal contractor.[49] Thus, the Survey Report at least implicates the regulations pertaining to renovation and demolition.

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46 *United States v. Ho*, 311 F.3d 589 (5th Cir. 2002).

47 *Id.* at 595.

48 RX 1.

49 *Id.* at 29-33.

But to prove that he reasonably believed that DOI violated or was about to violate the renovation-demolition regulations, Knox would necessarily have to first show that he reasonably believed that DOI renovated or demolished buildings containing asbestos or was preparing to do so. Therefore, what evidence did Knox present to demonstrate such a belief?

The only evidence that Knox presented that directly pertains to renovation-demolition is his testimony that he was aware that, before he began to work at the Center, construction work had been performed on the roofs of student dormitories. He further testified that the roofs on "Dorms 1 and 2" contained asbestos.[50] But since Knox did not know whether the roofs on Dorms 1 and 2 had been renovated, he could not have reasonably believed that DOI had renovated buildings containing asbestos.[51] Still, the record does contain some additional evidence about renovation.

***Ben Hutzler's Testimony***

As noted earlier, Ben Hutzler, a maintenance worker at the Center, told Knox that he, Hutzler, without protective gear, had removed tile and drywall that "might have had asbestos." Knox reported this conversation in his January 4, 2000 fax to Gloria Brown, DOI's Regional Safety Officer.[52] Hutzler testified that he became aware of the asbestos in 1999 and was upset because he worked in some of the areas that contained asbestos. In addition to removing tile and drywall, Hutzler's work included replacing light fixtures and valves, lifting ceiling tile, gluing sheets of drywall together, and sanding.[53] Thus, since Hutzler's work arguably involved renovation-type activities, Knox's report to Brown about what Hutzler told him might evidence his belief that DOI was renovating buildings containing asbestos.[54]

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[50] HT 2151-2152, 2154. As noted earlier, Knox's fax to Brown alleged that, at an unspecified time and place, DOI had violated 29 C.F.R. § 1926.1101, the OSHA regulation requiring employers to medically monitor construction workers who are exposed to asbestos. CX 119, p. 2. This evidence, therefore, indirectly pertains to renovation since it covers construction workers.

[51] Compare HT 2154 where Knox testifies that the roofs on Dorms 1 and 2 had been replaced, with HT 2163 where Knox admits that, "[N]o, I really don't know" which dormitory roofs had been replaced. Moreover, despite the fact that the Survey Report indicated that Dorms 1 and 2 contained asbestos, we are not convinced that Knox even reasonably believed that they did because he later testified, "I don't know if . . . [Dorms 1 and 2] had it." HT 2469.

[52] CX 119.

[53] HT 1579, 1581-82, 1584.

But the record does not support such a belief. First, though Hutzler testified that he "worked" in areas that contained asbestos, he did not indicate that he renovated to the extent that he disturbed, sanded, drilled or otherwise damaged areas containing asbestos, which, according to the Survey Report, would have made the asbestos hazardous.[55] Furthermore, Hutzler admitted that he did not know the difference between dust and asbestos.[56] And according to Knox, Hutzler told him only that he removed tile and drywall (i.e. renovated) that "might have had asbestos." Secondly, Davis, DOI's regional safety director, testified that on January 6, 2000, he talked to Hutzler about the areas where Hutzler worked. Davis testified, "But the location that he said that he had been working in was not an area that had been identified [as having asbestos] in the report of 1993, nor the report that we had done in 1999 and 2000."[57]

Therefore, we find that Knox has not shown that he reasonably believed that DOI renovated or demolished buildings that contained asbestos. Knox did not testify that he held such a belief. And for the reasons just stated, the Survey Report and Hutzler's testimony do not evidence that belief. Thus, if Knox did not reasonably believe that DOI renovated or demolished buildings containing asbestos, it follows, and we find, that he could not have reasonably believed that DOI violated or was about to violate the EPA regulations pertaining to renovating or demolishing buildings that contain asbestos. Given these findings, we conclude that Knox did not engage in the CAA-protected activity that pertains to EPA regulations.

**Knox's July 2005 Motion for Reconsideration**

In July 2005, after we had issued our September 30, 2004 Final Decision and Order dismissing his complaint because he had not proved that he reasonably believed that DOI was emitting asbestos into the ambient air, Knox requested that we reconsider

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[54] Knox did not present this argument to us. Generally, the Board will not consider an argument that a party has not raised and briefed and will consider such argument to be waived. *Walker v. American Airlines*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 9 (ARB Mar. 30, 2007). But in the spirit of the court's instruction that we examine the record for evidence that Knox reasonably believed that DOI violated the EPA regulations, we will proceed as if Knox makes this argument.

[55] RX 1 at 29-33.

[56] HT 1580.

[57] HT 4212-4213. James Kircher, another maintenance worker, testified that he drilled through drywall in the maintenance shop but did not know if the drywall contained asbestos, only that the drywall "possibly" contained asbestos. TR 1140-1141. Therefore, Knox cannot rely on Kircher's testimony to establish that he reasonably believed that DOI was renovating areas containing asbestos.

our decision, reopen the record, and admit two documents into evidence: an April 14, 2000 Letter from West Virginia's Division of Environmental Protection (WVDEP) Asbestos Program Manager to the U.S. Department of Justice and a May 2000 "Telephone Report of an Air Pollution Problem."[58]

Knox averred that after we rendered our Final Decision and Order, he discovered these documents which, when read together, indicate that he had notified the WVDEP Asbestos Program Manager that he had recently been fired because he had informed DOI officials that students and employees at the Job Corps Center had been exposed to asbestos and that at "sometime in the past, students and employees removed asbestos floor tiles and improperly disposed of floor tiles." The documents reveal that because of Knox's report, the Program Manager at first thought that the Job Corps Center might have violated 40 C.F.R. § 61.145, the EPA regulation pertaining to renovating facilities containing asbestos that we have just discussed.[59] Therefore, he notified the Job Corp Center about this information and, along with an EPA inspector and Weisz, the Job Corps Center Director, inspected the Job Corps Center training facility.[60] Knox argued that since he had not been able to submit these documents into evidence due to factors beyond his reasonable control and that his failure to do so constituted an exceptional circumstance warranting relief, we should accept this new evidence as establishing that he reasonably believed DOI was emitting asbestos into the air and, thus, reconsider our decision and conclude that he had engaged in CAA-protected activity.

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[58] July 27, 2005 Motion for Reconsideration, Exhibits A, B. The ARB is authorized to reconsider earlier decisions. *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002), *aff'g Macktal v. Brown and Root, Inc.*, ARB Nos. 98-112/122A, ALJ No. 86-ERA-023, slip op. at 2-6 (ARB Nov. 20, 1998). In the absence of our own rule, we have adopted principles federal courts employ in deciding requests for reconsideration. We will reconsider our decisions under similar limited circumstances, which include: (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence; (ii) new material facts that occurred after the court's decision; (iii) a change in the law after the court's decision; and (iv) failure to consider material facts presented to the court before its decision. *See, e.g., Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992); *Weinstock v. Wilk*, 2004 WL 367618, at *1 (D. Conn. Feb. 25, 2004); *Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc.*, 215 F.R.D. 581, 582-586 (D. Ariz. 2003). A similar standard is contained in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18 (2007), which provides that "[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." 29 C.F.R. § 18.34(c); *see e.g., Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 95-CAA-010, slip op. at 6-7 (ARB Jan. 31, 2001).

[59] July 27, 2005 Motion for Reconsideration, Exhibit A.

[60] *Id.*, Exhibit B.

We denied Knox's Motion for Reconsideration because these documents did not present material new evidence concerning asbestos emissions into the ambient air.[61] But because the Court has instructed us to "reconsider the entire record in light of Knox's contention that he reported EPA-work practice standard violations to DOI management," we will assume that Knox has, in light of the remand, renewed his motion that we reopen the record and admit these documents. We grant the motion because these documents are material to the issue of whether Knox reasonably believed that DOI was violating the EPA asbestos regulations pertaining to renovation and demolition as opposed to whether he reasonably believed DOI was emitting asbestos into the atmosphere.[62]

Therefore, with this evidence in the record, Knox would argue as follows. He reported to WVDEP that "sometime in the past, students and employees removed asbestos floor tiles and improperly disposed of floor tiles." Thus, because he reported renovation activity involving asbestos, the report demonstrates that he reasonably believed that DOI was violating the EPA renovation-demolition regulations.

But we find that this new evidence, though material, does not demonstrate that Knox reasonably believed that DOI was violating the renovation-demolition regulations. Knox based his report to WVDEP on information obtained from other employees. According to the "Telephone Report," one of the new documents Knox requested that we enter into the record, WVDEP's Officer Turner contacted Knox to discuss his allegations about the asbestos floor tiles. After questioning Knox, Turner concluded that Knox "did not have direct knowledge or evidence to support his allegations other than what was reported to him by fellow employees." Turner then contacted one of the "fellow employees" who informed him only that a contractor had removed a "dusty floor tile" from Dorm 2 in the summer of 1998. Turner (or perhaps another, unnamed WVDEP officer - the record is unclear) continued investigating and learned from Center Director Weisz that neither students nor contractors had abated asbestos containing materials within the last five years. Furthermore, Weisz informed Turner that Dorm 2 contained no asbestos floor tile or mastic in the summer of 1998.

After reviewing inspection reports and making "numerous calls" to Knox and Knox's information sources, Turner concluded that "no information or evidence could be

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[61] *Knox v. U.S. Dep't of the Interior*, ARB No 03-040, ALJ No. 2001-CAA-3 (Order Denying Reconsideration, ARB Oct. 24, 2005).

[62] We reiterate that the CAA protects employees who express a concern, and reasonably believe, that the employer has either violated EPA regulations implementing the CAA or has emitted or might emit, at a risk to the general public, potentially hazardous materials into the ambient air. *Knox v. U.S. Dep't of the Interior*, ARB No. 06-089, slip op. at 3; *Kemp v. Volunteers of America of Pa., Inc.*, ARB No. 00-069, slip op. at 4-6.

extracted to find a non-compliance with [EPA regulations]."[63] And Flemming, Knox's supervisor, confirms Turner's conclusion. She testified that no information existed to indicate that students or anyone else had ever abated or removed "any tiles or mastic or anything that was identified in the reports while I was there."[64]

Given these facts, we find that Knox only speculated that students and employees removed and disposed of asbestos floor tiles in the summer of 1998. Speculation cannot be the basis for a reasonable belief.[65] Therefore, we find that this newly admitted evidence does not demonstrate that Knox reasonably believed that DOI violated the EPA renovation-demolition regulation. Accordingly, even in light of this new evidence, we conclude that Knox did not engage in CAA- protected activity.

## CONCLUSION

In accordance with the Fourth Circuit's instruction, we have examined this record to determine if Knox reasonably believed that DOI violated or was about to violate EPA regulations that pertain to the CAA and thus whether he engaged in activity the CAA protects. The relevant regulations here are the EPA asbestos standards.

To prove that he engaged in CAA-protected activity, Knox must prove by a preponderance of the evidence that he reasonably believed DOI violated the asbestos regulations. The record, even when supplemented with the newly acquired evidence, does not contain a preponderance of such evidence. Therefore, since Knox did not demonstrate CAA-protected activity, as he must, we **DISMISS** his complaint.

**SO ORDERED.**

**OLIVER M. TRANSUE**
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**
**Chief Administrative Appeals Judge**

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63 July 27, 2005 Motion for Reconsideration, Exhibit B.

64 HT 820.

65 *McCoy v. North Fork Serv. Joint Venture,* ARB No. 04-176, ALJ No. 04-CAA-2, slip op. at 10-11 (ARB Apr. 30, 2007); *cf. Johnson v. Oak Ridge Operations Office,* ARB No. 97-057, slip op. at 9 (expressing concern that issuing security clearances to persons with questionable backgrounds might endanger the environment is "rank speculation," not protected activity).