UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	**)**	
	)	
AE Associates, Inc.	**)**	**TSCA -10-99-0262**
	)	
Respondent	**)**	

Initial Decision

Introduction

In this proceeding under the subchapter of the Toxic Substances Control Act known as the Asbestos Hazard Emergency Response Act,[1] AE Associates Inc. has been cited by the Environmental Protection Agency for a single violation of that Act, for conducting an asbestos inspection of a school building without having accreditation. The Complaint was filed on November 19, 1999. EPA seeks a civil penalty of $5,500, the maximum penalty for the offense. Where a violation is established, the penalty imposed is to consider the nature, circumstances, extent, gravity of the violation, along with the culpability of the violator, any history of violations, the violator's ability to pay and other matters as justice may require.[2]

---

[1]15 U.S.C. § 2647(g). EPA also relies upon 40 C.F.R. Part 763, Appendix C to Subpart E - Asbestos Model Accreditation Plan, as additional authority for the violation charged.

[2]In describing the penalty criteria, the Complaint refers to Toxic Substances Control Act (TSCA) Section 2647, 15 USC 2647, a provision directed to local educational agencies. Complaint at pages 1 and 4. The Respondent is not such an entity. As a consequence, in citing this provision, EPA referred to the wrong penalty criteria, criteria which included "the ability of the Respondent to continue to provide educational services to the community." The appropriate section to have cited is TSCA Section 16(a)(2)(b), 15 USC 2615(a)(2)(b). This error resulted in the Agency's failure to list all the penalty criteria that are to be considered by omitting the factor of "other factors as justice may require." In *Asbestos Specialists, Inc*. TSCA Appeal No. 92-3, 4 E.A.D. 819, 1993 WL 473845 (E.P.A.), the Environmental Appeals Board expressed its displeasure with such errors in complaints. In this case and in *Asbestos Specialists*, EPA incorrectly listed "the ability to continue to provide educational services to the community" even

A hearing was held on October 5th and 6th, 2000 in Portland, Oregon. There is no genuine dispute that AE Associates ("AE" or "Respondent") did inspect for asbestos-containing material at the Pacific Coast Community School, a school building which was under the authority of a local educational agency and did so without having Asbestos Hazard Emergency Response Act ("AHERA") accreditation. Consequently, the issues are whether AE presented any viable defense to liability for its admitted inspection and, if not, the determination of an appropriate penalty to impose in this instance.

Determination of Liability

EPA contends that AE's inspection of the Pacific Coast Community School ("Pacific School" or "School") without having obtained AHERA accreditation to conduct asbestos inspections is perforce a violation of 15 U.S.C. § 2646 (a)(1). It observes that AE concedes it conducted an inspection at the Pacific School on July 29, 1999 for the purpose of determining the presence of ACBM and memorialized that activity in its August 10, 1999 report and letter to the School. EPA contends that such activity falls within the definition of "inspection" as defined at 40 C.F.R. Part 763, Appendix C to Subpart E. The Agency also notes that the building AE inspected is covered by the definition of "school building" under 40 C.F.R. § 763.83

While acknowledging that "Oregon law[3] authorizes professional engineers to conduct 'investigation[s] ... for the purpose of ensuring compliance with specifications and design, in connection with any public or private ... buildings,'" EPA maintains that such authorization does not allow one to side step the federal AHERA accreditation requirements. EPA Br. at 21. It notes that the preamble to the AHERA Model Accreditation Plan expressly speaks to this issue, providing that even where inspections are required by other regulations, if such an inspection has an ACBM aspect, one must be accredited to perform the asbestos component of it.[4] *Id*. at 22,

---

though neither respondent provided such functions. EPA made no effort to correct this error, even after the Court called it to its attention. However, the pleading was *de facto* conformed to the evidence by the Court's noticing the parties of this error at the outset of the hearing. Respondent understood the charge against it and the pleading error did not impact on its ability to prepare its defense. See: *Port of Oakland and Great Lakes Dredge and Dock Co*. 4 E.A.D. 170, 1992 WL 211981 (E.P.A.) August 5, 1992, and *In the Matter of Tifa Ltd*., 1999 WL 549374 (E.P.A.), July 7, 1999.

[3]EPA cites the Oregon statutes at ORS 672.005(1)(a)(B).

[4]Attempting to gild the lily, EPA submitted, post-hearing and without any accompanying motion, the declaration of Sharon Eng, as additional authority for the proposition that there is no alternative to AHERA accreditation where one is involved in activity covered by the definition of "inspection" in the MAP. The Declaration itself is merely a vehicle for EPA to introduce a "Determination Detail" which informs, in response to an inquiry, of the Agency's position. This

citing C's Ex. 2 at 15. EPA contends that accreditation to inspect school buildings for the presence of ACBM can only be achieved through completion of the three-day AHERA training course and passing the examination which follows the course. In this instance, Oregon has not become authorized to administer accreditation for AHERA inspections and consequently in that state only an EPA approved course may be taken. EPA has previously made the determination that the AHERA training was mandatory, regardless of one's experience or training. Tr. 61-62. Consequently, as this is the exclusive means to obtain accreditation, a professional engineer's license can not operate as an alternate basis or an exemption to conduct these inspections.

From AE's perspective, it notes that these events began as a result of a letter from EPA, dated June 18, 1999, in which the Pacific School was asked to do an asbestos survey. R's Ex. 2. In late July of that year the school contacted AE, faxing it the EPA memo and, with some urgency, inquired whether the inspection and survey could be completed within the deadline. AE responded, through Mr. Robert Bowser, its principal engineer, that it would do the inspection and also informing the school that it could qualify for an exemption from further inspections and development of a management plan, if no asbestos were found. AE told the school that if asbestos were found, a management plan would be needed and another firm would need to be retained for that work. Thus, AE saw its role as one limited to the identification of asbestos candidates within the school and the forwarding of such candidates for laboratory analysis.

AE describes its inspection as "informational" and as a "preliminary [step] to any management plan ... if asbestos was present in the building." R's Br. at 2. AE operated under the assumption that Oregon AHERA inspectors were all registered contractors who could offer asbestos cleanups as well as inspections and management plans. For its part, AE felt that a potential for conflict of interest existed where contractors also engage in inspections, as a finding of asbestos would inure to the benefit of the asbestos removal side of such businesses. To avoid having a conflicting stake in the outcome of such inspections, AE believed that inspections and contractor work related to such work should not be done by the same entity. *Id*. at 3. In good faith, AE interpreted Oregon state law (ORS 672.005), allowing registered professional engineers to do inspections and investigations with "applications of special knowledge of the mathematical, physical and Engineering sciences" as permitting the type of inspection it performed at the Pacific School.[5] This interpretation was reinforced, in AE's view, because Mr.

---

declaration will not be considered as part of the record.

[5]AE presents a related argument, arguing that it would be a dereliction of its responsibilities in performing an inspection of a building, something it indisputably may do, to ignore the presence of suspected asbestos during the course of a building inspection. While this is a matter for state law, the Court accepts that, consistent with its ethical obligations and its duty to do adequate and appropriate inspections, AE is likely required, as would all professional engineers in Oregon, to note asbestos issues when conducting a general inspection. That being said, noting the issue of possible asbestos is distinct from conducting an AHERA inspection, as opposed to a general building inspection. Where the former is the activity, only those certified

Bowser was also accepted by the Oregon Board of Engineering Examiners as qualified in the field of "Environmental Engineering. *Id*. at 4 and R's Ex. 17. Further, when EPA voiced its objections to AE's non-AHERA inspection, AE acted responsibly by promptly withdrawing from involvement with the inspection and refunding all funds to the school.

To EPA's complaint that AE's report failed to meet the standards for management plans, AE maintains that although its report was brief, it still was very consistent with the AHERA qualified inspection report. AE's position is that, as a registered professional engineering company, it could do an evaluation to determine whether the school had asbestos candidates but that it could not do a management plan if such candidates turned out positive for asbestos. At a minimum, AE contends that it understandably operated under the assumption that it was qualified under Oregon law to do asbestos inspections. *Id*. at 6. It believes that a reasonable person would have believed that Oregon's authorization for registered engineers would allow them to perform asbestos inspections and not anticipate that EPA would take the view that only AHERA inspectors could do such work. *Id*. at 7.

As the Respondent is not a lawyer and was acting *pro se*, the Court made efforts to interpret the defenses AE was trying to articulate. Interpreting Respondent's arguments in response[6] to the Complaint, the Court posited whether AE had, due to the press of time to get the inspection done, entered into a contract with the school under which the inspection was conditional. That is, was the contract subject to a condition subsequent, the condition being that the inspection would be voided if AE or the school subsequently determined that AE did not have the proper accreditation?

EPA states that, to be found, a condition subsequent must "appear expressly or by clear implication" and that, in this instance, AE presented "no evidence that an express condition was agreed upon by Respondent and the school at the time of the formation of the contract." EPA Brief at 5-6. EPA submits that there was no clear implication of such an agreement and that to allow such an unexpressed condition subsequent would allow any party to breach an agreement, return the consideration, and then avoid damages for failure to perform the contract. *Id*. at 6.

---

under AHERA may do the work. Where the latter is the reason for the inspection, the engineer's responsibility would likely include mentioning suspected asbestos in the building inspection report, but such report should not attempt to be a substitute for the specific AHERA inspection. Thus, in those instances it would appear that the engineer should note the issue and refer the client to the need for an AHERA inspection to be conducted.

[6]EPA has objected to the Court's "pos[ing] a possible defense on behalf of Respondent," suggesting that AE did not raise any defenses in its answer and consequently that it waived any right to assert defenses. C's Post-hearing Brief at 5. The Court views the matter differently. The Respondent is a small business and was acting pro se. Under such circumstances the Court considers its responsibilities to include fairly interpreting the Respondent's defenses, even though inarticulately expressed.

Without citing any authority, EPA also asserts that, even if there was such a condition subsequent, it would have no impact on the AHERA violation, as AE conducted an inspection without the requisite accreditation. *Id.* [7]

It is undisputed that AE, through Mr. Bowser, inspected the Pacific Crest Community School, a private, non-profit, elementary or secondary school, located in Portland, Oregon, on July 29, 1999. The purpose of the inspection was to assess whether asbestos was present at the school. During the inspection, AE took samples of suspected asbestos containing material and had those samples evaluated by a laboratory. In order to inspect a school building under the authority of a local educational agency, one must be accredited to do so. Accreditation is accomplished by taking an approved AHERA three-day training course and passing an examination associated with that training. Neither AE, nor Mr. Robert Bowser, a licensed professional engineer in Oregon, is an accredited AHERA inspector.

Mr. Bowser, citing Oregon State law, Title 52, Chapter 701, Section 701.010(7)(b), has contended that he was authorized to inspect the school for asbestos by virtue of his status as a registered professional engineer. As reflected in R's Ex. 1, a letter from the Oregon State Board of Engineering Examiners, ("State Board"), the practice of engineering includes investigation. Such individuals are exempt from registration as a contractor but engineers can do no more than investigate or inspect. Consequently, they may not engage in affirmative actions beyond investigation and inspection with the result that activities such as constructing, altering, or repairing are precluded, being left to contractors alone. This is the basis for AE's understanding that professional engineers have broad authority to inspect or investigate buildings but may not develop management plans. Bowser also points to Oregon statutes, Chapter 672, Section 672.005(1)(a), and its definition of the practice of professional engineering.[8] R's Ex. 16, Tr. 232. AE witness Ed Graham, the Executive Secretary for the State Board, testified that professional engineers can inspect buildings. When Oregon law was amended to include construction contractors, the State Board decided that practicing engineers would not need to register as construction contractors. Tr. 239, R's Ex. 1. Graham conceded that the cited definition of engineering does not specifically authorize engineers to inspect for asbestos, although he noted that the definition is broadly written, authorizing such engineers to investigate,

---

[7]The regulations do provide some exemptions to the three-day course but none are applicable here. C's Ex. 2 at pgs.15-16.

[8]The section broadly provides: "Practice of engineering" or "practice of professional engineering means: (A) Any professional service or creative work requiring engineering education, training and experience; and (B) The application of special knowledge of the mathematical, physical and engineering sciences to such professional services or creative work as consultation, investigation, testimony, evaluation, planning, design and services during construction, manufacture or fabrication for the purpose of ensuring compliance with specifications and design, in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works or projects."

evaluate, plan and design, without any reference to the material involved. Tr. 245. AE witness Harold Slavik, a registered professional geologist in Oregon, was unaware of any special qualifying requirements for an engineer or a geologist to identify asbestos candidates in public or private buildings. In contrast, he was aware of special requirements for contractors or workers who are involved in asbestos abatement or removal. Tr. 256.

As mentioned, in support of his actions, Bowser drew a distinction between the process of identification of asbestos candidates and the development of a management plan or the actual removal of asbestos. Tr. 35 After reading the material faxed to him from the Pacific School, he interpreted the letter's reference to an authoritative source, such as an engineer or someone who could professionally certify that the school did not contain asbestos and its statement that no management plan would be needed in such instances, as allowing him to inspect and assess, but not permitting him to take the next step of developing a management plan in the event asbestos was found. Tr. 285. Bowser believed that his actions were consistent with the authority under his Oregon license. Consequently, he made it clear to the school that, while he could inspect, he could not do a management plan. In the event asbestos was detected, he advised the school that AHERA requirements would apply. Tr. 286. Bowser stated that it was not his intent to provide an AHERA report and that he specifically told the school that AE could not do one. He urges the Court to conclude that he would be in dereliction of his professional responsibilities to conduct a building inspection without assessing, and commenting on, suspected asbestos. He also believes that there is a conflict of interest for one to perform such inspections and then proceed to engage in abatement activities, because of the risk that such inspectors performing such inspections might be tempted to slant results in anticipation of being awarded the abatement contract. The Respondent additionally contends that his actions were permissible because he is also qualified in the field of environmental engineering, a status recognized by Oregon and reflected in his state professional engineering license. Tr.231, R's Ex. 17.

The Court determines that Mr. Bowser's engineering license is not an alternative means of qualification to the AHERA training. The applicable section of TSCA, Section 2646(a), unequivocally provides that "[a] person may not - (1) inspect for asbestos-containing material in a school building under the authority of a local educational agency or in a public or commercial building, ... unless such person is accredited by a State under subsection (b) of this section or is accredited pursuant to an Administrator-approved course under subsection (c) of this section. Whatever the intent of the parties, the act of conducting an asbestos inspection subjects the inspector to the requirements of AHERA. Therefore, Respondent's defense that it withdrew from further activity and refunded the fee it charged the Pacific School does not undo its inspection activity, for the purposes of determining liability. There is no contention that Bowser or AE had this required AHERA accreditation. Accordingly, a violation has been established.

Determination of an appropriate penalty

It is not in dispute that the maximum penalty available for this violation is $5,500.[9] In its brief, EPA steadfastly avoids directly mentioning the fact that it is seeking the maximum penalty here, preferring to describe its position for the penalty it proposes as "reasonable and appropriate" and that the "full proposed penalty," whether measured by the TSCA Section 16 penalty factors or by its Enforcement Response Policy,[10] ("ERP"), is supported by the record. EPA Brief at 8.

EPA's Penalty Perspective

The Agency maintains that "Both the Statutory Penalty Criteria and the Applicable Penalty Policies Should Be Considered in Assessing an Appropriate Penalty." *Id*. at 9. Under the statutory section, the determination of the civil penalty must take into account "the nature, circumstances, extent, and gravity of the violation ... and, with respect to the violator, ability to pay, effect on ability to continue to do business, and history of *prior such* violations, the degree of culpability, and *such other matters as justice may require*." EPA construes these statutory criteria as including consideration of a respondent's economic benefit, gained from its noncompliance, but does so without identifying the particular penalty element which applies. *Id*. at 10. It also notes that the penalty policies are intended to ensure that violations are assessed in a "fair, uniform and consistent manner." *Id*.

Examining the statutory penalty factors, EPA first examined the "nature" of the violation. It asserts that the nature was "chemical control," since AHERA is concerned with the safe maintenance and handling of ACBM. *Id*. at 10-11. It then evaluated the "circumstance" of the violation, which measures "the probability that harm will result from a particular violation." EPA witness Carlin rated this at the highest level because of the "high probability that asbestos, if improperly identified and assessed during an inspection, would lead to exposure of persons to asbestos in the building." *Id*. at 11. "Extent" was then assessed and this too received the highest rating of "major" because the amount of asbestos, while first unknown[11], ultimately was determined to be in excess of 3,000 square feet. *Id*. at 11.

EPA maintains that, owing to Respondent's failure to obtain accreditation, the inspection report contained "critical flaws." *Id*. This conclusion was reached by Carlin upon comparing

---

[9]TSCA Section 207(g), 15 U.S.C. §2647(g), provides that one who inspects for asbestos-containing material in a school, public or commercial building without having accreditation under Section 2646, is subject to a civil penalty of *not more than* $5,000 for each day the violation continues. Under the Civil Monetary Penalties Inflation Rule, a ten percent inflation is added to penalties, producing the $5,500 sought in this instance by EPA.

[10]The ERP in this instance refers to the Enforcement Response Policy for the Asbestos Model Accreditation Plan, March 9, 1998.

[11]When the amount of asbestos is unknown EPA assigns a "major" designation for the extent category.

the accredited inspector's report on the school with the Respondent's report and by her own visit to the school. *Id*. at 12. These "critical flaws" involve Respondent's failure to describe "with specificity" the locations where samples were collected and a failure to take an adequate number of samples. These deficiencies led to a report with "very different conclusions" from that of the accredited report. *Id*. at 14. Whereas AE's report described the sample locations as "boiler room wall and ceiling materials," "kitchen floor tile material," and "basement floor tile material," under the regulations a report must include "an inventory of the locations of homogeneous areas where samples are collected" together with the "exact location where each sample was taken." *Id*. at 12, quoting from C's Ex. 1 at 41848. The accredited report contained a chart which listed the name of the room in which each of the 33 samples were taken and the sample number was cross-referenced to a map, identifying the exact location of the sample, together with a description of the color and type of material. These details are important, according to EPA witness McDermott, because failing to adequately identify the locations of asbestos could lead to workers unknowingly releasing fibers during construction, renovation or even during routine maintenance. Further, all reinspections will be deficient because they will rely on the inadequate earlier report. *Id*. at 13.

EPA also asserts that by AE's failure to take the appropriate number of samples or at least to explicitly identify the assumed areas of ACBM, it "failed to alert the school to all of the areas ... that posed a potential risk to occupants of the building." *Id*. at 14. While the regulations permit an inspector to assume that homogeneous areas in a building are ACM, if such an assumption is *not* made then samples must be taken for each homogeneous area that is not assumed to have ACM. C's Ex.1 at 41848. In contrast, it observes that AE's report documents that a sample was taken only in the kitchen, the boiler room and the basement and that it inspected all interior and exterior surfaces at the school. The report was deficient, according to EPA, because AE "did not assume any areas had ACBM." Consequently, it was required to take additional samples for each of these areas to determine whether there was ACM.[12] Carlin testified that there were approximately 13 such homogeneous areas and that AE's report failed to identify many of them. EPA also rejects Respondent's implication that its report suggests the presence of asbestos in other areas because those areas are not specifically identified in the report. Far short of implication, EPA maintains that "nothing in the report even hints that there is asbestos present in the school other than in the samples taken by the Respondent of the kitchen and basement floor tiles." *Id*. at 14.

From EPA's perspective, the inadequacies of AE's inspection produced a report which concluded that asbestos was present in only two rooms in the building. In addition, EPA asserts that Bowser contradicted his own report's assertion that all exterior and interior surfaces had been inspected by admitting that he had not looked beneath the carpets on the first or second floors. In contrast, while the accredited report found asbestos "virtually in every room," AE's

[12]The number of additional samples required when no explicit assumption is made about homogeneous areas, depends on whether surfacing material, thermal system insulation, or miscellaneous material is involved. EPA Br. at 13, C's Ex. 1 at 41849.

report did not identify asbestos on the entire second floor. *Id*. at 15. Even on the first floor, AE's report failed to identify asbestos in "two classrooms, the sanctuary, an office, the stage and the hallway." *Id*. Were it not for the accredited report, EPA asserts, "a substantial risk of exposure for the school would [have] remain[ed]." *Id*. The deficiencies in the report highlight the importance of taking the accredited course, as Respondent would have learned about proper identification and assessment of asbestos, proper sampling techniques, identification of the exact locations of samples, the appropriate number of samples to take, and instances where assumptions of the presence of ACM may be made. The report, containing "so many flaws" ran the risk of exposing those at the school to the potential for all the serious health effects should there have been a release of fibers.

EPA's examination of the statutory factors strengthened its conclusion that the penalty it proposes is warranted. It believes that the factor of culpability supports this view. In this regard it observes that the school faxed AE the letter from EPA and that the letter noted that the inspection had to be performed by a federally accredited inspector. Bowser acknowledged that the letter indicates that inspections must be done by those who are federally certified to perform them. Thus, EPA maintains that Bowser knew or should have known of this requirement and he conceded that asbestos is hazardous. Given that Bowser had conducted a large number of asbestos inspections, EPA argues it is reasonable to assume that he should have basic knowledge of environmental regulations governing his business. Regarding the other statutory factors, EPA contends that the Respondent's attitude was poor, as evidenced by the fact it made no effort to become AHERA accredited, even after the Complaint was filed.[13] It also maintains that AE realized "financial gain" by ignoring the AHERA requirement. The "gain" was the avoided cost of taking the initial training course and the annual refresher courses. Constrained by the five year statute of limitation, EPA, through its witness Ms. Carpenter, began its calculation in 1994 and ascribed $425 for the initial course together with $598 for the missed years of refresher courses, for its total gain of $ 1,023. EPA believes Mr. Bowser conceded his economic gain through avoidance of the courses, as he admitted during cross-examination that he had evaluated the cost-effectiveness of obtaining AHERA certification, noting that the course would exceed his fee for inspecting the Pacific school. Building on this theory, EPA contends that Bowser implied he was able to charge less for his inspection than the accredited inspector charged and, building on this perception, it argues that a thorough inspection and more detailed report would naturally cost more. By cutting corners, AE was able to "attract the school with a lower bid than an

[13]EPA, after noting that AE made no voluntary disclosure prior to EPA's investigation and thus that the criterion was inapplicable in this instance, attempts to saddle AE with a "history of violations," by virtue of the company's admission that it had previously made a large number of inspections for asbestos. In attempting to add this charge of prior violations, EPA completely ignores the requirements for establishing such a history. Properly, this aspect of EPA's penalty assessment is rejected.

accredited inspector could offer."[14] *Id*. at 20. Last, EPA believes that assigning anything less than the maximum penalty "could have *national* adverse ramifications by encouraging persons to evaluate their own background and experience and make their own estimation that their superior training and experience negates the need for AHERA accreditation training." *Id*. Imposing the maximum penalty, it contends, will help ensure that the Respondent and others will be deterred from ignoring the regulatory requirements. *Id*. at 21

AE's Penalty Perspective

Although the AHERA qualified inspection took more samples and was considerably more expensive, both inspections reached the same core conclusions and offered the same recommendations. While AE never represented that its inspection was AHERA certified, it hoped that it would satisfy EPA. AE maintains that it examined "all school building areas and rooms," and involved "looking into every room on every floor," identifying suspected material in floor tile chips and boiler room wall material. These were sent to a laboratory for the analysis. It notes that when EPA did not accept the laboratory results, it referred the school to the AHERA contractor it had previously identified and refunded the entire $350 fee it had received from the school. AE argues that the subsequent report by the AHERA qualified inspection was, "for all practical purposes, *identical* to [AE's], the commonality of the reports' conclusions being that the floor tile was the asbestos problem. *Id*. at 2.

As a consideration for mitigation, AE plainly told EPA that if, in fact, despite the state's law permitting it to do building inspections, it developed that AHERA prohibited it from inspection aspects which addressed asbestos issues, then it would not perform such activities anymore. *Id*. at 5. Despite its contrition, in this first instance of asbestos inspection of a school, EPA, to the frustration of AE, continues to press the matter and seek a penalty.

Discussion

Determination of an appropriate penalty.

EPA's Complaint in this matter was issued November 19, 1999. In its penalty calculation section it relates that TSCA Section 207, 15 U.S.C. § 2647, authorizes a civil penalty of up to $5,000 per day for certain TSCA violations, and that such penalties encompass violations of regulations promulgated pursuant to Section 203(b), 15 U.S.C. § 2643(b), of that act. Added to

[14]This is pure fantasy. There is no evidence that the Pacific School took bids. Its director, Ms. Osborne, knew Bowser and called him when she received the EPA letter.

this penalty amount is an additional 10% under the Civil Penalty Inflation Rule, 40 C.F.R. Part 19, which effectively increases the maximum per day violation to $5,500. The Complaint relates that the penalty was calculated upon consideration of the facts alleged in it, together with the nature, circumstances, extent and gravity. It also relates that "the penalty reflects the significance of the violation; the culpability of the violator, including any history of previous violations; ability to pay; and the ability of the Respondent to continue to provide educational services to the community." Complaint at 4.

As the Court pointed out at the start of the hearing, EPA cited the wrong provision in its Complaint. The Complaint should have charged AE with a violation of TSCA Section 16(a)(2)(b), 15 U.S.C. § 2615(a)(2)(b). This is significant because the correct section includes a penalty factor omitted in EPA's calculation: "other factors as justice may require."[15] Thus, by its own terms, the Complaint reveals that, in arriving at the maximum penalty, EPA did not consider all the penalty factors. It was not until July 7, 2000, nearly eight months after the Complaint was issued, that EPA presented a penalty calculation reflecting the appropriate penalty criteria. The record is devoid of any document reflecting the pre-complaint calculation of the penalty.[16] Yet the complaint declares that an earlier penalty calculation was performed, albeit based on incorrect criteria and undocumented with any record of that calculation. That the subsequent calculation, in July 2000, belatedly applied the correct penalty criteria, and reached the same conclusion as the Complaint, to-wit, that the maximum penalty possible should obtain in this instance, leaves a whiff in the air that it was predetermined that EPA would seek the maximum penalty. Having considered this process, in the Court's view, this is enough to reject the Agency's calculation of the penalty and to independently calculate an appropriate penalty based on a consideration of the statutory factors.

Apart from the significant flaw that the record is without evidence that, at the time of the issuance of the Complaint, the Agency performed a penalty calculation applying the correct criteria, the Court would still depart from EPA's subsequent penalty calculation because that calculation produces a manifestly unjust result in this case. EPA witness Jayne Carlin testified that her July 2000 calculation relied upon the Interim Final Enforcement Policy for the Asbestos Hazard Emergency Response Act, the Enforcement Response Policy for the Asbestos Model Accreditation Plan (MAP), and the Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy. Tr. 83 - 84, C's Ex. 16, 17, 18. The witness' penalty calculation is reflected in Exhibit 19, which is the aforementioned July 7, 2000 calculation. Carlin testified that the nature of the violation, conducting an asbestos

---

[15]Despite being alerted to the problem, EPA never moved to amend its Complaint to cite the correct provision.

[16]In *Asbestos Specialists* (n.2) the Board was also critical of EPA's penalty calculation worksheet which it found was "not substantially more informative than the complaint." By comparison, in the case being decided today, not only were the wrong criteria cited in the complaint, but also no penalty calculation worksheet was provided.

inspection without current and valid AHERA inspection accreditation, falls under the category of chemical control. Her calculation under the criterion "circumstances' is intended to reflect the probability that harm would result. She concluded that because there was a high probability that harm would result if asbestos was unidentified, or improperly identified, during the inspection, this could lead its improper management or improper removal, and lead to exposure to workers and children. Under those circumstances the ERP directs that the violation should be rated at the highest level, which is a "1." Tr. 86, 87.

Carlin also looked at the "extent" criterion, which she stated was "actually the harm caused by the violation." Tr. 87. The harm, however, is actually determined by the *amount* of material. EPA did not know the amount when the calculation was made. In such circumstances the highest level is presumed.[17] Carlin pointed to Exhibit 17 at page 22, paragraph 2, as the applicable section. It is described as "Person conducting an inspection in a school or public or commercial building without having been accredited for that activity under TSCA § 206," and it lists a penalty of $5,500 per project along with confiscation of any invalid certificates. She contrasted that provision with Exhibit 17, at page 23, paragraph 7, which she described as applying to the circumstance where one has accreditation but from an unapproved source and had no basis for realizing the accreditation was not approved. Tr. 88. Carlin also confirmed that virtually no discretion is involved in assigning these category levels. Thus, inspecting without accreditation automatically and unvaryingly is assigned a "1," the highest level. The same is true for rating the "extent" with the highest level assigned in all instances where the amount is unknown or, if known, if there is 3,000 square feet or more. No distinction is drawn between circumstances where the asbestos is only viewed as opposed to having it removed; it is considered "major" apart from that fact. Tr. 93 -94.

The witness also testified concerning her assessment of the penalty adjustment factors. Regarding the "degree of culpability," EPA points to Exhibit 20, the July 22, 1999 facsimile from the Pacific Coast School to Bowser, which included the June 18, 1999 inquiry letter from EPA to the school. Carlin opined that this showed that AE and Bowser were aware of the EPA requirements. Tr. 94. EPA also relies upon Exhibit 21, the December 21, 1999 letter from AE to Senator Gordon Smith in which Respondent related its awareness that the June 1999 letter from EPA indicates "that inspections and management plans be done by federally recognized individuals holding valid certificates to that fact."[18] C's Ex. 21 at p. 2. Carlin stated that she

---

[17]Subsequently, EPA learned the amount of material involved, a finding that confirmed the presumption that the highest extent determination was applicable.

[18]While EPA correctly quotes that portion of AE's letter to Senator Smith, it omits Bowser's rationale, as set forth in the next sentence of the letter, for assuming that he would be "federally recognized." Bowser believed that since he is a Registered Professional Engineer with a state recognized discipline in Environmental Engineering, that he was authorized under Oregon state law to do inspections and had done several thousand inspections where asbestos was identified, that "neither [Bowser nor the director of the Pacific School] considered there to

considered Bowser's experience as a professional engineer and the fact he admitted doing asbestos or building inspections for many years as additional adverse penalty factors, although this did not increase the penalty because it was already at the maximum.[19] Tr. 98.

EPA also considered AE's failure to make a voluntary disclosure of its unaccredited inspection, that AE showed no interest in becoming AHERA certified and its assessment of AE's economic benefit, as adverse penalty factors. Tr. 101-102. As applied here, the consideration of these aspects demonstrates a slanted view of the facts. AE and, by extension, Bowser did not voluntarily disclose its violation because it did not believe it had committed one. As for its lack of interest in becoming AHERA certified, rather than reflecting a disregard for the regulatory requirement for certification, the true import of the AE's decision was that, once it became aware that there were federal certification requirements, it made the business decision that it had no desire to add the asbestos inspections to its professional engineering business. EPA steadfastly ignores the fact that once AE learned that its state professional engineering license, even with the state recognized environmental engineering discipline did not operate to excuse the federal AHERA certification, it decided to elect out of such activities. Certainly EPA can not be seriously suggesting that AE *had no choice* but to make the business decision to add AHERA inspections to its engineering business. Although it had already determined that AE should pay the maximum penalty for its violation, EPA proceeded to calculate the economic benefit it perceived in order to insulate itself from any reduction of the maximum penalty which the Court might direct. Thus, it viewed these additional perceived adverse factors as a anticipatory counter-weights to any prospective Court-imposed penalty reductions.

EPA's calculation of economic benefit requires a discussion by itself. Ms. Beatrice Carpenter, a financial analyst for EPA, was called to testify on this issue and she was qualified as an expert. Ms. Carpenter asserted that AE gained an economic benefit of $1,023. by its violation. To reach this figure, she was told to assume that Bowser, having admitted doing inspections in which asbestos was detected for a long time, should have had the required training long ago. Limited only by the statute of limitations, EPA directed Carpenter to calculate the course costs, and the annual refreshers, five years prior to the Complaint and then to carry the

---

be any restrictions to [AE] doing the inspection." C's Ex. 21 at p. 2.

[19]EPA also attempted to introduce a settlement document in which Bowser admitted going beyond the scope of his engineer's license. This document was not admitted by the Court, because, among other reasons, it related to land surveying activity and nothing to do with asbestos inspections. Tr. 100. EPA did not offer the document to establish a penchant or trait on Bowser's part to transgress the scope of his license. Also rejected by the Court was EPA's attempt to include Bowser's admission that he had inspected a large number of facilities where asbestos had been identified, as a backdoor means to show a history of prior of asbestos inspection violations. In so doing, EPA was unblushingly contradicting its own admission that the Respondent had no history of prior violations and ignoring case law on what properly may be considered to establish a prior violation history.

calculations through to the July 1999 hearing date. Figuring the course cost in 1994 at $258 and the after tax deduction cost to Respondent as $136, she then factored in the $100 annual refresher course cost, which had an after-tax impact of $293 and came up with a total net course cost of $551. To get to the $1,023 from that figure, she computed the future discount value, gained from AE's not having to spend the $551 for all those years. When that 'saved' money is assumed to grow at 10.8% per year over a period of six years, the final economic benefit is deduced. Tr. 201- 212. C's Ex. 28. The economic benefit EPA created is divorced from reality. In fairness to Ms. Carpenter, she had her "marching orders" and her calculations, as calculations alone, were reasonable. The problem was she had her "marching orders" and she was directed to work from assumptions that border on the farcical and display EPA's lack of perspective in this matter. The problems with EPA's assumptions begin with the notion that AE should have had the initial training five years prior to the Complaint's issuance. This of course was based on the idea that because Bowser said he had been doing inspections and noting the presence of asbestos for a long time, he should have had the AHERA training long before the first, and only, violation cited by EPA against him. In making such assumptions, EPA is not slowed by the lack of any prior AHERA violations or any details at all beyond the Respondent's vague assertion that he had long been doing inspections during the course of which asbestos had been detected. Consistent with this legally deficient analysis, EPA's one-sided approach ignores the Respondent's uncollected lab fee costs which it paid to Bullseye laboratory and takes no account of the lost time AE expended during the inspection, both of which were lost when AE immediately refunded its fee to Pacific School upon learning that EPA had issues with its inspection.

Thus, apart from the fact that EPA reached the conclusion that AE should pay the maximum penalty upon its consideration of the incorrect statutory factors and that it offered no documentary record of the calculation it asserted was made at the time of the Complaint, the Court, also having considered the post-complaint penalty calculation, departs from that calculation as well. For the reasons articulated above, the Court rejects EPA's culpability rationale. It also rejects the Agency's attempt, while acknowledging that it cannot use AE's admissions of prior violations under the factor of history of violations, to use them anyway by applying the "history" in the arena of Respondent's "culpability." C's Ex. 19 at page 4. Additionally, nowhere in the penalty calculation document does EPA discuss its rationale regarding the statutory factor of "other factors as justice may require." Regardless of the outcome of the analysis, EPA still has an obligation to express its view of the applicability of each factor to the case at hand. In sum, EPA's analysis did not fairly evaluate each of the statutory criteria. Rather, relying on the AHERA ERP, it concluded that any time an asbestos inspection occurs without AHERA accreditation, the automatic result is the maximum penalty. This approach does not square with the statutory penalty scheme.

Comparing the Report from AE Associates with the Report from ATC Associates

As mentioned, EPA contends that, lacking knowledge of the regulatory requirements, AE produced a report with "critical flaws" which created a risk to human health. Although the

report from ATC was considerably more detailed than that of AE's, at bottom, the reports reached the same fundamental conclusion: only the floor tile and its associated mastic (i.e. glue) were asbestos sources. ATS Report at 4-1 and AE Report at 2. Further, while AE's report was less precise in describing the areas of concern, its report expressly states that it "performed an inspection and evaluation of *all* exterior and interior surfaces at the Pacific Crest School. Similarly, while AE's report specifically mentions only kitchen floor tile glue and basement floor tile as samples where asbestos was found upon laboratory analysis, the report can be read as encompassing tile and glue throughout the school. This is implied by the broad reference to floor tile and its associated glue, where AE notes in its report that, as there were no loose or friable asbestos candidates presently, there was no current concern "in areas where floor tile and glue does contain asbestos." ATS also reached the same critical conclusion about current risks, stating that asbestos "material was in good condition and is considered non-friable." Both reports also share a similar warning about future building or construction activity at the school. AE's report warns that cosmetic upgrades could cause asbestos fibers to be disturbed and consequently such work "should be done in accordance with established standards of containment and disposal of dusts and other residues." ATS similarly advises "[p]rior to any repair, renovation, or demolition activities affecting concealed areas, a destructive asbestos inspection is recommended." ATS Report at 4-1. The lab tests results from the firm AE employed, Bullseye Analytical and Environmental Services and those from the firm EPA retained, ATS, also reached the same critical conclusions: only the floor tile and its associated mastic presented asbestos and in no instance was any immediate corrective action required.

The June 18, 1999 letter from EPA to N. K. Murphy Education Corporation was forwarded to AE by the Pacific Crest School on July 11, 1999. While EPA's letter makes references to AHERA, EPA informed the school that "[t]his rule requires each local educational agency ... to have inspections performed of each school building it owns..." Subsequently, the letter from EPA stated that the inspections "must be conducted by persons who have taken federally-recognized and approved training and hold valid certificates documenting this fact." However, the letter also made reference to an exemption from the AHERA inspection requirements for buildings constructed after October 12, 1988. In such situations, EPA informed that a statement from "an accredited engineer" that no asbestos containing material was specified in the construction building materials. Overall, other than the one reference to inspections by persons who have taken federally-recognized and approved training, the emphasis in the letter is that an inspection must be performed. This is underscored by the italicized bold print in the letter's last paragraph which warns that failure to comply may result in an EPA enforcement action "*for failure to conduct an inspection*..." EPA letter at 2 (italics in original). Although a close reading of the letter informs that the inspection must be done by one with "federally-recognized and approved training and holding valid certificates documenting this fact," it is possible that individuals holding licenses such as a professional engineer could erroneously believe that they would be "federally recognized." While not an excuse for liability, if the fact-finder determines that a respondent, in good faith believed that such inspections were within the scope of his professional engineer's license, such belief could be considered in assessing an appropriate penalty.

In examining the statutory criteria, the Court agrees with EPA's characterization that the "nature" of the violation is "chemical control." Tr. 86. According to EPA, the "circumstances" factor reflects the probability that harm would result from the violation. *Id*. For this, the Agency assigned the most serious level of "1." This reflected its view that there was a high probability that unidentified or improperly identified would lead to potential improper management or removal and as a consequence, to asbestos exposure to workers or school children. The Court finds that EPA overstates the deficiencies in AE's report and ignores that, at bottom, the reports agreed that the only asbestos risk was presented by the floor tile and its associated mastic. The Court accepts Bowser's testimony that, in fact, he inspected all floors of the building, although it is true that AE's report is not a model of articulateness. Its report advises that proper precautions must be taken when remodeling or renovation is undertaken. Again, while imprecise, nothing in the report expressly suggests that some floor tile should be considered exempt from concern about asbestos. Importantly, both reports also concurred that there was no present risk from any of the asbestos detected. As Carlin conceded, both reports found no friable asbestos and concluded no immediate action was required. Tr. 116. As she stated, the floor tile was the "only culprit of potential asbestos in the building that was identified by either company. Tr. 136. And while EPA suggests that the first asbestos inspection is especially important because re-inspections will rely on its conclusions, both reports alert a reader to the floor tile and mastic asbestos. Further, EPA's own exhibit, "AHERA Building Inspector" belies this assertion. That document advises that "[w]here the previous findings were negative ... or where non-friable materials were not investigated, *the investigation will likely need to be repeated*." C's Ex. 4 at 69.

Thus, EPA overstates the reliance on the initial report and consequently, in the Court's view, it is unlikely that one reading AE's report would assume that its silence about floor tile at other locations in the building would be interpreted to mean that it was of no concern. Carlin conceded she has seen "deficiencies" in AHERA reports. Tr. 171. All of this tends to undercut the assumption that re-inspections would be little more than blind adoption of the conclusions reached earlier. As Harold Slavik, a professional registered geologist in Oregon, stated, contractors do not rely solely on these reports and that a checks and balances system is employed when demolition work is undertaken. Tr. 257. Beyond these observations, the Court views the statutory criterion of "circumstances" as more encompassing term than a reflection of the probability that harm would result. In its customary sense, the term broadly includes "all the facts or conditions attending an event." Throughout this decision, the effort has been to provide a more complete recounting of the all the attending facts and circumstances.

For its assessment of the "extent" of the violation, described by Carlin as "actually the harm caused by the violation," EPA considers only the quantity of asbestos involved. Although the "extent," like "circumstances," would appear to be a broad term, the Agency measures this criterion solely by the quantity of asbestos involved. Tr. 87. In this instance, EPA first applied its presumption that where the quantity is unknown, it is assumed that more than 3,000 square feet is involved and later it learned that the quantity was in fact at this amount. *Id*. Carlin confirmed that the "extent"does not concern itself with whether the amount of asbestos is removed or left alone, and thus no differentiation is made between asbestos removal or

inspection alone.[20] Tr. 93 - 94.

EPA's treatment of the penalty adjustment factors: degree of culpability, history of violations, the ability of a respondent to pay the proposed to pay the penalty proposed, the related consideration of its impact on the ability to continue to do business, and other factors as justice may require, may be briefly summarized. Neither ability to pay nor the Respondent's ability to continue in business were claimed by AE. Though EPA tried to have it both ways, it does not formally claim that AE has any history of violations. Consequently, only the degree of respondent's culpability remains for discussion and such "other factors as justice may require" need be discussed. As mentioned, EPA considered the culpability to be high, based on the fact that AE reviewed the Agency's letter to the Pacific School prior to doing the inspection, that Bowser, as a professional engineer, was presumed to know of the need for accreditation, his acknowledgment that he had long been inspecting buildings in which asbestos had been detected, his lack of voluntary disclosure of the violation, his disinterest in becoming AHERA certified, and his economic gain from avoiding the expenses related to certification. Tr. 94 - 98. Each of these have already been addressed in this decision.

The Section violated, 15 U.S.C. § 2647(g), provides that "Any contractor who - (1) inspects for asbestos-containing material in a school, public or commercial building; ... and who fails to obtain the accreditation under Section 2646 of this title ... is liable for a civil penalty of *not more than* 5,000 for each day during which the violation during which the violation continues..." (emphasis added). Given that the maximum penalty Congress envisioned for this type of violation is $5,000 per day, it seems undeniable that the maximum penalty must be reserved for the most egregious of this class of violations and consequently that it was not intended to apply to all violations. Otherwise Congress would have not included the *not more than* language and simply provided that the penalty for such violations *shall be* $5,000 per day.

With the foregoing discussion in mind, the Court has determined that the fact that the reports reached the same fundamental conclusions, that only the floor tile and its associated mastic were a source of asbestos, that no friable asbestos was involved, that it was plausible, (although incorrect) for AE to believe they were qualified to do such inspections and that this was the first time it had been cited for such a violation, that AE promptly refunded the entire fee it had charged the Pacific School, that AE had to absorb the lab fees for the samples it had tested

---

[20]The agency put forward no discrete information on the violation's "gravity." Apparently this is because the TSCA penalty policy measures the nature, extent and circumstances of the violation to determine the gravity and in the face of the statute's treatment of gravity as a separate criterion. Curiously, even the policy acknowledges that the Act "requires the consideration of eight named factors in any penalty assessment." C's Ex. 18 at p. 3. The only place where the term appears in the transcript was Carlin's brief reference to "the gravity-based penalty matrix" which was tied only to the number of square feet of asbestos and to the nature of the violation. Tr. 104, 109. Both of these considerations, however, were already treated under the "nature," "circumstances," and "extent."

by Bullseye and was uncompensated for the time it expended during the inspection, and that it was unlikely that future inspections would be misled by AE's report and lulled into thinking that only certain floor tiles presented a hazard, all lead to the conclusion that a penalty of $500 is appropriate in this instance.

While the Court's assessment of a $500 penalty in this case is based only on its review of the record as measured against each of the statutory criteria, independent of that evaluation it considers the following cases as noteworthy in placing the violation here in perspective. This is particularly true in light of the fact that Congress intended that the civil penalty not be more than $5,000 per day. The cases are: *In the Matter of Hico, Inc.*, 1991 WL 280348 (E.P.A. 1991), ("*Hico*"), *In the Matter of Luis Navarette*, 1999 WL 1678472 (September 21, 1999), ("*L. Navarette*"), and *In the Matter of Cornerstone Baptist Church,*[21] 1999 WL 637420 (E.P.A. 1999), ("*Cornerstone Church*"). The Court brought these cases to the attention of the parties during the pre-hearing process and again at the outset of the hearing and asked for comment on them.

EPA notes that this Court inquired how the maximum penalty can be demanded in this case when, in *Hico*, the agency sought a $40,000 penalty for 16 days of violation involving four unaccredited workers. At hearing, this Court observed that, effectively, the *Hico* penalty broke down to $10,000 per worker which translates further to a per day/ per worker penalty amount of $624. It was only by a policy fiat that EPA decided to *calculate* penalties for nonaccredited workers on a one-day basis, but the calculation decision does not alter the fact that violation continued for 16 days, not merely one. Further, in that case the administrative law judge reduced the proposed penalty by 38%, producing a $387 per day violation for each worker, a sum which is a far cry from the $5,500 EPA would extract here. Tr. 22. EPA responds that "[t]he particular circumstances of a case must be considered to determine the appropriate penalty." EPA Br. at 22-23. In support of the penalty "discretion and flexibility" that it asserts is necessary for each case, EPA notes that *Hico* itself makes reference to *In the Matter of Briggs & Stratton Corp.*, 1 E.A.D. 653 (E.P.A. 1981) ("*Briggs & Stratton*") where the trial court rejected a respondent's attempt to have EPA's practice in like cases control the amount in its case. However, the section quoted by EPA from the trial judge's opinion demonstrates that the judge determined that the cases cited by the respondent revealed no case or cases like the one being litigated. In contrast, as discussed below, this Court finds that the *Hico* case and this litigation *are* fundamentally the same. While there are differences in the cases, the distinctions only serve to show that it was *Hico*, not AE Associates, that presented the far more serious violation.[22]

---

[21]EPA argues that *Cornerstone Church* is not relevant, as the issue was there was whether AHERA applies to schools that have not been accredited by the state. As the school in this litigation, Pacific Coast, has been accredited since 1995, the case is distinguishable. The Court agrees that, as the Court-ordered post-hearing affidavit of Ms. Osborne with the Pacific School acknowledges that the school is a non-profit entity, *Cornerstone Church* does not apply here.

[22]Bending reality, EPA claims that the penalty was reduced in *Hico* because the respondent, subsequent to the violation, had its workers take the 3 day course and that this was

Hico was a contractor that specialized in asbestos abatement and it performed 200 to 300 such asbestos abatement projects per year and employed between 75 to 100 employees in such projects. As in this case, the asbestos action involved a school. While *Hico* did take corrective action, this occurred after EPA had inspected the site and discovered the violation. Perhaps most significantly, as opposed to assessment of the presence of asbestos, the insufficiently trained workers were involved in the considerably more dangerous function of its removal. The judge rejected EPA's proposed penalty as an "enforce[ment] with all the compassion of a Torquemada"[23] and instead focused on the particular facts in reaching an appropriate penalty.

In facing the facts in *L. Navarrete*, a 1999 decision, EPA concedes that only a $1,000 penalty was sought for a violation which was essentially identical to the case litigated here: respondent's one day violation arising from its inspection of a school without having AHERA certification.[24] Unable to distinguish its penalty action there from the case at bar, the agency is reduced to criticizing its own proposed penalty calculation by asserting that it should have assigned the "major" extent where it did not know the amount of asbestos involved. EPA Br. at 23. Curiously, EPA's analysis of the case avoids the principle that it espoused in *Hico* of examining 'the particular circumstances of the case.' *L. Navarette* certainly involved a more egregious violation as the respondent participated in fraud, obtaining a phony accreditation

---

significant because it was done before the complaint was issued but, presumably, after the respondent was notified in some manner that there had been a violation. This Court is unaware that EPA has a policy of discounting its penalties where a respondent starts corrective activity after a violation but before the complaint is served. EPA also contorts the circumstances by claiming that in *Hico* the respondent was "particularly cooperative and displayed a good attitude." It contrasts this by asserting that AE showed no interest in becoming certified and, without expressing details, that it did not display a level of cooperation that warranted penalty mitigation. Of course, that misrepresents AE's attitude as a callous response to the events. That is not the case. AE did not realize that it had to be AHERA certified to do the type of inspection it performed. Once it realized its error, it promptly refunded its entire fee to the Pacific Coast School. The reason it never took the AHERA course was, far from any stridency, simply because it had no interest in expanding its professional engineer business into that line of work.

[23]The term "Torquemada" refers to the Spanish Dominican monk who, as the grand inquisitor during the Spanish Inquisition, was responsible for the torture or death of thousands of Jews, suspected witches and others. American Heritage Dictionary of the English Language, 3d Ed. 1992.

[24]In a sister, or perhaps more appropriately, a "related" case to *L. Navarette*, *In the Matter of Antonio Navarette, Respondent*, 1999 WL 362856, issued, on February 18, 1999, some seven months before *L. Navarette*, essentially the same facts obtained. Antonio Navarette also obtained a fraudulent certificate of asbestos training and then proceeded to conduct an asbestos *removal action* involving *friable* asbestos and he continued this activity for *twenty-four days* at an *elementary school*. For this considerably more egregious violation, EPA sought, as it did in *L. Navarette*, the sum of $1,000.

certificate through the mail and using that to get a license to conduct asbestos response actions. As in *Hico*, the respondent in *Navarette* then proceeded, not merely to inspect, but to engage in asbestos *removal, at a school*, over a *two*-day period. EPA also does not mention that the Regional Judicial Officer who drafted the decision and, by extension, the Regional Administrator who signed it, based the decision not only on the AHERA ERP but also concluded that it calculated "in compliance with the statutory criteria" and on that dual basis concluded that the $1,000 was "appropriate."

Thus, while this Court's penalty assessment has not been determined by these cases but rather has been based on an independent review of the particular facts and circumstances at hand, these cases do serve to underscore the appropriateness of the penalty assessed in this instance.

ORDER

A civil penalty in the amount of $500 is assessed against the Respondent, AE Associates, Inc. Payment of the full amount of the civil penalty assessed shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c). Payment shall be submitted by a certified check or cashier's check payable to the Treasurer, United States of America and mailed to:

Mellon Bank
EPA Region X
Regional Hearing Clerk
P.O. Box 360903M
Pittsburgh, PA 15251

A transmittal letter identifying the subject case and the EPA docket number, plus the Respondent's name and address must accompany the check. Failure of the Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty.

Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of the Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the EAB is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.30(a), within thirty (30) days after the Initial Decision is served upon the parties; or (3) the EAB elects, upon its own initiative, under 40 C.F.R. § 22.30 (b), to review the Initial Decision.

_____
William B. Moran
United States Administrative Law Judge

Dated: November 30, 2001

In the Matter of AE Associates, Inc., Docket No. TSCA-10-99-0262

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision**, dated November 30, 2001, was sent this day in the following manner to the addressees listed below:

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: November 30, 2001

Original and One Copy By Pouch Mail to:

Mary A. Shillcutt
Regional Hearing Clerk
U.S. EPA
1200 Sixth Avenue
Seattle, WA 98101

Copy by Pouch Mail and Facsimile to:

Elizabeth McKenna, Attorney
Jennifer MacDonald, Attorney
Office of Regional Counsel
U.S. EPA
1200 Sixth Avenue
Seattle, WA 98101

Copy By Certified Mail Return Receipt and Facsimile to:

Mr. Robert Bowser
AE Associates, Inc.
2920 SW Luradell Lane
Portland, OR 97219