

FINDINGS OF FACT

Pursuant to 40 C.F.R. §22.17 and based on the entire record, I make the following findings of fact:

1. The Respondent, Sargent Enterprises, Inc., is a corporation incorporated in the Commonwealth of Pennsylvania with a primary business address of 732 Center Street, Jim Thorpe, Pennsylvania 18229 and is a contractor specializing in asbestos abatement.
2. Respondent is a "person," as that term is defined in Section 302(e) of the Act, 42 U.S.C. §7602(e), and within the meaning of Section 113(d) of the Act, 42 U.S.C. § 7413(d).
3. On or about June 6, 2002, Respondent entered into a contract with the Palisades School District to perform asbestos abatement work at the Palisades High School, located at 35 Church Hill road in Kintnersville, Pennsylvania.
4. Palisades High School is a "facility" within the meaning of 40 C.F.R. §61.141.
5. In June and July 2003 Respondent conducted asbestos abatement work at the Palisades High School.
6. The asbestos abatement work conducted by Respondent at the Palisades High School was a "renovation" within the meaning of 40 C.F.R. §61.141.
7. Respondent was an "owner or operator of a demolition or renovation activity" within the meaning of 40 C.F.R. §61.141.
8. Pursuant to 40 C.F.R. §61.145(a)(4), each owner and operator of a renovation activity which involves stripping, removing, dislodging, cutting, drilling or similarly disturbing one hundred and sixty (160) square feet or more of regulated asbestos-containing material

("RACM") must comply with the notification requirements of 40 C.F.R. §61.145(b).

9. Respondent was required to comply with the notification requirements of 40 C.F.R. §61.145(b) for the June and July 2003 renovations at Palisades High School.
10. On June 10, 2003, Respondent submitted written notification to EPA of a renovation project at the Palisades High School ("Palisades Initial Notification").
11. The Palisades Initial Notification indicated that the renovation project at the Palisades High School included the abatement of 6,000 square feet of Category I nonfriable asbestos containing floor tile/mastic; 1,000 square feet of Category I nonfriable asbestos containing transite; and 1,000 linear feet of friable asbestos containing pipe insulation.
12. Pursuant to 40 C.F.R. §61.145(b)(3)(i) of the Asbestos NESHAP, each owner or operator of a regulated renovation activity must provide written notice to EPA at least ten (10) working days before asbestos stripping and removal work or any other activity (such as site preparation that would break up, dislodge or similarly disturb asbestos material).
13. The Palisades Initial Notification indicated that the asbestos abatement work would begin on June 23, 2003, nine (9) working days from the date Respondent submitted the Palisades Initial Notification.
14. Pursuant to 40 C.F.R. §61.145(b)(3)(iv)(B)(1) of the Asbestos NESHAP, when asbestos stripping or removal operations will begin on a date earlier than the original start date, each owner or operator of a regulated renovation activity must provide written notice of the new start date at least ten (10) working days before asbestos stripping or removal work begins.
15. On June 24, 2003, EPA conducted an inspection of the Palisades High School to monitor

- compliance with the Asbestos NESHAP.
16. During the inspection, the inspector discovered that Respondent began asbestos removal work on June 20, 2003, three days prior to the June 23, 2003 start date identified in the Palisades Initial Notification.
 17. According to a project logbook, maintained by Palisades Area School District Consultant Pennoni Associates, Inc., Respondent began asbestos removal work on June 20, 2003.
 18. By failing to provide written notice to EPA at least ten (10) working days before the June 23, 2003 start date indicated in the Palisades Initial Notification as required by 40 C.F.R. §61.145(b)(3)(I), and by commencing asbestos stripping or removal work at the Palisades High School on June 20, 2003 without having provided notice to EPA of the revised start as required by 40 C.F.R. §61.145(b)(3)(iv)(B)(1), Respondent violated the notification requirements of 40 C.F.R. §61.145(b) of the Asbestos NESHAP.
 19. On November 7, 2003, Respondent submitted written notification to EPA of an asbestos abatement project at the Pfaff Elementary School, located at 1600 Sleepyhollow Road, in Quakertown, Pennsylvania ("Pfaff Initial Notification").
 20. Pfaff Elementary School is a "facility" within the meaning of 40. C.F.R. §61.141.
 21. Respondent conducted asbestos abatement work at the Pfaff Elementary School in November and December of 2003.
 22. The asbestos abatement work conducted by Respondent at the Pfaff Elementary School in November and December of 2003 was a "renovation" within the meaning of 40 C.F.R. §61.141.
 23. Respondent was an "owner or operator of a demolition or renovation activity" within the

meaning of 40 C.F.R. §61.141.

24. Pursuant to 40 C.F.R. §61.145(a)(4), each owner and operator of a renovation activity which involves stripping, removing, dislodging, cutting, drilling or similarly disturbing one hundred and sixty (160) square feet or more of regulated asbestos containing material ("RACM") must comply with the notification requirements of 40 C.F.R. §61.145(b).
25. The Pfaff Initial Notification indicated that the asbestos abatement project at the Pfaff Elementary School involved 3,000 square feet of friable asbestos containing pipe insulation; 26,000 square feet of Category I nonfriable asbestos containing floor tile and mastic; 6,000 square feet of Category I nonfriable asbestos containing transite; 12,000 square feet of friable asbestos containing ceiling plaster; 36,500 square feet of friable asbestos containing ceiling tiles; and 1,200 square feet of friable asbestos containing boiler and breeching insulation.
26. Respondent was required to comply with the notification requirements of 40 C.F.R. §61.145(b) for the November and December 2003 renovation at the Pfaff Elementary School.
27. Pursuant to 40 C.F.R. §61.145(b)(3)(i) of the Asbestos NESHAP, each owner or operator of a regulated renovation activity must provide written notice to EPA at least ten (10) working days before asbestos stripping and removal work or any other activity (such as site preparation that would break up, dislodge or similarly disturb asbestos material).
28. The Pfaff Initial Notification indicated that the asbestos abatement work would begin on November 14, 2003, five (5) working days from the date Respondent submitted the Pfaff Initial Notification.

29. By failing to provide written notice to EPA at least ten (10) working days before the November 14, 2003 start date indicated in the Pfaff Initial Notification as required by 40 C.F.R. §61.145(b)(3)(i), Respondent violated the notification requirements of 40 C.F.R. §61.145(b) of the Asbestos NESHAP.
30. On August 18, 2004, an Administrative Complaint and Notice of Opportunity for Hearing was issued by EPA, the Complainant, pursuant to Section 113(a)(3) and (d) of CAA, and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation/Termination or Suspension of Permits, Part 22.
31. The Complaint proposed to assess a penalty in the amount of four thousand six hundred twenty dollars (\$4,620) for these alleged violations.
32. 40 C.F.R. § 22.15(a) states that the Respondent has a right to request a hearing and that, in order to avoid being in default, Respondent is required to file a response to the Complaint within thirty (30) days of service.
33. 40 C.F.R. § 22.17(a) states that an order of default may be issued "after motion, upon failure to file a timely answer to the complaint . . . Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations."
34. A copy of the Complaint was received by Respondent on August 23, 2004, as evidenced by a copy of the certified mail return receipt "green card."
35. The Respondent did not file an Answer or other response to the Complaint within thirty (30) days of service and has not, as of the date of the Motion for Default Judgment, filed

an Answer or other response to the Complaint.

36. On November 18, 2004, Complainant filed a Motion for Default Judgment stating that Respondent failed to file an Answer to the Complaint.
37. On November 18, 2004, the Motion for Default Judgment was delivered to Respondent via Federal Express.
38. The Respondent did not file a response to the Motion for Default Judgment.

CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. § 22.17 and based on the entire record, I make the following conclusions of law:

1. The Complaint in this action was lawfully and properly served upon Respondent in accordance with the Consolidated Rules. 40 C.F.R. § 22.5(b)(1).
2. Respondent was required to file an Answer to the Complaint within thirty (30) days of service of the Complaint. 40 C.F.R. § 22.15(a).
3. Respondent failed to file an Answer to the Complaint and such failure to file an Answer to the Complaint or otherwise respond to the Complaint constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. § 22.17(a).
4. Complainant's Motion for Default Judgment was lawfully and properly served on Respondent. 40 C.F.R. § 22.7(c).
5. Respondent was required to file any response to the Motion within 20 days of service. 40 C.F.R. §§ 22.7(c) and 22.16(b).

6. Respondent failed to respond to the Motion and such failure to respond to the Motion is deemed to be a waiver of any objection to the granting of the Motion. 40 C.F.R. § 22.16(b).
7. The Respondent, Sargent Enterprises, Inc., is a corporation incorporated in the Commonwealth of Pennsylvania with a primary business address of 732 Center Street, Jim Thorpe, Pennsylvania 18229 and is a contractor specializing in asbestos abatement.
8. Respondent was an "owner or operator of a demolition or renovation activity" within the meaning of 40 C.F.R. §61.141.
9. The asbestos abatement work conducted by Respondent at the Palisades High School and Pfaff Elementary School was a "renovation" within the meaning of 40 C.F.R. §61.141.
10. Respondent, as a owner or operator of a demolition or renovation activity, was required to comply with the notification requirements of 40 C.F.R. §61.145(b) for the renovations at Palisades High School and Pfaff Elementary School.
11. Pursuant to 40 C.F.R. §61.145(b)(3)(i) of the Asbestos NESHAP, each owner or operator of a regulated renovation activity must provide written notice to EPA at least ten (10) working days before asbestos stripping and removal work or any other activity (such as site preparation that would break up, dislodge or similarly disturb asbestos material).
12. On June 10, 2003, Respondent submitted written notification to EPA of a renovation project at the Palisades High School ("Palisades Initial Notification") stating that work would begin on June 23, 2003.
13. During the inspection, the inspector discovered that Respondent began asbestos removal work on June 20, 2003, three days prior to the June 23, 2003 start date identified in the

Palisades Initial Notification.

14. By failing to provide written notice to EPA at least ten (10) working days before the June 23, 2003 start date indicated in the Palisades Initial Notification as required by 40 C.F.R. §61.145(b)(3)(i), and by commencing asbestos stripping or removal work at the Palisades High School on June 20, 2003 without having provided notice to EPA of the revised start as required by 40 C.F.R. §61.145(b)(3)(iv)(B)(1), Respondent violated the notification requirements of 40 C.F.R. §61.145(b) of the Asbestos NESHAP.
15. On November 7, 2003, Respondent submitted written notification to EPA of an asbestos abatement project at the Pfaff Elementary School, located at 1600 Sleepyhollow Road, in Quakertown, Pennsylvania ("Pfaff Initial Notification").
16. Respondent conducted asbestos abatement work at the Pfaff Elementary School in November and December of 2003.
17. Pursuant to 40 C.F.R. §61.145(b)(3)(i) of the Asbestos NESHAP, each owner or operator of a regulated renovation activity must provide written notice to EPA at least ten (10) working days before asbestos stripping and removal work or any other activity (such as site preparation that would break up, dislodge or similarly disturb asbestos material).
18. The Pfaff Initial Notification indicated that the asbestos abatement work would begin on November 14, 2003, five (5) working days from the date Respondent submitted the Pfaff Initial Notification.
19. By failing to provide written notice to EPA at least ten (10) working days before the November 14, 2003 start date indicated in the Pfaff Initial Notification as required by 40 C.F.R. §61.145(b)(3)(i), Respondent violated the notification requirements of 40 C.F.R.

§61.145(b) of the Asbestos NESHAP.

20. Respondent's failure to comply with the requirements of 40 C.F.R. §61.145(b)(3)(i) and 40 C.F.R. §61.145(b)(3)(iv)(B)(1) is a violation of Section 112 of CAA, 42 U.S.C. §7412 for which Respondent is liable for civil penalties under Section 113(d) and (e) of the CAA, 42 U.S.C. §7413(d) and (e), and EPA's October 25, 1991 Clean Air Act Stationary Source Civil Penalty Policy ("General Penalty Policy") and May 5, 1992 Appendix III - Asbestos Demolition and Renovation Civil Penalty Policy ("Asbestos Penalty Policy").
21. Respondent's failure to file a timely Answer to the Complaint or otherwise respond to the Complaint is grounds for the entry of a default order against the Respondent assessing a civil penalty for the violations described above. 40 C.F.R. § 22.17(a).
22. Respondent's failure to file a Response to Complainant's Motion for Default Judgment is deemed a waiver of Respondent's right to object to the issuance of this Order. 40 C.F.R. § 22.16(b).
23. The civil penalty of \$4,620 proposed in the Complaint and requested in the Motion for Default Judgment is not inconsistent with CAA and the record in this proceeding.

DETERMINATION OF CIVIL PENALTY AMOUNT

Complainant requests the assessment of a penalty of four thousand six hundred twenty dollars (\$4,620) for the violations as stated in the Complaint. The penalty is based on the analysis of the statutory factors in Section 113(e) of CAA, 42 U.S.C. 7413(e), the October 25, 1991 Clean Air Act Stationary Source Civil Penalty Policy ("General Penalty Policy") and the May 5, 1992 Appendix III - Asbestos Demolition and Renovation Civil Penalty Policy

("Asbestos Penalty Policy"). Complainant explains in its Motion for Default Judgment that it "has followed the suggested calculations and methodology in both penalty policies to the maximum extent possible consistent with the statutory penalty factors and the specific circumstances of this case."

Section 113(d) of the Act, 42 U.S.C. §7413(d), the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, codified at 40 C.F.R. part 19 (July 1, 2004), authorize a penalty of not more than \$27,500 for each violation of the Act which occurs between January 30, 1997 and March 15, 2004.

The violations cited in the Complaint all occurred between January 30, 1997 and March 15, 2004. The proposed penalties for those violation have been adjusted upwards by ten (10) percent to reflect the applicable increase in the statutory maximum penalty, pursuant to the September 21, 2004 Memorandum from Action Assistant Administrator Thomas V. Skinner entitled "Modifications to EPA Penalty Policies to Implement the Civil Monetary Inflation Rule (Pursuant to the Debt Collection Improvement Act of 1996, Effective October 1, 2004)."

In preparing the penalty amount in this case, Complainant is required by Section 113(e) of the CAA, 42 U.S.C. §7413(e) to take into consideration (in addition to such other factors as justice may require) the following: the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

One of the first factors to be addressed by the Complainant in its Motion for Default Judgement was the size of Respondent's business. According to Complainant's Kyla Townsend-McIntyre's affidavit, dated November 18, 2004, Sargent's Dun & Bradstreet ("D&B") Report, as of October 31, 1999 (printed June 10, 2004), indicates its net worth to be in excess of three hundred and seventy thousand dollars. On page 14 of the General Penalty Policy, a net worth in the range of one hundred thousand and one dollars to one million dollars translates to a penalty amount of \$5,000. In light of the fact that the D&B Report indicates the information on the Report was from October 31, 1999, Complainant assessed a penalty in the amount of \$2,000. Under the General Penalty Policy, this is the smallest penalty amount allowed under the "size of the violator" category - that is, a corporation whose net worth is under one hundred thousand.

The next factor is the economic impact of the penalty on the business. Complainant points out that "the Act's 'economic impact of the penalty on the business' factor has been found to be analogous to 'ability to pay' factors found in other environmental statutes. See In re Commercial Cartage Co., 7 E.A.D. 784, 807 (E.A.B. 1998)." Complainant also cites In re New Waterbury, Ltd., 5 E.A.D. 529, 542 (E.A.B. 1994), which states that "where a respondent does not raise its ability to pay as an issue in its answer...[Complainant] may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived." Since Respondent has failed to file an Answer, it has also failed to raise an ability to pay defense, so Complainant deemed this factor waived and it was not considered.

In addition, the D&B Report included an April 18, 2002 note which stated that Sargent's estimated annual sales for 2002 to be \$2,487,159 and an estimate that, as of September 30, 2003, Sargent employed fifty (50) people. It would appear the penalty would have very little economic

impact on the business based on these numbers.

The next factor is the violator's full compliance history and good faith efforts to comply. According to EPA's Motion for Default Judgment, EPA did not make any adjustments to the proposed penalty on this factor. However, according to Paragraph 2 of Complainant's Kyla Townsend-McIntyre's affidavit, EPA, on or about October 17, 2003, provided written notice (a Notice of Noncompliance and Request to Show Cause Letter authored by Kyla Townsend-McIntyre) to Respondent of EPA's belief that Respondent violated the Asbestos NESHAP notification requirements with respect to the asbestos abatement project at the Palisades High School asbestos renovation project. Even after this Notice of Noncompliance, Respondent still submitted its late notification for the asbestos abatement project at the Pfaff Elementary School. In its Motion for Default Judgment, Complainant states that "[a]side from that, EPA has not discovered any prior history of Asbestos NESHAP violations, or violations of other environmental statutes, on the part of the Respondent." Complainant's Motion for Default Judgment concludes, "EPA has not discovered any prior history of Asbestos NESHAP violations or violations of other environmental statutes, on the part of the Respondent. EPA does not believe that the Respondent exhibited any extraordinary efforts to comply or any unusual cooperation during the pre-filing investigation. EPA did not make any adjustments to the proposed penalty based on this factor."

The duration and seriousness of the violations are additional factors to be considered. Count I involves two violations of the regulatory notification requirements. Regulations require written notification to be provided at least ten (10) working days prior to the start of work. Respondent provided its written notice to EPA nine (9) working days prior to the renovation at

Palisades High School. Respondent also failed to provide any notice of its revised start date. In this instance, the asbestos renovation work began before the start date specified in the written notice.

Complainant recommends a \$2,000 penalty amount for Count I. Complainant explains that "by starting asbestos removal work three (3) days prior to the start date specified in its written notice, Respondent prevented enforcement agencies from observing and determining whether the required work practices were complied with during the first few days of the project." Notification is considered to be submitted as of the postmark date and not the date received. I concur with the findings of the Complainant.

Complainant recommends a \$200 penalty amount for Count II. Regulations require written notification to be provided at least ten (10) working days prior to the specified start date. Respondent provided its written notice to EPA five (5) working days prior to the renovation at the Pfaff Elementary School. Respondent, by submitting the notification as it did, significantly reduced the notice provided to EPA to effect an inspection.

Pursuant to the table on page 15 of the Asbestos Penalty Policy, the recommended penalty breakdown for the violations is as follows:

Count I:

Notice submitted late, but still prior to asbestos removal starting date	\$ [200]
Failure to provide telephone and written notice when start date changes	\$ 2,000

[As set forth in Complainant's Motion for Default Judgment "[t]he Asbestos Penalty Policy instructs 'the single largest dollar figure that applies' to be selected. Asbestos Penalty Policy at 15. Additionally, penalties for asbestos notice violations are to be assessed as a one-time penalty. Id"]

Count II:

Notice submitted late, but still prior to asbestos removal starting date	\$ 200
<u>Size of the violator</u>	<u>\$2,000</u>
<u>SUBTOTAL:</u>	\$4,200
<u>Ten (10)% inflation adjustment</u>	\$ 420
<u>TOTAL:</u>	\$4,620

The next factor is payment of the violator of penalties previously assessed for the same violation. EPA did not make any adjustments to the proposed penalty based on this factor. EPA asserted in its Motion for Default Judgment that it believed the Respondent has not previously paid penalties for the violations alleged in this matter.

In considering the next factor, economic benefit of noncompliance, EPA made no adjustment to the penalty figure. EPA stated that "Respondent did not likely gain an economic benefit by failing to submit timely notifications for the asbestos abatement projects at the Palisades High School and Pfaff Elementary School."

In addition to the above listed considerations, EPA found that there were no "other factors as justice may require" to be considered. EPA stated in its Motion for Default Judgment that "[a]fter carefully reviewing the Congressionally-mandated adjustment factors set forth at CAA §113(e)(1), 42 U.S.C. §7413(e), EPA does not believe that there are any other factors which need to be considered in determining an appropriate penalty. EPA did not make any adjustments to the proposed penalty based on this factor."

DEFAULT ORDER

Respondent is hereby ORDERED as follows:

1. Respondent, Sargent Enterprises, Inc. is hereby assessed a civil penalty in the amount of four thousand six hundred and twenty dollars (\$4,620) and ordered to pay the civil penalty as directed in this Order.
2. Respondent, Sargent Enterprises, Inc., shall pay the civil penalty by certified or cashier's check payable to the Treasurer of the United States within thirty (30) days after this Default Order has become final. The check shall be sent by certified mail, return receipt requested, to:

Mellon Bank
EPA - Region III
Regional Hearing Clerk
P. O. Box 360515
Pittsburgh, PA 15251-6515
3. A copy of the payment shall be mailed to the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103. A transmittal letter identifying the name and docket number of this matter should accompany both the remittance and the copy of the check.
4. In the event of failure by Respondent to make payment as directed above, this matter may be referred to a United States Attorney for recovery by appropriate action in United States District Court.
5. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest

and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim.

6. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. § 22.17(c) and 22.27(a). This Initial Decision shall become a final order forty-five (45) days after the Initial Decision is served upon the parties unless (1) a party appeals the Initial Decision to the EPA Environmental Appeals Board,¹ (2) a party moves to set aside the Default Order that constitutes this Initial Decision, or (3) the Environmental Appeals Board elects to review the Initial Decision on its own initiative.

IT IS SO ORDERED.

December 30, 2005
Date

Renee Sarajian
Renee Sarajian
Regional Judicial Officer

¹Under 40 C.F.R. § 22.30, any party may appeal this Order by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board within **thirty days** after this Initial Decision is served upon the parties.

CERTIFICATE OF SERVICE

This Initial Decision and Default Order was served on the date below, by the manner indicated, to the following people:

VIA HAND DELIVERY:

Jennifer M. Abramson (3RC10)
Assistant Regional Counsel
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103

**VIA CERTIFIED MAIL/
RETURN RECEIPT REQUESTED:**

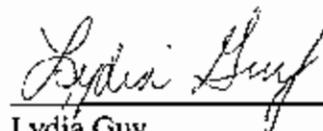
Brian Sargent
Sargent Enterprises, Inc.
732 Center Street
P.O. Box 193
Jim Thorpe, PA 18229

VIA POUCH MAIL:

Eurika Durr
Clerk of the Board, Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

DEC 30 2005

Date


Lydia Guy
Regional Hearing Clerk