



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
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Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
Colorado Building
1341 G Street,
NW, Suite 600
Washington, D.C. 20005

Re: Appeal No. CAA-06-(03)

To whom it may concern:

Enclosed please find an original and five copies of both COMPLAINANT-APPELLANT's NOTICE OF APPEAL and BRIEF OF COMPLAINANT-APPELLANT for filing with the Environmental Appeals Board in the in the matter referenced above.

Sincerely

Jennifer M. Abramson
Assistant Regional Counsel

Enclosures
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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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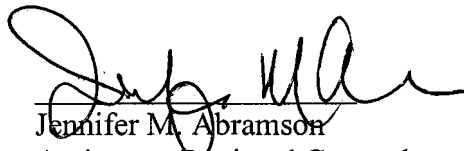
In the Matter of)
)
City of Wilkes-Barre,)
A.R. Popple, Inc.,)
Wyoming S.& P., Inc.)
)
Docket No. CAA-03-2005-0053)

APPEAL No: CAA-06-(03)
COMPLAINANT-APPELLANT'S
NOTICE OF APPEAL

NOTICE OF APPEAL

1. Pursuant to Section 22.30(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. § 22.30(a), the United States Environmental Protection Agency ("EPA" or "Complainant-Appellant"), files this Notice of Appeal of Administrative Law Judge Spencer T. Nissen's rationale for the penalty assessments for Counts II, III and IV in his Initial Decision, In the matter of City of Wilkes-Barre, et. al (Docket No. CAA-03-2005-0053), dated November 14, 2006 ("Initial Decision").
2. The Initial Decision was served on the undersigned attorney for Complainant-Appellant on November 14, 2006 by Facsimile and Pouch Mail. Section 22.30(a) of the Consolidated Rules of Practice requires parties to file Notices of Appeal and accompanying appellate briefs with the Environmental Appeals Board with 30 days after the Initial Decision is served. Concurrent with the filing of this Notice of Appeal, EPA is filing an appeal brief.

Respectfully Submitted,



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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

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ENVIR. APPEALS BOARD

In the Matter of:

City of Wilkes-Barre, et.al, Docket No.: CAA-03-2005-0053

Appeal No. CAA-06-(03)

Appeal from Initial Decision of Administrative Law Judge Judge Spencer T. Nissen

Issued, November 14, 2006

BRIEF OF COMPLAINANT-APPELLANT

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION III

December 12, 2006

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I. Introduction

On behalf of Complainant-Appellant, the Director, Waste, and Chemicals Management Division, U.S. Environmental Protection Agency, Region III ("Complainant" or "Region"), EPA files this brief in support of its concurrently filed Notice of Appeal, pursuant to Section 22.30(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. § 22.30(a). Complainant is seeking review of the Initial Decision issued by Administrative Law Judge ("ALJ") Spencer T. Nissen, dated November 14, 2006, In re City of Wilkes-Barre et. al., Docket No. CAA-03-2005-0053. Complainant respectfully requests that the Environmental Appeals Board ("Board") remand the case for further explanation of the rationale for the ALJ's penalty assessments for Counts II, III and IV.

II. Summary of the Issues Presented for Review and Relief Sought

As noted in Complainant's Notice of Appeal, this appeal concerns the rationale for the ALJ's penalty assessments for Counts II, III, and IV. Complainant asserts that the ALJ failed to provide sufficient rationale: (1) for deviating from EPA's proposed penalty calculated pursuant to applicable penalty policies, and (2) for his alternative penalty assessments for Counts II, III, and IV (including the apportionment of liability among Wilkes-Barre and Popple in Counts II and III), to inform the parties and an appellate body of the basis for his penalty decisions. Thus, Complainant respectfully requests the Board to remand the case for further explanation of the ALJ's rationale, based on the evidence in the record, for deviating from EPA's proposed penalty, and for the penalty assessments for Counts II, III and IV.

III. Nature of the Case

This appeal arises from an enforcement proceeding under the authority of Section 113(a)(3) and (d) of the Clean Air Act, 42 U.S.C. § 7413(a)(3) and (d)(the "CAA" or the "Act"). Complainant initiated this enforcement proceeding through the filing of a Complaint on December 30, 2004 against the City of Wilkes-Barre ("Wilkes-Barre"), A.R. Popple, Inc. ("Popple") and Wyoming S&P, Inc. ("Wyoming") (collectively the "Respondents") concerning their involvement with the 2002 demolition of the former Steam Heat Plant located in Wilkes-Barre, Pennsylvania. Initial Decision at 4. Complainant alleged that Respondents violated Section 112 of the CAA, 42 U.S.C. § 7412, and the National Emission Standard for Asbestos codified at 40 C.F.R Part 61, Subpart M ("Asbestos NESHAP") by failing to provide adequate notification as required by 40 C.F.R. § 61.145(b) (Count I), by failing to keep asbestos containing waste material wet as required by 40 C.F.R. § 61.145(c)(6) (Count II), by failing to have a trained supervisor present during demolition activities as required by 40 C.F.R §61.145(c)(8) (Count III), and by failing to deposit all asbestos-containing waste material in an authorized disposal site as soon as was practical as required by 40 C.F.R §61.150(b) (Count IV). *Id.* For the violations alleged in the Complaint, Complainant sought a total proposed civil penalty of \$36,850 from the Respondents, jointly. *Id.* at 23.

A hearing was held on this matter on August 23 and 24, 2005 in Wilkes-Barre, Pennsylvania and the ALJ issued an Initial Decision on November 14, 2006. *Id.* at 5 and 33. With respect to Count I, the ALJ found Respondents Wilkes-Barre and Popple liable for the deficient asbestos notification, but assessed no penalty under the facts of the case. *Id.* at 27, ¶¶ 12, 13. With respect to Count II, the ALJ found all three Respondents liable and assessed a

\$3,666 penalty against Wilkes-Barre, a \$3,666 penalty against Popple, and a \$2,200 penalty against Wyoming for such violations. Initial Decision at 28, ¶¶14 and 15, and at 30, ¶19. With respect to Count III, the ALJ found that only two of the Respondents were liable and assessed a separate \$3,333 penalty against both Wilkes-Barre and Popple for such violation. Initial Decision at 29, ¶16, and at 30, ¶19. With respect to Count IV, the ALJ found all three Respondents liable and assessed a \$3,333 penalty against Wilkes-Barre, a \$2,000 penalty against Popple, and a \$2,000 penalty against Wyoming for such violation. Initial Decision at 29, ¶¶17 and 18, and at 30, ¶19. The ALJ found that EPA's \$2,000 assessment for 'size of business' was arbitrary and refused to impose any assessment for the 'size of business' component of the civil penalty. Initial Decision at 30, ¶20. Multiplying the penalty assessments to account for inflation, the ALJ imposed a total penalty of \$25,884 of which \$11,365 was apportioned to Wilkes-Barre, \$9,899 was apportioned to Popple, and \$4,620 was apportioned to Wyoming¹. Initial Decision at 30, ¶19 and at 32, ¶3.

IV. Legal Framework for Penalty Determinations

Section 113(d) of CAA, 42 U.S.C. § 7413(d), authorizes EPA to assess an administrative civil penalty of up to \$25,000 per day of violation of for each violation of CAA. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, in conjunction with the Adjustment of Civil Penalties for Inflation rule promulgated at 40 C.F.R. Part 19, authorize the assessment of a civil penalty of up to \$27,500 for each violation of CAA occurring between January 30, 1997 and

¹ While EPA's proposed penalty was assessed against Respondents jointly, the ALJ found apportionment among the parties both necessary given that Count III was dismissed as to Wyoming, and appropriate to reflect the apparent degree of control Respondents had over the violations. Initial Decision at 28-30, ¶¶14-19.

March 15, 2004. In calculating penalties, Section 113(e) of CAA requires EPA to consider (in addition to such other factors as justice may require) 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 (together "the CAA statutory penalty factors"). Section 113(e) of CAA, 42 U.S.C. § 7413(e). In matters involving violations of the Asbestos NESHAP, the CAA statutory penalty factors are applied using EPA's May 5, 1992 "Asbestos Demolition and Renovation Civil Penalty Policy" and October 25, 1991 "Clean Air Act Stationary Source Civil Penalty Policy" ("applicable penalty policies"). The Board has long affirmed the use of EPA penalty guidelines in determining the appropriateness of a penalty in an administrative enforcement action. In re: Employers Insurance of Wausau and Group Eight Technology, Inc., 6 E.A.D. 735 (EAB 1997).

The Consolidated Rules of Practice provide that the dollar amount of the proposed civil penalty in an administrative complaint "shall be determined in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty and with any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.14(c).

V. Argument

- A. The ALJ failed to make clear his reasoning for deviating from EPA's proposed penalties in Counts II, III and IV.

According to the Consolidated Rules of Practice, "[i]f the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding

Officer shall set forth in the initial decision the specific reasons for the increase or decrease.” 40 C.F.R. § 22.27(b). The Board has explained that one should not have to engage in conjecture in order to identify the reasons for which a Presiding Officer has deviated from a recommended penalty. In re EK Assocs., 8 E.A.D. 458, 474-75 (EAB 1999), *citing* In re Pacific Refining Co., 5 E.A.D. 607, 613 n.7 (EAB 1994).

In Count II, EPA alleged that the Respondents violated the work practice requirements of the Asbestos NESHAP by failing to keep asbestos containing waste material wet on July 16 and July 31, 2002 and proposed a penalty of \$11,000 (jointly) pursuant to applicable penalty policies. Initial Decision at 22-25, ¶¶ 50-55. The ALJ found all three Respondents liable for the violations but assessed a decreased total penalty for Count II (*See* Section V.B *infra.*) without any explanation for deviating from EPA’s recommended penalty of \$11,000. Initial Decision at 28, ¶¶14 and 15, and at 30, ¶19.

In Count III, EPA alleged that the Respondents violated the work practice requirements of the Asbestos NESHAP by failing to have a trained supervisor present on June 20 and June 21, 2002 and proposed a penalty of \$10,000 (jointly) pursuant to applicable penalty policies. Initial Decision at 22-25, ¶¶ 50-55. The ALJ found Wilkes-Barre and Popple liable for the violations but assessed a decreased total penalty for Count III (*See* Section V.B *infra.*) without any explanation for deviating from EPA’s recommended penalty of \$10,000. Initial Decision at 29, ¶16, and at 30, ¶19.

In Count IV, EPA alleged that the Respondents violated the work practice requirements of the Asbestos NESHAP by failing to dispose all asbestos containing waste as soon as practical and proposed a penalty of \$10,000 (jointly) pursuant to applicable penalty policies. Initial

Decision at 22-25, ¶¶ 50-55. The ALJ found all three Respondents liable for the violations but assessed a decreased total penalty for Count IV (*See* Section V.B *infra.*) without any explanation for deviating from EPA's recommended penalty of \$10,000. Initial Decision at 29, ¶¶ 17 and 18 and at 30, ¶19.

EPA proposed a total penalty of \$36,850 which was calculated pursuant to the applicable penalty policies. Initial Decision at 22-25, ¶¶ 50-56. While explaining the bases for refusing to assess the \$500 penalty EPA proposed for Count I and the \$2,000 penalty EPA proposed for size of business (*see* Initial Decision at 27-28, ¶13 and at 30, ¶20) which when adjusted for inflation would account for a \$2,750 reduction from EPA's proposed penalty, the ALJ does not provide any other explanation for deviating from EPA's proposed penalty and one would need to engage in conjecture to determine his reasons for doing so.

- B. The ALJ failed to make clear his reasoning for his alternative penalty assessments for Counts II, III and IV (including his reasoning for apportioning liability among Respondents Wilkes-Barre and Popple in Counts II and III).

According to the Consolidated Rules of Practice,

the Presiding Officer shall determine the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b).

In this regard, the Board has clarified that while there is no precise formula by which statutory criteria must be considered, the presiding officer should make clear his or her reasoning such that the parties and an appellate body are informed of the basis for the penalty decision. In

re FRM Chem, Inc., A/K/A Industrial Specialties, FIFRA Appeal No. 05-01, 12 E.A.D. ____, slip op. at 16 (EAB, June 13, 2006), *citing In re Marshall*, 10 E.A.D.173, 190 (EAB 2001); In re Britton Constr. Co. 8 E.A.D. 261, at 282-83 (EAB 1999).

The ALJ found all three Respondents liable for the violations alleged in Count II, but limited Wyoming's liability to 20% of the \$11,000 penalty claimed for that Count due to its 'limited control over the operations at the Site.' Initial Decision at 28, ¶¶14 and 15. Correspondingly, the ALJ assessed a penalty of \$2,200 against Wyoming. Initial Decision at 30, ¶19. Without any explanation for his alternative amount or to its sufficiency under the facts and circumstances of the case, the ALJ assessed a total penalty of \$9,532² for Count II. Initial Decision at 28, ¶¶14, 15 and at 30, ¶19. EPA also notes that the ALJ failed to explain the bases for assessing identical penalties of \$3,666 against Wilkes-Barre and Popple for Count II. *Id.* For example, the ALJ does not discuss the relative culpabilities of Wilkes-Barre and Popple with respect to the 'failure to wet' violation or his rationale for assessing a penalty of \$7,332 among them in place of the \$8,800³ assessable under EPA's penalty calculation.

The ALJ found Wilkes-Barre and Popple liable for the violations alleged in Count III. Initial Decision at 29, ¶16. Without any explanation for his alternative amount or to its sufficiency under the facts and circumstances of the case, the ALJ assessed a total penalty of \$6,666⁴ in place of the \$10,000 proposed by EPA for Count III. Initial Decision at 29, ¶16 and at

2 Summing the penalties assessed against Wilkes-Barre (\$3,666), Popple (\$3,666) and Wyoming (\$2,200) yields a total penalty of \$9,532 for Count II. *See* Initial Decision at 30, ¶19.

3 Subtracting the \$2,200 assessment against Wyoming from the \$11,000 proposed by EPA leaves a balance of \$8,800.

4 Summing the penalties assessed against Wilkes-Barre (\$3,333), Popple (\$3,333) and Wyoming (\$0) yields a total penalty of \$6,666 for Count III. *See* Initial Decision at 30, ¶19. Under the

30, ¶19. EPA also notes that the ALJ failed to explain the bases for assessing identical penalties of \$3,333 against Wilkes-Barre and Popple for Count III. *Id.* For example, the ALJ does not discuss the relative culpabilities of Wilkes-Barre and Popple with respect to the ‘failure to have a supervisor present’ violation.

The ALJ found all three Respondents liable for the violations alleged in Count IV, but limited both Popple’s and Wyoming’s liability to 20% of the \$10,000 penalty claimed for that Count due to their limited control over the events causing the violation. Initial Decision at 29, ¶¶17 and 18. Correspondingly, the ALJ assessed a penalty of \$2,000 against both Popple and Wyoming. Initial Decision at 30, ¶19. Without any explanation as to his alternative amount or to its sufficiency under the facts and circumstances of the case, the ALJ assessed a total penalty of \$7,333⁵ for Count IV. Initial Decision at 29, ¶¶17 and 18 and at 30, ¶19.

EPA believes that the ALJ failed to explain the bases for the alternative penalty amounts assessed for Count II, III, and IV. Recognizing that the ALJ was not required to apportion a penalty by count (In re FRM Chem, Inc., A/K/A Industrial Specialties, FIFRA Appeal No. 05-01, 12 E.A.D. ___, slip op. at 17-18 (EAB, June 13, 2006)), EPA notes that the ALJ failed to explain even on a general (versus count by count) basis his rationale for assessing \$25,884 in place of the \$34,100⁶ EPA assessed for counts II, III and IV. By failing to provide rationale for his alternative

ALJ’s calculation, it appears that he reduced the liability against Wilkes-Barre and Popple due to his finding of no liability for Wyoming. However, if the penalty were properly allocated, the total amount for Count III (i.e.\$10,000) should have been apportioned between Wilkes-Barre and Popple with no reduction because Wyoming’s lack of liability.

⁵ Summing the penalties assessed against Wilkes-Barre (\$3,333), Popple (\$2,000) and Wyoming (\$2,000) yields a total penalty of \$7,333 for Count IV. *See* Initial Decision at 30, ¶19.

⁶ EPA proposed penalties of \$11,000 for Count II, \$10,000 for Count III, and \$10,000 for Count IV totaling \$31,000 which converts to \$34,100 when adjusted for inflation.

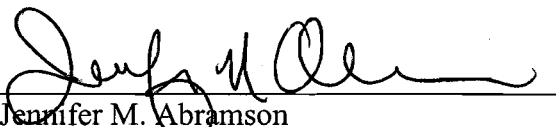
penalty assessments for Counts II, III and IV (including the apportionment of liability among Wilkes-Barre and Popple in Counts II and III) or their sufficiency under the facts and circumstances of the case, the parties and an appellate body are left uninformed of the basis for ALJ's penalty decision.

VI. Conclusion

The ALJ failed to provide sufficient rationale: (1) for deviating from EPA's proposed penalty calculated pursuant to applicable penalty policies, and (2) for his alternative penalty assessments for Counts II, III, and IV (including the apportionment of liability among Wilkes-Barre and Popple in Counts II and III), to inform the parties and an appellate body of the basis for his penalty decisions. Thus, Complainant respectfully requests the Board to remand the case for further explanation of the ALJ's rationale, based on the evidence in the record, for deviating from EPA's proposed penalty, and for the penalty assessments for Counts II, III and IV.

Respectfully submitted,

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Date


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CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, the original and five copies of the foregoing COMPLAINANT-APPELLANT's NOTICE OF APPEAL and BRIEF OF COMPLAINANT-APPELLANT in the matter of City of Wilkes-Barre, et. al., CAA Appeal NO: CAA-06-(03), were sent via FEDERAL EXPRESS to the Clerk of the Board, Colorado Building, 1341 G Street, N.W., Suite 600, Washington, D.C. 20005, and that a true and correct copies were sent to the following persons in the following manner:

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Lydia Guy, Regional hearing Clerk
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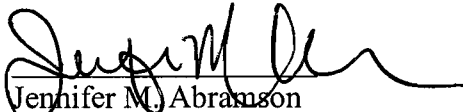
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