

On March 29, 2001, Region III and Ohio Valley filed a joint motion for a thirty-day stay of the proceedings in this case, reporting that they had reached a settlement in principle and needed time to craft, execute, and file a Consent Agreement and Final Order (“CAFO”) disposing of all issues in the underlying enforcement action. On April 3, 2001, the Board granted the parties’ motion and directed them to file a CAFO, or in the alternative briefs, on or before Monday, May 7, 2001. The Board made its grant of the motion subject to the express condition that, if a CAFO were filed, nothing in the CAFO’s terms, either express or implied, would preclude the Board from entering a final order vacating the January 29, 2001 Initial Decision of the Presiding Officer. *See* Order Granting Joint Motion to Stay Proceedings 2 (Apr. 3, 2001).

On April 24, 2001, the parties complied with the Board’s latest order by filing the anticipated CAFO. Accordingly, the Board hereby **RESCINDS** its March 6, 2001 order electing *sua sponte* review of the Presiding Officer’s Initial Decision in this matter. The Board also hereby **VACATES** the Presiding Officer’s decision. That decision, *In re Ohio Valley Insulating Co.*, Dkt. No. CAA-III-116 (ALJ Jan. 22, 2001), henceforth has neither force nor effect and may neither be cited as an administrative decision of the U.S. Environmental Protection Agency nor given precedential weight of any kind.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 05/01/01

By: _____ /s/
Ronald L. McCallum
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Rescinding *Sua Sponte* Grant of Review and Vacating Presiding Officer's Initial Decision in the matter of Ohio Valley Insulating Company, Inc., CAA Appeal No. 01-01, were sent to the following persons in the manner indicated:

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Dated: 05/02/01

/s/
Annette Duncan
Secretary

ATTACHMENT

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:)
Ohio Valley Insulating Company, Inc.)
CAA Appeal No. 01-01)
Docket No. CAA-III-116)

ORDER ELECTING TO REVIEW SUA SPONTE

On January 29, 2001, Administrative Law Judge Carl C. Charneski ("Presiding Officer") issued an Initial Decision in this matter. He determined that Ohio Valley Insulating Company, Inc. ("Ohio Valley") violated section 112 of the Clean Air Act ("CAA") by failing to ensure that regulated asbestos-containing material remained adequately wet until collected for disposal, as required by 40 C.F.R. § 61.145(c)(6)(i). For this violation, he assessed a civil penalty of \$20,000 against Ohio Valley.

Pursuant to 40 C.F.R. § 22.30(a), the parties were given 30 days to appeal the Presiding Officer's decision. The Board did not receive an appeal from either party. Accordingly, we must determine whether an appeal of the matter initiated by the Board

is appropriate. See 40 C.F.R. § 22.30(b).¹ Because we find that the penalty determination made by the Presiding Officer is at odds with the Board's holding in *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522 (EAB 1998), we elect to review the Presiding Officer's decision.

The Presiding Officer used the Board's decision in *Ocean State* as the cornerstone for his analysis of Ohio Valley's "full compliance history and good faith efforts to comply." Initial Decision at 14-16. At the outset of his analysis of this issue, the Presiding Officer quoted from a portion of the Board's decision in *Ocean State* that provides, "[I]mposition of a penalty increase based on a prior notification of an alleged violation, even if there is no adjudication of liability for the violation, promotes the statutory purpose of assuring that violations will not occur.'" *Id.* at 15 (quoting *Ocean State*, 7 E.A.D. at 547

¹Section 22.30(b) states:

Whenever the Environmental Appeals Board determines to review an initial decision on its own initiative, it shall file notice of its intent to review that decision with the Clerk of the Board, and serve it upon the Regional Hearing Clerk, the Presiding Officer and the parties within 45 days after the initial decision was served upon the parties. The notice shall include a statement of issues to be briefed by the parties and a time schedule for the filing and service of briefs.

(emphasis added)). This portion of the *Ocean State* decision explicitly recognizes that a finding of liability for a prior alleged violation is not a prerequisite for imposing a penalty increase. This is further supported by the Board's summary of its holding at the outset of the *Ocean State* decision. There the Board stated:

[W]e hold, based on the facts of this case, that a proper penalty assessment inquiry under the CAA may look to whether the present violation occurred after the respondent was given notice of a prior alleged violation (which notice should have heightened the respondent's awareness of both the need to comply and the sanctions for noncompliance), irrespective of whether the respondent may also be liable for that prior violation.

Ocean State, 7 E.A.D. at 527 (emphasis in original).

In applying the facts of the present matter to the Board's holding, however, the Board finds that the Presiding Officer incorrectly inserted a requirement, not found in the Board's *Ocean State* decision, that an "underlying violation" is necessary to impose an increased penalty. Initial Decision at 15-16. The Presiding Officer stated:

The *Ocean State* case involved the existence of an earlier violation from which it could be determined that

in committing a subsequent violation the respondent was already on notice as to what was required by the Asbestos NESHAP and simply should have known better. * * * [C]onsidering the context of [Ohio Valley's] clear denial of having committed a violation in the earlier matter, this court is unable to find the underlying violation that seems to be required by *Ocean State*. Thus, because EPA settled the earlier case in a manner which allowed the respondents to deny the fact of violation, it does not appear to be a proper basis under *Ocean State* for an upward adjustment in the civil penalty in this matter.

Id.

The Board also finds that the Presiding Officer's conclusion that an "underlying violation" is necessary for the imposition of an upward adjustment of the penalty under the "full compliance history and good faith efforts to comply" statutory factor overlooks the Board's discussion of deterrence and notice as bases for the imposition of increased penalties under the CAA. See *Ocean State*, 7 E.A.D. at 545-57. Consistent with *Ocean State*, regardless of Ohio Valley's denial of the conclusions of law and legal determinations in the complaint and consent agreement filed by EPA against Ohio Valley in a previous matter, the filing of these documents gave Ohio Valley a "heightened awareness" of the need to comply with the NESHAP work practice standards and the sanctions for noncompliance. See *id.*

Although the Presiding Officer individually analyzed each CAA statutory penalty factor, it is not clear how his determinations were taken into account in the final penalty calculation. The parties are, therefore, directed to brief the following specific issues set forth in this order:

1) To what extent, if any, does the Presiding Officer's penalty calculation need to be revised to be consistent with the Board's holding in *Ocean State*?

2) Should this matter be remanded to the Presiding Officer for clarification of his penalty calculation?

Both parties' briefs must be filed with the Board on or before Wednesday, April 5, 2001. Each party may then file a response to the other's brief on or before Wednesday, April 25, 2001.

So ordered.

ENVIRONMENTAL APPEALS BOARD

By: _____ /s/
Ronald L. McCallum
Environmental Appeals Judge

Dated: 03/06/01

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Electing to Review Sua Sponte in the matter of Ohio Valley Insulating Company, Inc., CAA Appeal No. 01-01 was sent to the following persons in the manner indicated:

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Date: 03/07/01

_____/s/_____
Annette Duncan
Secretary