IN RE OCEAN STATE ASBESTOS REMOVAL, INC.

CAA Appeal Nos. 97-2 and 97-5

FINAL DECISION

Decided March 13, 1998

Syllabus

This is a consolidated appeal by both the United States Environmental Protection Agency Region I (the "Region") and Ocean State Asbestos Removal, Inc./Ocean State Building Wrecking and Asbestos Removal, Inc. from an Initial Decision by Administrative Law Judge Andrew S. Pearlstein (the "Presiding Officer"). These appeals arise out of an administrative enforcement action for an alleged violation of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (the "CAA"). The Region brought its complaint against two related entities, Ocean State Asbestos Removal, Inc. ("Ocean State I") and Ocean State Building Wrecking and Asbestos Removal, Inc. ("Ocean State II"), for failure to properly wet regulated asbestos-containing material ("RACM") during a renovation project in August 1992 as required by the National Emissions Standards for Hazardous Air Pollutants with respect to asbestos, 40 C.F.R. § 61.145 (the "Asbestos NESHAP").

By the time of the evidentiary hearing on March 12, 1996, the Region had determined to proceed only against Ocean State II as the entity that was responsible for the failure to adequately wet RACM and to assure that the RACM remained wet until disposal. The Region requested that Ocean State II be assessed a civil penalty of $25,000 for its violation of the Asbestos NESHAP. The Region's calculation of the proposed civil penalty included an initial gravity component of $10,000 based on the size of the asbestos abatement project, an automatic $10,000 upward adjustment based on an alleged history of noncompliance as provided by the Asbestos Penalty Policy, and a $5,000 upward adjustment based on Ocean State II's alleged high degree of negligence. The Region's allegation that Ocean State II had a history of prior violations was based on the Region's prior issuance of an earlier Immediate Compliance Order in 1990 (the "1990 ICO") to Ocean State II arising out of Ocean State II's alleged failure to notify the Region of an earlier demolition/renovation project.

The Presiding Officer found that on the date of the inspection, August 27, 1992, Ocean State II inadequately wetted RACM and failed to ensure that RACM remained adequately wet until disposal. In applying the penalty assessment criteria of the CAA § 113(e), 42 U.S.C. § 7413(e), and in considering the guidance of the Asbestos Penalty Policy, the Presiding Officer assessed an initial base penalty of $7,500 for Ocean State II's violation of the wetting requirements of the Asbestos NESHAP, which base penalty is less than the penalty proposed by the Region and the guideline of the Asbestos Penalty Policy. The Presiding Officer also found that the violation occurred as a result of a high degree of negligence for which the Presiding Officer assessed a $5,000 increase in the amount of the base penalty. He did not include a penalty increase for Ocean State II's alleged history of noncompliance. The total civil penalty assessed by the Presiding Officer was $12,500.

Ocean State II now appeals from the Presiding Officer's findings and disputes the Initial Decision on two grounds: first, Ocean State II argues that the Region failed to sustain its burden

of proof and, second, Ocean State II argues that the circumstances surrounding the violation did not warrant a finding of a high degree of negligence. The Region appeals from the Presiding Officer's rejection as a matter of law of the request that the amount of the penalty be adjusted upward by $10,000 on the grounds of the alleged earlier violation of the CAA by Ocean State II.

Held: 1. The Presiding Officer's determination of liability is affirmed. The Region carried its burden of proof that Ocean State II failed to adequately wet RACM and assure that the RACM remained wet until disposal.

2. The Presiding Officer's finding of a high degree of negligence and assessment of a penalty increase of $5,000 on account of such negligence is affirmed as adequately supported by evidence in the record and consistent with the guidance of the General CAA Penalty Policy.

3. The Presiding Officer's determination that he could not consider in determining the appropriate penalty any alleged prior violations, unless such prior violations had been previously adjudicated after notice and a hearing or determined by a consent decree, is reversed. A plain reading of the penalty assessment criteria of CAA § 113(e), which includes a requirement to consider the respondent's "full compliance history," authorizes consideration of previously unadjudicated notices of alleged violations. The Asbestos Penalty Policy's guidance that previously issued notices of alleged violations should be considered in assessing a penalty increase is reasonable because it recognizes that a notice of violation, which includes both notice of the applicable requirements of the Asbestos NESHAP and the sanctions for noncompliance, when followed by a subsequent violation shows that the respondent was not deterred by the prior notice. Thus, the Region properly relied upon the Asbestos Penalty Policy in pleading its complaint and presenting its *prima facie* penalty case. Nevertheless, once Ocean State II offered evidence and argument in rebuttal, the Presiding Officer should have considered the matters raised in assessing the appropriate penalty.

4. A penalty increase of $5,000 is assessed to take into account Ocean State II's admission that it received the 1990 ICO (which gave it specific notice of the requirements of the Asbestos NESHAP and the sanctions for noncompliance) and to take into account the facts and circumstances of the 1990 ICO.

5. The $5,000 increase in the penalty imposed in this case on the grounds of the facts and circumstances of the 1990 ICO does not violate Ocean State II's due process rights to notice and hearing because adequate notice and opportunity for hearing were given.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge McCallum:

This is a consolidated appeal by both the United States Environmental Protection Agency Region I (the "Region") and Ocean State Asbestos Removal, Inc./Ocean State Building Wrecking and Asbestos Removal, Inc. from an Initial Decision by Administrative Law Judge Andrew S. Pearlstein (the "Presiding Officer") arising out of an administrative enforcement action for an alleged violation of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (the "CAA"). The record reflects that the Region originally had some uncertainty regarding the identity of the entity responsible for the violation at issue in this case. The complaint was originally filed against Ocean State Asbestos Removal, Inc. ("Ocean State I"). Subsequently, Ocean State Building Wrecking and

Asbestos Removal, Inc. ("Ocean State II") was added as a second respondent by the Region's Second Amended Complaint. At the administrative hearing held in this case on March 12, 1996, the Region indicated that it was proceeding only against Ocean State II, and thereafter, in the Initial Decision, the Presiding Officer assessed a civil penalty of $12,500 against Ocean State II for its failure to comply with the wetting requirements of the National Emissions Standards for Hazardous Air Pollutants with respect to asbestos, 40 C.F.R. § 61.145 (the "Asbestos NESHAP").

Ocean State I and Ocean State II are related entities. They have the same business address and the same president. They also have been represented by the same attorney throughout these proceedings and have consistently filed joint pleadings as if speaking with one voice. Continuing that practice, Ocean State I and Ocean State II jointly filed an appeal from the Initial Decision. In their appeal papers, Ocean State I and Ocean State II have shown no apparent recognition that only Ocean State II was found liable and that no finding of liability was entered against Ocean State I.[1] Because the Region did not proceed against Ocean State I at the administrative hearing and because the Presiding Officer only entered findings with respect to Ocean State II, we formally dismiss Ocean State I from these proceedings, and for clarity treat Ocean State II as the sole "respondent" on this appeal. Both Ocean State II and the Region timely appealed from different aspects of the Initial Decision.[2]

I. *BACKGROUND*

On July 15, 1992, Ocean State II filed a Notification of Demolition and Renovation with the Region for a renovation project at the Roger Williams Junior High School in Providence, Rhode Island (the "Facility").[3] Initial Decision at 2. The notice stated that Ocean State II

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[1] In contrast, the Region acknowledges in its appeal that Ocean State II is the entity that was found liable by the Initial Decision. *See* Appellant's Brief ("Region's Brief") at 5 n.2.

[2] After receiving an extension of time for filing its appeal, the Region timely filed a notice of appeal and brief on March 14, 1997. Also after receiving an extension of time, Ocean State II timely filed a notice of appeal and supporting brief on March 13, 1997. Memorandum of Ocean State Asbestos Removal, Inc./Ocean State Building Wrecking and Asbestos Removal Co., Inc. ("Ocean State's Memorandum"). The Region filed a Reply to Ocean State's Notice of Appeal and Supporting Memorandum ("Region's Reply"). Ocean State II did not file any reply to the Region's Brief.

[3] The Notification of Demolition and Renovation identified the removal contractor as Ocean State Asbestos Removal Co., Inc., not Ocean State Building Wrecking and Asbestos

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intended to remove approximately 2,675 linear feet of regulated asbestos-containing material ("RACM") from pipes in the Facility. *Id*.

On August 27, 1992, a compliance inspector from the Region's Air Division, Mr. William Osbar (the "Compliance Inspector"), and an inspector from the Rhode Island Department of Health went to the Facility to inspect the removal work being performed by Ocean State II. *Id*. The Compliance Inspector reported finding stripped asbestos pipe lagging which was not properly wetted. Transcript of March 12, 1996 Hearing ("Tr.") at 40-42. The stripped pipe lagging had been placed in polyethylene ("poly") bags, with some of the bags deposited in a dumpster and other bags still within the project's containment area. The Compliance Inspector examined four poly bags, two of which he testified contained dry asbestos pipe lagging. *Id*.

On March 31, 1993, the Region filed its complaint against Ocean State I charging it with one count of failing to adequately wet RACM in violation of CAA § 112(d), 42 U.S.C. § 7412(d), and in violation of the Asbestos NESHAP, 40 C.F.R. § 61.145(c)(6)(1). Ocean State I filed an answer denying the material allegations of the complaint and alleging that Ocean State II was the real party in interest. The Region filed its first amended complaint on January 12, 1994, and its second amended complaint on or about November 14, 1994. By the second amended complaint, the Region conformed its complaint to reflect the Presiding Officer's order (dated October 2, 1994) adding Ocean State II as a party. By its complaint, as amended, the Region sought to impose a civil penalty against Ocean State I and Ocean State II in the amount of $25,000 pursuant to CAA § 113(d), 42 U.S.C. § 7413(d).

The Region's calculation of the proposed civil penalty included an initial gravity component of $10,000 based on the size of the asbestos abatement project, a $10,000 upward adjustment based on an alleged history of noncompliance, a $2,000 upward adjustment based on the size of Ocean State II's business and a $5,000 upward adjustment based on Ocean State II's alleged high degree of negligence. Region's Prehearing Memorandum at 7-9.[4] The Region's allegation that Ocean State II had a history of prior violations was based on the

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Removal, Inc. The Presiding Officer found that this identification was erroneous and that the correct removal contractor was Ocean State Building Wrecking and Asbestos Removal Co., Inc. None of the parties has appealed this finding and it appears well grounded on the parties' stipulations dated March 7, 1996, contained in the record.

[4] The Region, however, requested a total penalty of only $25,000 as that was the maximum per day penalty authorized at the time by the statute for a single violation. Subsequent to

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Region's prior issuance of an immediate compliance order in 1990 (the "1990 ICO") to Ocean State II arising out of Ocean State II's alleged failure to notify the Region of an earlier demolition/renovation project. *See* Second Amended Complaint ¶ 7. The Region also alleged that Ocean State I had a history of violations due to the Region's prior issuance of an immediate compliance order in 1988 (the "1988 ICO") stemming from an alleged failure to provide demolition/renovation notices in 1984. Second Amended Complaint ¶ 6.

At the commencement of the administrative hearing held on March 12, 1995, the parties also submitted stipulations as to certain uncontested facts, including Ocean State II's admission that it received the 1990 ICO and authentication of the certified mail receipt of the 1990 ICO signed by Harry Baccarie, as president of Ocean State II. Stipulations ¶ 12. The parties also stipulated that Ocean State I received the 1988 ICO and the parties authenticated the certified mail receipt of the 1988 ICO signed by Harry Baccarie, as president of Ocean State I. Stipulations ¶ 11. At the administrative hearing, the Region presented three witnesses. The Region relied primarily on the Compliance Inspector's testimony to establish the alleged violations of the wetting requirements found by him on August 27, 1992.[5] A total of 17 exhibits were admitted into evidence. The respondents elected not to present any witnesses in rebuttal. The parties submitted post-hearing briefs and reply briefs (Ocean State I and Ocean State II submitted joint briefs, without any recognition of any distinction between them).

The Presiding Officer issued his Initial Decision on January 24, 1997, setting forth his findings of fact and conclusions of law, including specific factual findings that on August 27, 1992, Ocean State II inadequately wetted RACM and failed to ensure that RACM remained adequately wet until disposal. Initial Decision at 5. The Presiding Officer assessed an initial base penalty of $7,500 for this violation. *Id*. at 7. The Presiding Officer also found that the violation occurred as a result of a high degree of negligence for which the Presiding Officer assessed a $5,000 increase in the amount of the base penalty. *Id*. at 12. He did not include a penalty increase for the alleged history of

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the violations at issue in this case, the Debt Collection Improvement Act of 1996 was enacted authorizing the Agency to make periodic adjustments of maximum statutory penalties to take into account inflation. *See infra* n.12.

[5] The Region's other two witnesses were Damien Houlihan of the Region who testified regarding the Region's calculation of the penalty, and Howard S. Davis who testified regarding the laboratory analysis of samples taken from the Facility by the Compliance Inspector on August 27, 1992.

noncompliance or for the size of Ocean State II's business. The total civil penalty assessed by the Presiding Officer was $12,500.

Ocean State II appeals from the Presiding Officer's findings and disputes the Initial Decision on two general grounds: first, Ocean State II argues that the Region failed to sustain its burden of proof and, second, Ocean State II argues that the circumstances surrounding the violation did not warrant a finding of a high degree of negligence. Because Ocean State II's arguments are not well focused and appear to challenge most of the Presiding Officer's factual and legal conclusions, we have fully reviewed the Presiding Officer's finding of liability and penalty assessment. For the reasons discussed below, we find no error in the Presiding Officer's determination of liability and his finding that Ocean State II acted with a high degree of negligence.

The Region appeals from the Presiding Officer's rejection as a matter of law of the request that the amount of the penalty be adjusted upward by $10,000 on the grounds of the alleged earlier violation of the CAA by Ocean State II. The Presiding Officer reasoned that an increase of the penalty for the present violation grounded solely upon an alleged earlier violation of the CAA (which had not previously been adjudicated at a hearing) would constitute a violation of Ocean State II's due process rights to notice and a hearing on the prior violation. The Region argues on appeal that the procedures used in the present case afforded Ocean State II its due process rights to notice and a hearing. As described below, we hold, based on the facts of this case, that a proper part of a 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. Such consideration of the prior notice does not violate Ocean State II's due process rights. We find further that the Region's evidence was not sufficient to prove that Ocean State II is liable for the alleged prior violation, but that Ocean State II's admission that it received the 1990 ICO properly supports a $5,000 increase in the amount of the penalty.

II. *DISCUSSION*

A. *The Issue of Liability*

The complaint, as amended, alleges a violation of section 112(b) of the CAA, 42 U.S.C. § 7412(b), and its implementing regulations. Section 112(b) lists pollutants that Congress has determined present,

or may present, a threat of adverse human health or environmental effects. Asbestos is on that list. Section 112 also authorizes the Administrator of the United States Environmental Protection Agency (the "EPA" or "Agency") to adopt standards, known as NESHAPs, which may consist of emission standards or, in some circumstances, work practice standards, or both, for the listed pollutants. *In re Echevarria*, 5 E.A.D. 626, 631-32 (EAB 1994). The EPA promulgated the Asbestos NESHAP at 40 C.F.R. part 61, subpart M. *Id*. at 632.

The Asbestos NESHAP imposes mandatory notice and work practice standards. Where a demolition or renovation involves removal of at least 260 linear feet of RACM[6] on pipes or at least 160 square feet of RACM on other components of the facility, the relevant work practice standards at section 61.145(c) apply. 40 C.F.R. § 61.145(a). Section 61.145(c) provides as follows:

> (c) Procedures for asbestos emission control. Each owner or operator of a demolition or renovation activity to whom this paragraph applies, according to paragraph (a) of this section, shall comply with the following procedures:
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> * * * * * * *
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> (3) When RACM is stripped from a facility component while it remains in place in the facility, adequately wet the RACM during the stripping operation.
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> * * * * * * *
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> (6) For all RACM including material that has been removed or stripped:

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[6] The term RACM is defined by the regulations as follows:

> Regulated asbestos-containing material (RACM) means (a) Friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart.

40 C.F.R. § 61.141.

> (i) Adequately wet the material and ensure that it remains wet until collected or treated in preparation for disposal in accordance with § 61.150[.]

40 C.F.R. § 61.145(c)(3) and (6)(i).

In essence, these work practice standards require a person engaged in the removal of asbestos containing material to adequately wet the material prior to removal and then to keep the material adequately wet until it is collected for disposal. *Echevarria*, 5 E.A.D. at 633. The term "adequately wet" is defined by the regulations to mean:

> [S]ufficiently mix or penetrate with liquid to prevent the release of particulates. If visible emissions are observed coming from asbestos-containing material, then that material has not been adequately wetted. However, the absence of visible emissions is not sufficient evidence of being adequately wet.

40 C.F.R. § 61.141. "The Asbestos NESHAP imposes a standard of strict liability for violating any of the work practice standards." *Echevarria*, 5 E.A.D. at 633, citing *United States v. Sealtite Corp.*, 739 F. Supp. 464, 468 (E.D. Ark. 1990).

We have held that proof of liability under the Asbestos NESHAP requires a "two-fold showing: first, the Agency must show that the NESHAP requirements apply, and second, that the work practice standards of the NESHAP have not been satisfied." *Echevarria*, 5 E.A.D. at 633, citing *United States v. MPM Contractors, Inc.*, 767 F. Supp. 231, 233 (D. Kan. 1990). In the present case, the Region alleged in its second amended complaint, and Ocean State II admitted in the stipulations, facts sufficient to establish the first part of the two-fold showing, that the Asbestos NESHAP wetting work practice standards applied to Ocean State II's activities at the Facility. First Amended Complaint ¶¶ 6-9; Stipulations ¶¶ 1 and 3-8. At the hearing, the Region sought to prove that Ocean State II violated the wetting work practice standards on the date of the inspection, August 27, 1992, and Ocean State II now argues on appeal that the Region failed to carry its burden of proof that a violation occurred. Ocean State's Memorandum at 1-2. Ocean State II argues among other things that the Compliance Inspector's testimony regarding the wetness of the RACM was not credible. *Id.* at 2-9.

The Region was required to prove that a violation occurred by a preponderance of the evidence. 40 C.F.R. § 22.24. We have held that

"the preponderance of the evidence standard means that a fact finder should believe that his factual conclusion is more likely than not." *Echevarria*, 5 E.A.D. at 638 (citing *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 363 n.20 (EAB 1994) (preponderance of the evidence means that a fact is more probably true than untrue); *In re City of Detroit*, 3 E.A.D. 514 (CJO 1991); Koch, Administrative Law and Practice, at 491 (1985)). Here, the Presiding Officer found that the Region satisfied its burden of proof showing that a violation occurred.

Generally, we review a presiding officer's determination *de novo*, 40 C.F.R. § 22.31(a) (conferring authority on the Board to "adopt, modify, or set aside" the findings and conclusions of the presiding officer); however, with respect to findings where credibility of witnesses is at issue, as Ocean State II has alleged in the present case, we generally defer to the presiding officer's factual findings because the presiding officer had the opportunity to observe the witnesses testify and to evaluate their credibility. *Echevarria*, 5 E.A.D. at 639, citing *Great Lakes*, 5 E.A.D. at 372; *In re Port of Oakland*, 4 E.A.D. 170, 193 n.59 (EAB 1992). In the present case, while Ocean State II has expressed its disagreement with the Presiding Officer's determinations, Ocean State II has not demonstrated that any of the factual findings made by the Presiding Officer are not supported by a preponderance of the evidence when due deference is given to the Presiding Officer's observation of the witnesses.

The Presiding Officer found that Ocean State II had inadequately wetted RACM and failed to ensure that it remained wet until disposal. Initial Decision at 4-5. The Presiding Officer based this finding almost exclusively on the testimony of the Compliance Inspector regarding his observations made at the time of his inspection on August 27, 1992. The Compliance Inspector testified that he found two poly bags containing dry RACM. Tr. at 41-46. The Presiding Officer found that the Compliance Inspector's testimony was consistent with his notes taken contemporaneously with the inspection.[7] Initial Decision at 4-5. The Presiding Officer also supported his findings by noting that the inspection was observed by a representative of Ocean State II who

[7] Ocean State II argues that the Compliance Inspector's notes "constitute the best evidence of what he observed." Ocean State's Memorandum at 4. By this argument, Ocean State II appears to invoke the best evidence rule regarding the inadmissibility of testimony to contradict the contents of a written document. *See* Fed. R. Evid. 1002. Ocean State II's argument is not well founded for two reasons. First, penalty proceedings are not governed by the Federal Rules of Evidence, but instead are governed by the Agency's Consolidated Rules of Practice, which generally allow admission of a broader range of evidence. *In re Great Lakes*, 5 E.A.D. at 368-369. Because the Compliance Inspector's testimony was not irrelevant, immaterial, unduly repetitious

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was present at the trial and who was not called by Ocean State II to contradict the Compliance Inspector's testimony, thereby leading to the inference that the Compliance Inspector's testimony was materially accurate.[8] *Id*. Based on the Compliance Inspector's testimony and the absence of any contradictory testimony, the Presiding Officer found that the evidence was sufficient to prove both that Ocean State II failed to adequately wet the RACM at the time of removal and failed to ensure that it remained adequately wet prior to disposal. *Id*.

Ocean State II makes several arguments in an effort to show that the Presiding Officer's conclusions are not supported by a preponderance of the evidence. First, Ocean State II argues that the Region's witnesses regarding the wetness of the asbestos were not competent to testify on the wetness issue. Ocean State's Memorandum at 1. Ocean State II argues that the laboratory analysis, which confirmed the asbestos content of samples taken from the two dry poly bags, did not include any test of the wetness of the RACM. *Id*. By this argument Ocean State II appears to presume that the Region must prove wetness by laboratory analysis. We rejected a similar contention in *Echevarria*, where we held that the testimony of a compliance inspector regarding personal observations is sufficient to establish whether RACM has been adequately wetted. *Echevarria*, 5 E.A.D. at 639. *See also, MPM Contractors*, 767 F. Supp. at 233. Accordingly, the Region was not required to show a laboratory analysis of the wetness of the asbestos, and the failure of the Region's laboratory witness to testify regarding laboratory tests of the water content of the RACM samples is not material.

A review of the record in the present case shows that the Compliance Inspector was adequately trained and personally observed that the material in two bags was not adequately wet at the time of the inspection. With respect to the first bag in which the

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or otherwise unreliable or of little probative value, it was properly admitted into evidence. 40 C.F.R. § 22.22(a). Second, Ocean State II's argument would even fail under the Federal Rules of Evidence. The purpose of the best evidence rule is to prevent inaccuracy and fraud when the contents of a writing are at issue. Fed. R. Evid. 1001 advisory committee's note. Here, the issue is not the content of the Compliance Inspector's notes or the content of any other writing and, therefore, the best evidence rule does not apply. The issue here is whether the RACM was adequately wetted on August 27, 1992. Both the Compliance Inspector's contemporaneous notes and his testimony of his personal observations are evidence of the wetness of the RACM.

[8] Ocean State II did not object on appeal to such inference having been drawn by the Presiding Officer, and we find that it is consistent with our prior decisions. *See, e.g., In re Johnson Pacific, Inc.*, 5 E.A.D. 696, 705 (EAB 1995) (upholding the presiding officer's factual finding regarding the size of respondent's business, which finding was based on unrebutted testimony).

Compliance Inspector found dry RACM, the Inspector testified that the material in the bag was "white — white pipe lagging, very very white, very dry, and I just couldn't detect any water anywhere inside the bag * * * it crumbled with my hand pressure." Tr. at 41. With respect to the second bag, the Compliance Inspector testified that the material "was pretty light, like bone dry asbestos * * *. [W]hat was interesting about this bag, as you looked inside, the static electricity from the plastic kind of afforded a lot of the dust particles to settle on the walls of the bag." Tr. at 45-46. This testimony and the record as a whole was sufficient to support the Presiding Officer's finding that the RACM was not adequately wet at the time of the inspection.[9]

Second, Ocean State II argues that the Compliance Inspector's testimony is not sufficient to establish liability because the Compliance Inspector did not observe the wetness of the RACM at the time it was being removed from the pipes. Ocean State's Memorandum at 3 and 6. The Presiding Officer was correct in rejecting this contention as a matter of law because the Region was only required to show that Ocean State II failed to ensure that the RACM was kept adequately wet until disposal. *Echevarria*, 5 E.A.D. at 633. Because the evidence showed that RACM in two poly bags was not adequately wet at the time of the inspection on August 27, 1992, the Region sustained its burden of proof that Ocean State II violated its duty to assure that the RACM remained wet until disposal. *Id.*

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[9] We reject Ocean State II's argument that the Compliance Inspector's testimony was not credible. Ocean State II argues that the dust particles observed by the Inspector on the walls of the second bag could be attributable to moisture in the bag, rather than static electricity. While that suggestion may be plausible in the abstract, the testimony here was that the bag was light and easy to lift, there was no moisture condensation on the bag, and the material in the bag was white, the color of dry pipe lagging, not grey, the color of wetted lagging. Tr. at 45-46. This detailed testimony sufficiently negates Ocean State II's argument that the dust adhered to the wall of the bag due to moisture in the bag.

Second, Ocean State II argues that the Compliance Inspector's testimony was inconsistent because on two occasions in the transcript the Compliance Inspector stated that the material in the bags was wet. We note that on one of those occasions, the Compliance Inspector immediately corrected himself and stated that he intended to state that the material was dry. Tr. at 47. This self-correction by the witness, and the detailed contrary testimony noted above, negates any suggestion of inconsistency in the Compliance Inspector's memory or testimony. Indeed, Ocean State II acknowledges that the Compliance Inspector, if given the opportunity, would "indicate that he simply misspoke." Ocean State's Memorandum at 4. Thus, we do not find the transcript to show that the Region's witness lacked credibility, particularly since we generally defer to the Presiding Officer's determination on issues of credibility and he found this witness to be credible.

While the Presiding Officer's finding that the RACM was not adequately wet at the time of the inspection is sufficient, standing alone, to support the Presiding Officer's determination of liability, the Presiding Officer made additional, alternative findings of fact that the RACM was not adequately wet when bagged. We review these findings as alternative grounds for the Presiding Officer's determination that Ocean State violated the work practice standards of the Asbestos NESHAP, and we find there is no error in the Presiding Officer's alternative factual findings.

Ocean State II had argued that it should not be found liable for violating the Asbestos NESHAP because any dryness at the time of the inspection was attributable to evaporation. As discussed above, Ocean State II's failure to keep the RACM adequately wet constitutes a violation of the Asbestos NESHAP, even if that failure occurred as a result of evaporation. However, the Compliance Inspector's additional testimony that the bags were sealed and air tight reasonably led the Presiding Officer to conclude that the dryness on the date of the inspection could not have been attributed to evaporation and, therefore, the RACM could not have been adequately wet when bagged. Initial Decision at 5. We believe that this conclusion is correct. Moreover, as noted by the Presiding Officer, even a contrary conclusion that the dryness was attributable to evaporation would have supported an additional alternative ground for liability because a failure to keep the bags sealed and leak proof is an independent violation of the Asbestos NESHAP. 40 C.F.R. § 61.150(a)(1)(iii).

For these reasons we find no error in the Presiding Officer's finding that Ocean State II violated the Asbestos NESHAP by failing to adequately wet RACM as alleged in the complaint. Next, we review the Presiding Officer's determination of the appropriate civil penalty for this violation of the Asbestos NESHAP.

B. *The Issue of the Amount of the Penalty*

1. *The Statutory and Regulatory Background*

Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1), authorizes the Administrator to assess civil administrative penalties for violations of the CAA or its implementing regulations. That section provides in relevant part as follows:

> (1) The Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to $25,000, per day of violation,

> whenever, on the basis of any available information, the Administrator finds that such person —
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> * * * * * * *
>
> (B) has violated or is violating any other requirement or prohibition of subchapter I of this chapter * * *[.]

CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1)**.** The statute also specifies general criteria that must be considered by the Agency in assessing a civil penalty. Those criteria in relevant part are as follows:

> In determining the amount of any penalty to be assessed under this section * * *, the Administrator * * * shall take into consideration (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 * * *, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

CAA § 113(e), 42 U.S.C. § 7413(e)**.** In addition, pursuant to 40 C.F.R. § 22.27(b), the presiding officer must "consider" any civil penalty guidelines or policies issued by the Agency.[10] The Agency has prepared a general penalty policy applicable to violations of the CAA, known as the Clean Air Act Stationary Source Civil Penalty Policy of October 25, 1991 (the "General CAA Penalty Policy"). Attached to the General CAA Penalty Policy as Appendix III, Asbestos Demolition and

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[10] The cited regulation provides the following guidance to the presiding officer on the proper criteria for the assessment of civil penalties:

> (b) Amount of civil penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, 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).

Renovation Civil Penalty Policy (revised May 5, 1992), are the specific guidelines for penalties assessed for violations of the Asbestos NESHAP (the "Asbestos Penalty Policy").[11]

We have generally held that, while the presiding officer must consider the Agency's official penalty policy, in any particular instance the presiding officer may depart from the penalty policy as long as the reasons for the departure are adequately explained. *In re Pacific Refining Co.*, 5 E.A.D. 607, 612 (EAB 1994); *In re DIC Americas, Inc.*, 6 E.A.D. 184, 190 n.10 (EAB 1995); *In re A.Y. McDonald Indus., Inc.*, 2 E.A.D. 402, 414 (CJO 1987). *See also*, *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 374 (EAB 1994) (penalty policies facilitate the application of statutory penalty criteria; policies serve as guidelines that need not be rigidly followed); *In re ALM Corp.*, 3 E.A.D. 688 (CJO 1991). We have also approved deviation from the penalty policies on numerous occasions. *See, e.g.*, *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120 (EAB 1994) (affirming ALJ's deviation from penalty policy's formula for calculating "ability to pay" because application of policy's formula resulted in an unduly harsh penalty); *In re Mobil Oil Corp.*, 5 E.A.D. 490 (EAB 1994) (deviating from EPCRA penalty policy with respect to policy's "gravity" level because policy would have resulted in an overestimation of the potential threat of the release).

In the present case, the Region's expert witness, Damien Houlihan, the Region I Asbestos NESHAP coordinator, testified regarding the application of the statutory criteria and the Asbestos Penalty Policy to Ocean State II's violation of the Asbestos NESHAP. Through Mr. Houlihan's testimony the Region proposed a total penalty of $25,000, the per day maximum allowed by the statute for a single violation.[12] The Region's proposed penalty consisted of four components: an initial "gravity" component of $10,000 and three upward adjustments. The largest upward adjustment was in the amount of $10,000 for Ocean State II's alleged history of noncompliance with the Asbestos NESHAP. The Region also proposed a $5,000 upward adjustment for Ocean State II's alleged high degree of negligence and a

[11] Neither the applicability of the General CAA Penalty Policy nor the applicability of the Asbestos Penalty Policy have been disputed in this case. We have held that the General CAA Penalty Policy "provides a sound framework for the exercise of an appellate tribunal's discretion." *In re House Analysis & Assoc. & Fred Powell*, 4 E.A.D. 501, 509 n.29 (EAB 1993), citing *In re Alm Corp.*, 3 E.A.D. 688 (CJO 1991).

[12] Subsequent to the violations at issue in this case, the Debt Collection Improvement Act of 1996 was enacted authorizing the Agency to make periodic adjustments of maximum civil penalties to take into account inflation. The Agency has published inflation adjusted maximum penalties at 40 C.F.R. §§ 19.1 *et seq*.

$2,000 upward adjustment for the size of Ocean State II's business. Because the total of the base penalty and the upward adjustments exceeded the statutory maximum of $25,000 per violation, the Region requested a penalty amount equal to the statutory maximum.

The Presiding Officer considered, but rejected in part, the Region's proposed calculation of the penalty and the proposed application of the Asbestos Penalty Policy. Instead, the Presiding Officer assessed a penalty of $12,500, consisting of a base gravity component of $7,500 and a single upward adjustment of $5,000 for a high degree of negligence. Both Ocean State II and the Region appealed from different parts of this penalty assessment.[13]

The applicable regulation confers discretion on us to increase or decrease the civil penalty assessed by the Presiding Officer. 40 C.F.R. § 22.31(a). However, we have held that when the Presiding Officer assesses a penalty that falls within the range of penalties provided in the penalty guidelines, the Board generally will not substitute its judgment for that of the Presiding Officer absent a showing that the Presiding Officer has committed an abuse of discretion or a clear error in assessing the penalty. *Pacific Refining*, 5 E.A.D. 607; *Ray Birnbaum Scrap Yard*, 5 E.A.D. at 124. As described below, we find no error in the Presiding Officer's assessment of the base gravity component of the penalty and the increase for a high degree of negligence. However, we find that the Presiding Officer committed clear error in rejecting an increase in the penalty to take into account the prior notice of violation given to Ocean State II.

2. *The "Gravity" Component of the Penalty*

The Asbestos Penalty Policy instructs that the penalty analysis should begin with the calculation of an initial "gravity" component of the penalty followed by several different categories of adjustments.[14]

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[13] The Region expressly stated that it has not appealed from the Presiding Officer's determination not to increase the penalty by $2,000 based on the size of Ocean State II's business. Region's Brief at 8 n.6. Ocean State II also has not appealed from this determination. Accordingly, we do not review the Presiding Officer's reasoning on this issue.

[14] This approach is different from that adopted by the Article III federal courts, which have held that the analysis should begin with a presumption that the statutory maximum penalty will be imposed followed by downward adjustments if shown to be appropriate. *United States v. B&W Inv. Properties*, 38 F.3d 362, 368 (7th Cir. 1994) (courts generally presume that the maximum penalty should be imposed); *United States v. Midwest Suspension and Brake*, 824 F. Supp. 713, 733-737 (E.D. Mich. 1993), *aff'd*, 49 F.3d 1197 (6th Cir. 1995). Both approaches would appear to be reasonable means for considering the statutory criteria. Here, we follow the approach used by the Region and Presiding Officer by beginning with the Asbestos Penalty Policy.

The initial gravity component for violation of the work practice standards is calculated by reference to a chart or matrix, which takes into account two variables: (1) whether the violation(s) occurred on a single or multiple days, and (2) the size of the project determined by reference to the total amount of asbestos to be removed. For the size variable, the Asbestos Penalty Policy provides three categories: (1) projects involving ten (10) or fewer units[15] of asbestos; (2) more than 10 units, but not more than 50 units; and (3) more than 50 units. For a single day violation, the Asbestos Penalty Policy sets a $5,000 initial gravity component for the smallest size projects; a $10,000 gravity component for the mid-size category; and a $15,000 gravity component for the largest projects.

The Asbestos Penalty Policy explains that size is a relevant factor because it "relates to the potential for environmental harm associated with improper removal and disposal." Asbestos Penalty Policy at 3. The Penalty Policy further explains that "[w]here there is evidence indicating that only part of a demolition or renovation project involved improper stripping, removal, disposal or handling, the Region may calculate the number of units based upon the amount of asbestos reasonably related to such improper practice." *Id*.

In the present case, the Region did not allege that violations occurred on any days other than the date of the inspection, August 27, 1992. With respect to the size component, the Region used the total project size as reported by Ocean State II in its initial notice of the abatement, which stated that 2,675 linear feet of asbestos pipe lagging would be removed. Based on these facts, Mr. Houlihan testified that the Region calculated the appropriate initial gravity component of the penalty to be $10,000 for a single day violation involving a project in the mid-range of size.

The Presiding Officer rejected the Region's proposed initial gravity component. Instead, the Presiding Officer assessed an initial gravity component of $7,500. He explained that he made this reduction because the total asbestos involved in Ocean State II's project at the Facility of 2,675 linear feet was barely over the threshold of 2,600 linear feet for the mid-range size project and the Region's evidence showed that some of the poly bags of pipe lagging were properly wetted. Initial Decision at 6-7. He stated that under these circumstances he deemed it inappropriate to use the penalty assigned under the

[15] A unit of asbestos is defined, relevant for the present case, as 260 linear feet of asbestos pipe lagging. 40 C.F.R. § 61.145(a).

Asbestos Penalty Policy for a mid-size project. *Id*. at 7. However, he also explained that he did not consider it appropriate to lower the base penalty to $5,000, the amount assigned by the Asbestos Penalty Policy for the smallest category of projects. *Id*. Thus, he set the base penalty mid-way between the two penalty categories, thereby recognizing the potential harm associated with the size of the total project and recognizing that only part of the project was improperly handled.

The Region did not expressly appeal from this reduction of the initial gravity component of the total penalty, and the Region did not provide any significant briefing on this issue. However, the Region does argue in its brief and in its notice of appeal that the total penalty should be assessed at $25,000, which amount can be reached only by reversal of the Presiding Officer's reasoning on this issue. Nevertheless, the Region's lack of argument on this issue, presumably, recognizes that the Presiding Officer's analysis represents a reasoned, independent determination of the penalty calculation falling within his sound discretion.[16] *Ray Birnbaum Scrap Yard*, 5 E.A.D. 120. We agree that the Presiding Officer's reasoning on this issue falls within the scope of his discretion and, therefore, do not disturb his adoption of a $7,500 base gravity component of the penalty.

3. *Increase in Base Penalty for High Degree of Negligence*

The Presiding Officer next considered the various proposed adjustments to the base gravity component of the penalty. We first review the Presiding Officer's increase in the amount of the penalty based upon his finding that Ocean State II acted with a high degree of negligence.

The General CAA Penalty Policy provides guidance that the penalty should be increased if the violator acted negligently or willfully. General CAA Penalty Policy at 16.[17] In the present case the Presiding Officer found that the circumstances of the violation led him to conclude that Ocean State II was acting with a high degree of negligence and that an increase in the penalty by $5,000 is appropriate.

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[16] In a footnote, the Region appears to acknowledge that the Presiding Officer's departure from the Asbestos Penalty Policy's gravity matrix falls within the Presiding Officer's discretion and is not the subject of the Region's appeal. *See* Region's Brief at 8 n.6.

[17] As noted above, the Asbestos Penalty Policy is an appendix to the General CAA Penalty Policy. The Asbestos Penalty Policy states that it provides guidance only as to certain factors to be considered in assessing the penalty, and that reference should be made to the General CAA Penalty Policy for other factors. Asbestos Penalty Policy at 1. The General CAA Penalty Policy provides the guidance on the appropriate penalty in cases of negligence or willfulness.

The Presiding Officer found that Ocean State II "knew of the requirement to adequately wet asbestos-containing material and to keep it wet until disposal" and had "complete control over this portion of the project" and that Ocean State II presented no evidence or excuse for its failure to comply. Initial Decision at 12. These reasons for a finding of a high degree of negligence and assessment of an additional penalty are consistent with the General CAA Penalty Policy's guidelines. General CAA Penalty Policy at 16.[18]

While Ocean State II has appealed from the Presiding Officer's finding of a high degree of negligence, Ocean State II's arguments, however, go primarily to the question of whether any violation occurred.[19] Ocean State II's arguments do not address the Presiding Officer's findings of knowledge of the wetting requirements and control over the project, nor does Ocean State II discuss its failure to present any excuse for the violation. *See* Ocean State's Memorandum at 9. Since we have found no error in the Presiding Officer's finding of liability and because his reasons for assessing a penalty increase for a high degree of negligence fall within the General CAA Penalty Policy's guidelines, we affirm the Presiding Officer's finding of a high degree of negligence.

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[18] The General CAA Penalty Policy directs that the following factors shall be considered in assessing the degree of willfulness or negligence:

- The degree of control the violator had over the events constituting the violation.
- The foreseeability of the events constituting the violation.
- The level of sophistication within the industry in dealing with compliance issues or the accessibility of appropriate control technology (if this information is readily available). This should be balanced against the technology-forcing nature of the statute, where applicable.
- The extent to which the violator in fact knew of the legal requirement which was violated.

General CAA Penalty Policy at 16.

[19] As part of Ocean State II's argument, it notes that the Region offered evidence that only two poly bags of asbestos out of approximately sixty bags of debris were inadequately wet. By this observation, Ocean State II appears to indirectly argue that it substantially complied with the wetting requirement. However, even if such evidence were sufficient to support a determination of substantial compliance (a proposition about which we have doubt), a finding of substantial compliance would not address the factors relevant to a determination of negligence, *see supra* n.18, nor would such a finding negate, or be inconsistent with, the Presiding Officer's finding of a high degree of negligence.

Ocean State II also argues that "the penalty phase of the litigation establishes that Ocean State II cooperated in the investigation, in that its conduct, taken as a whole, throughout the abatement project does not reflect a high degree of negligence, and therefore there should be no additional monetary increase in the penalty." Ocean State's Memorandum at 10. Here, Ocean State II confuses two disparate factors under the General CAA Penalty Policy: the degree of willfulness or negligence, and the degree of cooperation. *Compare* General CAA Penalty Policy at 16 (Degree of Willfulness or Negligence), *with* General CAA Penalty Policy at 16-17 (Degree of Cooperation).

With respect to the adjustment category based on the respondent's degree of cooperation, the General CAA Penalty Policy states that "this factor may justify aggravation of the gravity component because the source is not making efforts to come into compliance" or it may "justify mitigation of the gravity component in the circumstances * * * where the violator institutes comprehensive corrective action after discovery of the violation." *Id.* In the present case, there was no evidence submitted regarding Ocean State II's efforts to correct its violations after it was discovered that RACM was not properly wetted, and Ocean State II has not shown that the Presiding Officer relied upon a clearly erroneous analysis in not reducing the penalty on the grounds of Ocean State II's cooperation.[20] *In re DIC Americas, Inc.*, 6 E.A.D. 184, 192 n.12 (EAB 1995) (upholding a presiding officer's rejection of a proposed downward adjustment to a TSCA penalty on the alleged grounds of the respondent's "cooperative and courteous" attitude during the investigation). Accordingly, we adopt the Presiding Officer's $5,000 increase in the penalty based on Ocean State II's high degree of negligence.

4. *Increase in Penalty for a History of Prior Violations*

Finally, we review the Presiding Officer's rejection of the Region's proposed increase in the gravity component of the penalty to take into account Ocean State II's alleged history of noncompliance with the Asbestos NESHAP. The Region's contention that Ocean State II has a his-

[20] On cross examination at the hearing, the Region's expert regarding the proposed penalty, Mr. Houlihan, acknowledged that Ocean State II cooperated in the investigation by permitting the Compliance Inspector to have full access to the Facility. Tr. at 239-240. However, Mr. Houlihan also testified that he did not consider such cooperation to warrant a reduction in the proposed civil penalty. Tr. at 244-245. While cooperation may form the basis for "some mitigation" in the amount of a penalty (General CAA Penalty Policy at 17), we agree with the Region's witness that merely granting permission to inspect a facility is not sufficient cooperation to justify a reduction of the penalty, particularly where any obstruction would constitute a ground for aggravation of the penalty. General CAA Penalty Policy at 17.

tory of noncompliance is primarily based upon the subject matter of the 1990 ICO, *i.e.*, an alleged failure to give the Region notice, as required by the Asbestos NESHAP, of a demolition of a McDonald's restaurant in Johnston, Rhode Island in early 1990 (the "McDonald's Demolition").

Many of the basic facts regarding the prior McDonald's Demolition are not in dispute. The McDonald's restaurant was demolished, and no notice of the demolition was given to the Region. It also is clear that under the Asbestos NESHAP both the owner and the person performing the demolition are responsible for assuring that the Region receives notice in advance of the demolition. 40 C.F.R. § 61.145(b). Ocean State II has stipulated that the Region had issued to Ocean State II the 1990 ICO holding Ocean State II responsible for the failure to give the Region notice of the McDonald's Demolition, Stipulations ¶ 12.a., and Ocean State II has also stipulated that it received the 1990 ICO on September 1, 1990. Stipulations ¶ 12.b.

Ocean State II, however, disputes that it was the entity responsible for the McDonald's Demolition. It contends instead that a related corporation was the responsible entity and that, therefore, Ocean State II did not have a history of noncompliance with the Asbestos NESHAP. This factual issue of the identity of the entity responsible for the McDonald's Demolition was not litigated prior to the commencement of this case. At trial of this case, the parties treated this factual issue as dispositive of whether there would be an increase in the gravity component of the penalty due to a history of noncompliance.

The Presiding Officer, however, did not make any factual findings regarding the issue of responsibility for the prior McDonald's Demolition and the related failure to give notice to the Region. Instead, the Presiding Officer determined as a matter of law that the alleged prior violation could not be considered in connection with the assessment of the penalty in the present case. The Presiding Officer gave two reasons for not considering the alleged prior violation. The Presiding Officer first held that implementation of the Asbestos Penalty Policy as proposed by the Region resulting in an increase in the amount of the penalty when there was no prior adjudication of the alleged 1990 violation would "amount to the deprivation of respondent's property — the arbitrarily fixed amount of $10,000 — without due process of law." Initial Decision at 8. This, the Presiding Officer held, is prohibited by the Fifth Amendment of the U.S. Constitution. *Id*. Second, the Presiding Officer held that the "automatic penalty increase for a 'second' violation that was never admitted or adjudicated also violates the enforcement provisions of the Clean Air Act itself." *Id*. We disagree with both of these propositions.

We analyze these issues, first in subpart a. below, by reviewing the Congressional intent as expressed by the language, structure and legislative history of section 113(e) of the CAA. Finding that Congress has not expressed an intention with respect to the precise matters at issue in this case, we turn next in subpart b. to the issues that inform our decision, as the Administrator's delegatee, in exercising the discretion delegated by Congress to the Administrator. Finally, we turn in subpart c. to the Constitutional question of whether the due process requirements of notice and an opportunity to be heard have been satisfied in this case.

a. *The Requirement Under the Clean Air Act § 113(e) to Consider the "Full" Compliance History*

The question raised by the Presiding Officer in this case has not been decided in our prior cases.[21] The Agency also has not promulgated any regulations addressing these issues. Thus, it is necessary for us to consider fully the statutory and policy basis for the Region's proposed penalty increase as well as the Presiding Officer's due process and statutory objections.

We begin our analysis by reviewing the plain meaning of the statutory language. We begin with the statutory language because we "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (footnote omitted). To determine Congress's intent we use the traditional tools of statutory construction, which include examination of the statute's text, legislative history, and structure. *See Southern Cal. Edison Co. v. FERC*, 116 F.3d 507, 515 (D.C. Cir. 1997). However, if Congress has not directly addressed the precise question at issue, then the Agency (and the Board as the Administrator's delegatee) must make a reasoned determination consistent with the purposes of the statute. *Chevron*, 467 U.S. at 843 (holding that where "the statute is silent or ambiguous with respect to the specific issue, the question for the [reviewing] court is whether the

[21] The Article III federal courts also have not addressed the precise issues raised by the Presiding Officer in this case. There are, however, three CAA cases in which the courts briefly considered the violator's compliance history. *United States v. Midwest Suspension and Brake*, 824 F. Supp. 713, 736 (E.D. Mich. 1993); *United States v. B&W Inv. Properties, Inc.*, No. 91 C 5886, 1994 U.S. Dist. LEXIS 1751 (N.D. Ill. 1994), *aff'd*, 38 F.3d 362 (7th Cir. 1994); *United States v. A.A. Mactal Constr. Co.*, No. 89-2372-V, 1992 U.S. Dist. LEXIS 21790, at *6 (D. Kan. 1992). The discussion in these cases, however, did not include consideration of any of the applicable policy or due process issues raised by the Presiding Officer in this case.

agency's answer is based on a permissible construction of the statute").[22]

At issue here is Congress' direction that, in assessing civil penalties for violations of the CAA, the Agency must consider the factors set forth in CAA § 113(e)(1), 42 U.S.C. § 7413(e)(1), which provides in relevant part as follows:

> In determining the amount of any penalty to be assessed under this section * * * the Administrator * * * shall take into consideration (in addition to such other factors as justice may require) * * *, the violator's full compliance history and good faith efforts to comply, * * *.

Read naturally, the phrase "full compliance history" would appear to authorize a broad inquiry, including both a history of violations as well as notices previously given to the respondent regarding alleged violations. In particular, Congress' use of the adjective "full" to describe compliance history supports the conclusion that Congress intended any relevant aspect of the violator's history with respect to compliance be considered. Thus, we conclude that the language of "full compliance history," authorizes a broad inquiry.

The structure of CAA § 113(e) also supports our conclusion that a broad inquiry is authorized. The phrase "full compliance history and good faith efforts to comply" is set off from the other statutory criteria by commas, signifying that compliance history is to be considered along with the respondent's good faith. The joinder of an analysis of the respondent's good faith along with the inquiry into compliance history further suggests that Congress intended a broad inquiry. We note that under TSCA it has been held that unadjudicated notices of violation sent to the respondent are relevant to the issue of the respondent's good faith and commitment to comply, even if, as the ALJ concluded in the case, such prior notices under TSCA are not relevant to a "history of prior violations." *In re Ketchikan Pulp Co.*, TSCA-X-86-01-14-2615, (ALJ, Dec. 8, 1986).[23] Here, where the lan-

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[22] Because we serve as the final decision maker for the Agency in this adjudication, this aspect of *Chevron* deference does not apply in our review; instead, we perform our own "independent review and analysis of the issue." *In re Mobil Oil Corp.*, 5 E.A.D. 490, 508-509 and n.30 (EAB 1994). *See also*, *In re Lazarus, Inc.*, 7 E.A.D. 318 (EAB 1997).

[23] Although a prior notification would appear clearly relevant to the issue of good faith, we express no opinion as to whether such prior notification would be sufficient standing alone to support a finding of bad faith.

guage and structure of the statute direct that "full compliance history" and good faith are to be considered together, it is even more clear that consideration of notices of violation is authorized by the statute.

Finally, the legislative history does not provide much guidance as it is almost completely silent on the intended meaning of "full compliance history and good faith efforts to comply." The Clean Air Act Amendments of 1990 added the penalty assessment criteria of section 113(e) without Congress having discussed, insofar as we are able to ascertain, the meaning of the phrase "full compliance history and good faith efforts to comply." The history does show that the word "full" was not used in the bill as originally submitted and that it was added by an amendment in the nature of a substitute submitted on January 23, 1990. *Compare* S. 1630 as introduced, 101st Cong. § 301(i) (1989), *with* S. Amdt. No. 1293, 101st Cong. § 601(i) (1990). However, no explanation was given for this change. While it may be difficult to discern the intended meaning from the addition of a single word, nevertheless, if anything, the specific addition of the word "full" would appear to suggest an intent to expand, rather than restrict, the scope of inquiry regarding compliance history. Thus, the legislative history tends to support our conclusion that Congress intended a broad inquiry.

However, "[t]he Act [CAA] does not prescribe with precision how or with what weight to apply the mitigating factors." *B&W Inv. Properties,* 38 F.3d at 368. The statute also does not define what aspects of a compliance history are relevant to the penalty determination. Thus, Congress has remained silent as to the precise questions of whether a notice of an alleged violation is encompassed within the concept of full compliance history, whether it is relevant, or what weight it should be given.

In the present case, the Presiding Officer appeared to implicitly recognize that the plain meaning of the statutory language authorizes a broad inquiry into the respondent's compliance history. *See, e.g.*, Initial Decision at 9. Nevertheless, the Presiding Officer concluded that he would only consider a more restrictive inquiry and would increase the amount of the penalty "based only on prior violations that have resulted in a final order where there was an opportunity to contest the violation." *Id.* at 11-12. Because our analysis of the statutory language, its structure and its legislative history has led us to conclude that Congress did not specifically limit the scope of inquiry to only violations previously determined after full adjudication, we must next turn to considerations that the Supreme Court in *Chevron*, and its progeny, has stated fall within the expertise of the Agency in order

to determine the appropriate scope of inquiry into Ocean State II's compliance history. *Chevron*, 467 U.S. at 843.

b. *The Asbestos Penalty Policy's Implementation of the CAA's Requirement that the Full Compliance History Be Considered*

Relying on the Asbestos Penalty Policy the Region urges us to find that Ocean State II should be subject to a penalty increase on the grounds that it has a history of prior violations even though there has never been a prior adjudication, with notice and an opportunity for Ocean State II to be heard, regarding the alleged prior violation. Based on our review of the applicable issues, as discussed below, Ocean State II's full compliance history supports the imposition of a penalty increase, although not of the magnitude requested by the Region.

The Asbestos Penalty Policy directs that an upward adjustment to the gravity component of the penalty should be made based on whether the violation is a second or subsequent offense.[24] It specifically states that:

> A "second" or "subsequent" violation should be determined to have occurred if, after being notified of a violation by the local agency, State or EPA at a prior demolition or renovation project, the owner or operator violates the Asbestos NESHAP regulations during another project, even if different provisions of the NESHAP are violated. This prior notification could range from simply an oral or written warning to the filing of a judicial enforcement action. Such prior notification of a violation is sufficient to trigger treatment of any future violation as second or subsequent violations; there is no need to have an admission or judicial determination of liability.
>
> Violations should be treated as second or subsequent offenses only if the new violations occur at a

[24] Here we review the Asbestos Penalty Policy not as a body of law governing the penalty to be assessed, but instead to determine whether it serves as a reasonable guide to effectuate the statutorily required inquiry into the respondent's compliance history. *See In re McLaughlin Gormley King Co.*, 6 E.A.D. 339 (EAB 1996) (Order on Interlocutory Review) (holding that an Agency penalty policy which has not been subject to notice and comment is non-binding and may be attacked in any particular case).

> different time and/or a different jobsite. Escalation of the penalty to the second or subsequent category should not occur within the context of a single demolition or renovation project unless the project is accomplished in distinct phases or is unusually long in duration.

Asbestos Penalty Policy at 4.

This extended quotation identifies the convergence of two key facts as relevant to an upward adjustment of the base gravity component of the penalty: (1) actual notice given to the respondent regarding an alleged violation, and (2) a violation occurring at a subsequent jobsite or time. This guideline properly identifies a prior notice as a relevant fact to be considered in the penalty assessment analysis.

The purpose of the CAA is "to protect and enhance the quality of the Nation's air resources," 42 U.S.C. § 7401(b)(1), and the purpose of the Asbestos NESHAP "is to ensure that buildings containing asbestos are demolished in such a way as to minimize the release of asbestos dust into the air." *United States v. J&D Enterprises*, 955 F. Supp. 1153, 1158 (D. Minn. 1997) (quoting *United States v. Geppert Bros.*, 638 F. Supp. 996, 1000 (E.D. Pa. 1986)).

The CAA's imposition of strict liability for violations of the CAA and the Asbestos NESHAP was intended to advance the statutory purpose of improving the quality of the nation's air by providing incentives for persons to obtain the knowledge necessary to comply with the regulations. The legislative history stated this rationale as follows:

> Where protection of the public health is the root purpose of a regulatory scheme (such as the Clean Air Act), persons who own or operate pollution sources in violation of such health regulations must be held strictly accountable. This rule of law was believed to be the only way to assure due care in the operation of any such source. Any other rule would make it in the owner or operator's interest not to have actual knowledge of the manner of operation of the source. Moreover, in the Committee's view, the public health is injured just as much by a violation due to negligence or inaction as it is by a violation due to intent to circumvent the law. Thus, the Committee believes that the remedial and deterrent purposes of the civil penalty would be better served by not limiting its application to 'knowing' violations.

H.R. Rep. No. 94-1175, at 52 (1976). The legislative history further states that:

> The Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will assure that violations will not occur.

Id. at 53-54. We believe that the imposition 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.

First, a prior notification, even without a determination that a violation occurred, is *relevant* to the penalty issue. A prior notification can serve as evidence of the respondent's knowledge of the Asbestos NESHAP requirements and the degree of fault associated with the subsequent violation. Because the CAA imposes strict liability, a respondent cannot defend against a finding of liability based upon lack of fault or lack of intent to violate the Asbestos NESHAP and, therefore, fault is irrelevant to the issue of *liability*. *In re Echevarria*, 5 E.A.D. 626, 633 (EAB 1994). However, fault and intent are not irrelevant to the amount of the *penalty* to be assessed. The distinction we draw here between relevance of particular evidence to the penalty issue, as opposed to relevance to the issue of liability, has been recognized under other strict liability regulatory statutes. *See, e.g., Lowe v. FDIC*, 958 F.2d 1526, 1535 n.35 (11th Cir. 1992) (holding that culpability is to be considered in determining the penalty assessed against a bank director for participating in an improper loan made to an insider of the bank even though the director's culpability, or knowledge, was irrelevant to the issue of liability).

A prior notification is relevant to the size of the penalty because such notification when followed by a subsequent violation is evidence of the respondent's failure to take steps to prevent violations and to comply voluntarily with the regulations. The administration of the asbestos work practice standards substantially depends on the voluntary cooperation of the public in assuring that asbestos is properly abated. As the Region's penalty expert, Mr. Houlihan, explained, a violation occurring after a prior notice is considered more serious: "the companies that have been previously cited * * * should know the regulations at that point, and it's more serious if they continue to violate." Tr. at 215. A prior notification is even more relevant when it was given in connection with a possible violation of the regulations relating to a hazardous air pollutant such as asbestos, as is the case here.

In analogous contexts, courts have also held that a history of prior violations of a regulatory statute is relevant for determining whether a respondent was aware of the compliance required by the statute. *See, e.g., In the Matter of Erik Orman*, 1994 NOAA LEXIS 17, *23 (U.S. Dep't Commerce, ALJ, Apr. 7, 1994) (holding that a history of violations of the Magnuson Fishery Conservation and Management Act is relevant in determining the penalty for a subsequent violation of the Act because it shows knowledge of the required compliance). Here, we hold that a history of prior notices regarding alleged violations of the Asbestos NESHAP is similarly relevant to the question of whether the respondent was aware of the compliance required by the work practice standards of the Asbestos NESHAP.

A history of prior notices not only is evidence that the respondent was aware of the required compliance, but also is evidence that the respondent was aware of the sanctions for noncompliance. Here, the 1990 ICO not only gave notice of an alleged violation, it also directed the respondent to comply with the Asbestos NESHAP in the future and warned that a penalty may be assessed for noncompliance. Thus, an inference can be drawn from the respondent's previous receipt of an ICO that the respondent should have had a heightened awareness of the sanctions for noncompliance. Such knowledge or heightened awareness of the sanctions for noncompliance is relevant to the amount of the penalty required to deter the respondent.

We have held that a primary purpose of civil penalties is deterrence. *In re Sav-Mart, Inc.*, 5 E.A.D. 732, 738 (EAB 1995). The General CAA Penalty Policy[25] states that "[e]vidence that a party has violated an environmental requirement before clearly indicates that the party was not deterred by a previous governmental enforcement response." General CAA Penalty Policy at 17. Similarly, a compliance history that includes receipt of a prior ICO indicates that the party was not deterred by such knowledge of the sanctions for noncompliance.[26] It,

[25] The General CAA Penalty Policy requires consideration of prior violations as an additional ground for an increase in the amount of the penalty, but also recognizes that an additional increase may not be appropriate if the penalty was already increased under the Asbestos Penalty Policy for the notification of the alleged violation. General CAA Penalty Policy at 18.

[26] In the present case, the admission that Ocean State II received the 1990 ICO constitutes evidence which both supports the Presiding Officer's finding that Ocean State II had knowledge of the wetting requirements (which was a component of the Presiding Officer's finding of a high degree of negligence) and, as described more fully above, also supports the determination that an increase in the penalty is appropriate based on a history of noncompliance. It is permissible for this fact (the receipt of the 1990 ICO) to serve as support for more than one of the required

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therefore, is appropriate for persons who have received such warnings or an ICO to be subject to an increased penalty if a violation subsequently occurs in spite of the specific notice provided by the ICO.[27]

Finally, it is also appropriate for the Agency to have discretion to give, for example, an initial warning or heightened notice, or to use the statutorily authorized ICO procedure, with respect to a first time or a more minor violation, rather than pursue a burdensome and expensive administrative enforcement proceeding to obtain a final adjudication of civil penalty liability after notice and a hearing or a consent decree. Some persons involved with asbestos abatement may find such warnings or ICO to be sufficient deterrence to future violations, thereby making further enforcement action unnecessary. However, if further enforcement does become necessary as a result of a subsequent violation, it is appropriate that the "full history," including the warning or ICO, be considered in assessing the penalty for the subsequent violation. We therefore hold that the Asbestos Penalty Policy's guidelines for consideration of a prior notice of an alleged violation as grounds for an increase of the penalty, even where the alleged prior violation was never adjudicated, is an appropriate implementation of the CAA's requirement that the "full compliance history and good faith efforts to comply" be considered. However, as discussed below, since the Region requested a penalty increase based on the 1990 ICO and Ocean State II placed at issue whether a penalty increase is appropriate under the facts and circumstances of the 1990 ICO, the proper amount of the penalty increase must be determined in light of the issues raised.

The Presiding Officer, in contrast, gave two general policy reasons for not using prior notices of violation as the basis for a penalty increase where there was no prior adjudication of liability for the alleged violation.[28] First, the Presiding Officer concluded that the

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statutory factors of CAA § 113(e). *See, e.g., United States v. Starr,* 971 F.2d 357, 361 (9th Cir. 1992) (holding that, in the context of criminal sentencing, the same fact may be considered in connection with different requirements of the sentencing guidelines); *United States v. Reese,* 2 F.3d 870, 895 (9th Cir. 1992) (same).

[27] Our holding today is the inverse of our holding in *Sav-Mart,* where we held that a reduction in the amount of the penalty was appropriate for a first time violator when the evidence showed that a lower penalty was a sufficient deterrent. *Sav-Mart,* 5 E.A.D. at 739. Today we hold that the prior notification is evidence that the base gravity penalty would not be a sufficient deterrent and that an increase is appropriate.

[28] The Presiding Officer did not differentiate these arguments from his "due process" analysis. Nevertheless, we view them as falling more properly as issues to be considered in determining the relevant scope of inquiry, rather than issues of the Constitutional requirements of notice and opportunity to be heard.

Asbestos Penalty Policy is arbitrary in comparison with the Agency's other penalty policies. The Presiding Officer stated that "[a] review of the penalty policies promulgated for the enforcement of other statutes administered by EPA reveals a split with respect to the definition of prior violations that could support an increase in the amount of the penalty for a second violation." Initial Decision at 10. The Presiding Officer observed that each of the respective penalty policies for the Toxic Substance Control Act ("TSCA"), the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), and the Emergency Planning and Community Right-to-Know Act ("EPCRA") expressly defines a prior violation that gives rise to an increased penalty as only those violations that have previously been determined by a "final order" (defined by such penalty policies as an order entered as a result of an uncontested complaint or as a result of a contested complaint which is finally resolved against the violator). *Id*. at 10-11. The Presiding Officer also observed that, while the penalty policy with respect to the Resource Conservation and Recovery Act ("RCRA") has a broader definition of prior violation, including informal notifications of violations, the RCRA penalty policy does not provide a blanket increase of $10,000 in the amount of the penalty, but instead lists a number of factors to be considered in determining the appropriate penalty increase. *Id*. at 11. Based on these observations, the Presiding Officer held that "[t]he Asbestos Policy is thus unique in its broad definition of prior violations and its blanket arbitrary penalty increase for a second or subsequent violation." *Id*. We disagree with the Presiding Officer's suggestion that the Asbestos Penalty Policy is arbitrary, or otherwise improper, as a result of its uniquely broad definition of prior violation or its recommended $10,000 penalty increase.

First, as discussed above, not only do the language, structure and history of CAA § 113(e) authorize a broad inquiry into the respondent's compliance history, but also a penalty increase that takes into account the heightened awareness of the required compliance and heightened awareness of the sanctions for noncompliance created by a prior notification or ICO is rationally related to the deterrence function of civil penalties under the CAA. Thus, because the analysis of the intended meaning and purposes of this statute support the reasonableness of the guidance provided by the Asbestos Penalty Policy, there is no reason to review the guidance provided by penalty policies regarding the enforcement of wholly different environmental statutes.

Second, while we do not purport to fully review the policies of the other environmental statutes and the penalty policies identified by the Presiding Officer, we note that the differences in the penalty poli-

cies may be attributed to different underlying statutory language. Each of TSCA, CERCLA and EPCRA use language that is different from the language of the CAA regarding compliance history. These statutes provide that the Administrator shall consider "any prior history of such *violations*." *See* TSCA § 16(a)(1)(B), 15 U.S.C. § 2615(a)(1)(B); CERCLA § 109(a)(3), 42 U.S.C. § 9609(a)(3); EPCRA § 325(b)(1), 42 U.S.C. § 11045(b)(1) (emphasis added). This reference to history of "violations" could be read to express a narrower scope of inquiry than the reference to "full compliance history" under the CAA.

The Agency's penalty policies, thus, may merely reflect this difference in the statutory language. The Asbestos Penalty Policy at issue here directs the Region to calculate the penalty based upon whether a prior "notification" of a violation ranging "from simply an oral or written warning to the filing of a judicial enforcement action" had been given to the respondent. Asbestos Penalty Policy at 4. It expressly states that "there is no need to have an admission or judicial determination of liability." *Id*. In contrast, the Agency's penalty policies under TSCA, EPCRA and CERCLA state that only "violations" which have been determined by "final order or a consent order" are to be considered in assessing a higher penalty for a history of prior violations. *See* Initial Decision at 10. We express no opinion as to whether the statutory language of TSCA, CERCLA and EPCRA require a narrower inquiry into the respondent's history. Instead, we merely note the difference in the statutory language to show that the guidance provided by the penalty policies with respect to TSCA, CERCLA and EPCRA cannot in any way support a conclusion that the Asbestos Penalty Policy is arbitrary. As discussed above, we believe that consideration of a prior notice of an alleged violation rationally advances the intended purposes of the CAA.

The Presiding Officer's second policy reason for not considering prior unadjudicated notices of violation as the basis for a penalty increase was that, in his view, "[t]he mere introduction of a unilateral notification of an alleged prior violation as the basis for a $10,000 penalty increase does not * * * allow for a genuine consideration of the party's 'full' compliance history." Initial Decision at 9. The Presiding Officer reasoned that there is no consideration of the "full" history because the increase is automatic if prior notice was given, and there is "no allowance for possible defenses and mitigating factors." *Id*. Thus, the Presiding Officer concluded that the "second violation rule makes no distinction with regard to the prior violation's seriousness and respondent's culpability, even apart from the issue of whether the respondent was actually guilty at all." *Id*.

It is true that the guidance provided by the Asbestos Penalty Policy provides that an automatic $10,000 increase in the penalty shall be made solely based upon proof that prior notice was given to the respondent, without any distinction as to whether the prior notice was correctly or erroneously sent to the respondent in connection with an actual violation, and without distinction as to factors that might mitigate the prior violation, such as the respondent's control. We do not, however, agree with the Presiding Officer that this observation supports his conclusion that an unadjudicated notice of alleged violation should not be considered in the penalty assessment analysis. To the contrary, a rule that automatically excludes any consideration of prior notices of unadjudicated alleged violations would, itself, not give genuine consideration to all factors relevant to the penalty determination. *See In re Employers Ins. of Wausau and Group Eight Technology, Inc.*, 6 E.A.D. 735, 756 (EAB 1997) ("A * * * penalty is 'appropriate' for purposes of 40 C.F.R. § 22.24, only if it is calculated in a manner consistent with the Agency's obligation to 'take into account' the factors enumerated in [the statute]").

It is important to note that the Region properly applied the Asbestos Penalty Policy and the General CAA Penalty Policy in this case. The General CAA Penalty Policy states, in its introduction, that "[i]n calculating the penalty amount which should be sought in an administrative complaint, * * * a gravity component should be calculated under this penalty policy using the most aggressive assumptions supportable." General CAA Penalty Policy at 1. It goes on to explain that "[t]his policy will ensure the penalty plead [sic] in the complaint is never lower than any revised penalty calculated later based on more detailed information." *Id.* at 2. At the time it was preparing its amended complaint, the Region had information that Ocean State II may have been responsible for a prior violation of the Asbestos NESHAP, and the Region had evidence that the 1990 ICO had been issued to Ocean State II. The Region was correct in relying upon this information in drafting its complaint and could reasonably assume that the 1990 ICO was correctly issued to Ocean State II.

In *Wausau*, we held that the complainant may rely upon the analytical framework of an Agency penalty policy to establish the *prima facie* penalty case and to satisfy the complainant's burden of "going forward" under 40 C.F.R. § 22.24. *Wausau*, 6 E.A.D. at 756. In *Wausau*, we also held that the complainant is not required as part of its *prima facie* case to "offer evidentiary support for each and every factual proposition that is either recited in the policy or implicit in or underlying the policy, in the absence of either a specific challenge to the policy by a respondent or a specific request for such support from the

Presiding Officer." *Id*. at 760. We also noted that the respondent may choose to offer evidence or argument in rebuttal or the Presiding Officer may request additional support, neither of which was done by the respondent and Presiding Officer in *Wausau*. *Id*. Here, however, Ocean State II argued below that it should not be assessed a penalty increase on account of the 1990 ICO because it asserted that the 1990 ICO was not properly issued to Ocean State II. Ocean State II offered both argument and evidence (in the form of testimony elicited on cross-examination and documents introduced during cross-examination) in an effort to rebut the Region's *prima facie* penalty case.

In issuing his Initial Decision, the Presiding Officer rejected the Region's proposed penalty. We have frequently held that the Presiding Officer may reject a proposed penalty even if it is calculated as directed by the penalty policy. *See, e.g.*, *Wausau*, 6 E.A.D. at 758 (held that the Presiding Officer "is in no way constrained by the Region's penalty proposal, even if that proposal is shown to have 'taken into account' each of the prescribed statutory factors"). The Presiding Officer, however, must "ensure that the penalty he or she ultimately assesses reflects a reasonable application of the statutory penalty criteria to the facts of the particular violations." *Id*. As we stated in *Wausau*:

> [T]he Penalty Policy has never been subjected to the rulemaking procedures of the Administrative Procedure Act, and thus does not carry the force of law. Indeed, for that reason the ALJ could simply have considered the Penalty Policy's analytical framework and concluded that, in this particular case, application of the [statutory] criteria in the manner suggested by the Penalty Policy did not yield an "appropriate" penalty. The ALJ could likewise have rejected an "appropriate" penalty generated in accordance with the Penalty Policy, in favor of another "appropriate" penalty better suited to the circumstances of this particular case.

Id. at 759 (citations omitted).

In the present case, the Presiding Officer's rejection of the Region's proposed $10,000 penalty increase was not based upon an analysis of the evidence introduced at the evidentiary hearing or a weighing of the arguments made by the Region and Ocean State II. In short, the Presiding Officer did not reject the proposed penalty based upon the particular circumstances of the present case. Instead, the Presiding Officer adopted a new rule of law to the effect that only previously adjudicated violations (either after a full hearing or based on

a consent decree) may be considered for increasing a penalty under the statutory factor of "full compliance history."

In adopting this rule, the Presiding Officer did not consider whether the 1990 ICO was properly issued to Ocean State II, or whether a reasonable inference can be drawn from the 1990 ICO that Ocean State II had a heightened awareness of the required compliance and the sanctions for non-compliance, even if it was not properly issued to Ocean State II. This failure to consider the specific facts of this case with respect to the 1990 ICO shows that the Presiding Officer's penalty assessment is not "a reasonable application of the statutory penalty criteria to the facts of the particular violations." *See Wausau,* 6 E.A.D. at 758. In *Wausau,* we held that if the Region relies on a penalty policy to establish its *prima facie* penalty case, the respondent may offer evidence or argument in rebuttal. *Id.* at 756- 757. It follows that, once particular matters concerning the application of the penalty policy are placed at issue by the respondent, an analysis of those issues is an appropriate part of the penalty determination. Because the Region has chosen to rely on the 1990 ICO in arriving at its requested penalty, and Ocean State II has argued that it should not be assessed a penalty increase grounded on the 1990 ICO, the facts and circumstances of the 1990 ICO must be considered. Thus, we turn next to a review of the facts developed by the parties at the evidentiary hearing.

In the present case, Ocean State II admitted that it had received the 1990 ICO. Stipulations ¶ 12. As noted above, the 1990 ICO gave notice to Ocean State II of the compliance required by the Asbestos NESHAP and that sanctions may be imposed for noncompliance. Therefore, after Ocean State II received the 1990 ICO it is reasonable to infer that Ocean State II should have had a heightened awareness of the need to comply with the work practice requirements of the Asbestos NESHAP and the sanctions for noncompliance.

The Region also sought to prove that the 1990 ICO was properly sent to Ocean State II and that Ocean State II was the entity responsible for the underlying violation (*i.e.*, the failure to give the Region advance notice of the McDonald's Demolition). At the hearing, the Region proceeded under two alternative theories of liability. First, the Region sought to prove that Ocean State II was liable for the violation, notwithstanding Ocean State II's contention that a related corporation, not Ocean State II, was the responsible entity.[29]

[29] Ocean State II contended that a third entity, Ocean State Building Wrecking Co., Inc., was the entity that demolished the McDonald's restaurant. The president of Ocean State Building Wrecking Co., Inc. also was Harry Baccarie. *See* Stipulations ¶¶ 14 and 15 and attached exhibits.

Region's Post-Hearing Memorandum at 18. Second, the Region sought to show that "the Ocean State entities have a longstanding practice of blurring the distinctions among the various corporations," and that "[t]hey should not be allowed to assert separate corporate entities now." *Id*.

After fully reviewing the evidence submitted at the hearing, we conclude for the following reasons that the Region has not shown that Ocean State II was the entity responsible for the prior violation (*i.e.*, the entity responsible for the failure to give the Region advance notice of the McDonald's Demolition). Nevertheless, we find that the evidence was sufficient to establish that Ocean State II requires a penalty increase to serve as additional deterrence because Ocean State II received the 1990 ICO in circumstances that should have resulted in a heightened awareness of the applicable requirements and a heightened awareness of the sanctions for noncompliance.

As its proof that Ocean State II, not the related entity, was responsible for the McDonald's Demolition, the Region produced a letter by the general contractor for the McDonald's Demolition. Hearing Exhibit 11. In that letter, the general contractor stated that it had subcontracted the demolition work to Ocean State II. *Id*. The Region also produced the response received by the Region to the 1990 ICO, Hearing Exhibit 14, which the Region sought to characterize as an admission by Ocean State II that it had performed the McDonald's Demolition. Region's Post-Hearing Memorandum at 18. While these two documents do serve as some evidence that Ocean State II was the responsible entity, we do not believe that this evidence is sufficient to show by a preponderance of the evidence that Ocean State II was the responsible entity when considered in conjunction with other evidence in the record.

First, the probative value of the general contractor's statement contained in Hearing Exhibit 11 that Ocean State II was the demolition subcontractor is controverted by evidence submitted by Ocean State II. Ocean State II produced a copy of the check given by the general contractor for payment of the McDonald's Demolition. *See* Hearing Exhibit 17. The named payee on the check signed by the general contractor is not Ocean State II, but instead is the related entity. Thus, the two statements made by the general contractor appear to conflict and do not establish that the general contractor clearly believed Ocean State II was the subcontractor. Second, we do not believe that the response to the 1990 ICO (Hearing Exhibit 14) con-

stitutes an admission by Ocean State II — the response is on the letterhead of the related corporation.[30]

As its proof that "the Ocean State entities have a longstanding practice of blurring the distinctions among the various corporations," the Region's penalty expert, Mr. Houlihan, testified as to his confusion regarding the related corporate entities. Tr. at 247. The Region also produced examples of correspondence sent to the Region where the name of the entity on the return address of the envelope did not match the cover letter or other document sent in the envelope. Region's Post-Hearing Memorandum at 22; Stipulations ¶¶ 16, 18, 19, 23, 24, and 25. The Region also produced evidence that the related entity's name still appeared on notices sent to the Region after the date that its corporate charter was revoked. Region's Post-Hearing Memorandum at 21. While this evidence establishes that the distinctions between the corporate entities were not always carefully maintained, we do not believe that this evidence alone is sufficient to overcome the burden normally required for the liability of one corporate entity to be imputed to another corporate entity. *See, e.g., United States Fire Ins. Co., v. Allied Towing Corp.,* 966 F.2d 820, 829 (4th Cir. 1992).

Nevertheless, we do believe that the Region's evidence regarding the close relationship between Ocean State II and the entity responsible for the violation underlying the 1990 ICO supports our determination that the 1990 ICO properly forms the basis for a substantial increase in the amount of the penalty. The Region's evidence shows that this is not the case of an unrelated corporation receiving an erroneously sent ICO;[31] but instead this is a case where the recipient of the prior ICO should have been aware of the significance of the ICO and that a heightened awareness of the applicable requirements and sanctions for noncompliance may properly be inferred from the 1990 ICO. Indeed, courts generally will impute an officer's or director's knowledge to the corporation. *See, e.g., FDIC v. Ernst & Young,* 967 F.2d 166, 170 (5th Cir. 1992); *BCCI Holdings, S.A. v. Clifford,* 964 F.

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[30] We also note that Ocean State II produced at the hearing a second ICO, dated January 7, 1991, issued by the Region with respect to the McDonald's Demolition and addressed to the related corporation. Hearing Exhibit 17. The response to this ICO, (which response was sent in January 1991) contains a clear statement that the related entity admitted responsibility for the McDonald's Demolition. Thus, the denial of responsibility by Ocean State II does not appear to be a recent fabrication, and this second ICO also shows uncertainty on the part of the Region as to the responsible entity.

[31] A case of an unrelated corporation receiving an erroneously sent ICO may present different circumstances than the case before us. Such a case would need to be decided based on the particular facts and circumstances of the prior ICO.

Supp. 468, 478 (D.D.C., 1997) ("knowledge acquired by a corporation's officers or agents is properly attributable to the corporation itself").[32] These facts and circumstances of this case are relevant and properly provide the basis for a penalty increase in this case. They also show, however, that the most aggressive assumptions which the Region pled in the amended complaint consistent with the guidance of the General CAA Penalty Policy did not prove to be fully supported and that a revised penalty calculation must be made based on the "more detailed information" developed at the evidentiary hearing. General CAA Penalty Policy at 2.

We believe that, under the circumstances of this case as discussed above, an additional increase in the penalty by $5,000 is appropriate to serve as greater deterrence. This increase takes into account that Ocean State II admitted receiving the 1990 ICO (which gave notice of both the applicable requirements and sanctions for noncompliance). It also takes into account that the evidence established that there is a substantial and close relationship between Ocean State II and the entity that performed the demolition underlying the 1990 ICO. Finally, it also takes into account that the Region was not able to prove that Ocean State II, itself, had previously violated the Asbestos NESHAP.

c. *The Issues of Due Process and Consistency with the CAA Penalty Assessment Procedures*

Finally, we must consider whether the assessment of this penalty increase, which takes into account the prior notice given to Ocean State II, violates Ocean State II's due process rights to notice and a hearing prior to the deprivation of its property.

As a preliminary matter, we note that constitutional challenges to regulations, even challenges based upon due process claims, are

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[32] We note that the record also includes admissions that Ocean State II's president previously received the 1988 ICO with respect to several additional alleged prior violations by a separate corporation under his control. Stipulations ¶¶ 11 and 12. It has been aptly stated that:

> Corporations do not act on their own initiative. They proceed, within or outside of the boundaries of the law upon the direction of their officers and employees.

In the matter of Erik Orman, 1994 NOAA LEXIS 17, *23 (U.S. Dep't Commerce, ALJ, Apr. 7, 1994) (imposing a penalty increase against the respondent based on prior violations of a regulatory statute by corporations controlled by the respondent). Thus, we believe that the admissions regarding the 1988 ICO additionally support the inference that Ocean State II was aware of both the need to comply and the sanctions for noncompliance.

rarely entertained in Agency enforcement proceedings. *In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171 (EAB 1997. However, where the constitutionality of the statute or regulation is not at issue, but instead where the issue is whether the statute or regulation is being applied in a manner that satisfies constitutional requirements, such challenges will be entertained. *See In re General Electric Co.*, 4 E.A.D. 627, 632-33, 639 (EAB 1993).

In the present case, the Presiding Officer held that the increase of the penalty based upon a prior "unilateral notification of an alleged violation" when the respondent "could well not even have had any opportunity to contest the merits of the alleged prior violation" violates the Fifth Amendment to the U.S. Constitution. Initial Decision at 8. As a related argument, the Presiding Officer also held that "[i]mplementation of the second violation rule of the Asbestos Penalty Policy for a prior notification, in effect contravenes" CAA §§ 113(d)(1) and (e), 42 U.S.C. §§ 7413(d)(1) and (e), which provide for assessments of penalties after an opportunity for hearing pursuant to the Administrative Procedure Act and only pursuant to specific criteria. *Id*. In holding that the respondent is entitled to notice and a hearing on the alleged prior violation before any of the underlying facts may be considered in connection with the assessment of a penalty imposed for a subsequent violation, the Presiding Officer made a significant conceptual error. The Presiding Officer viewed the increase of the penalty imposed for the second violation as the imposition of a penalty for the alleged prior violation. This is simply not correct.

While it is true that the respondent is entitled to notice and a hearing directed at the prior violation before a penalty may be imposed for that violation, neither the Clean Air Act nor the Asbestos Penalty Policy nor the penalty assessment in this case imposes an additional penalty for the prior violation, itself. Instead, as discussed above, it is reasonable for the Agency to assess a higher penalty for the present violation when it is found that the respondent was given specific notice of the Asbestos NESHAP but still violated its requirements in spite of that prior notice. As discussed above, the prior notice may reasonably lead to the inference of higher culpability or fault by the respondent with respect to the violation that occurred in spite of such prior notice. It also may be reasonably inferred that a respondent who violates the Asbestos NESHAP after receiving notice of an alleged prior violation requires a higher sanction to serve as deterrence against future violations. These reasons for the increased penalty show that the focus of the analysis is the facts and circumstances at the time of the second violation and the size of the penalty required to deter future violations. The increase, therefore, is not a

sanction for the prior alleged violation and does not contravene the requirements of CAA §§ 113(d)(1) and (e).

In the present case, Ocean State II admitted receiving the 1990 ICO and it was given notice and an opportunity for hearing on whether that prior notice should be considered in assessing the penalty for the subsequent work practice violation at the Facility. *See* Second Amended Complaint ¶ 7; Region's Pre-Hearing Memorandum at 8; Region's Motion for Leave to Amend Complaint at ¶ 15. As noted by the Presiding Officer, the Supreme Court has "consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests." Initial Decision at 8 (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 16 (1978)). However, the Supreme Court has also recognized that due process "is not a technical conception with a fixed content unrelated to time, place and circumstances" but is "flexible and calls for procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961) and *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

Here, the Region alleged in its first amended complaint and its second amended complaint that the issuance of the 1988 ICO and the 1990 ICO are grounds for a penalty increase. First Amended Complaint ¶ 5; Second Amended Complaint ¶¶ 6-7. The penalty calculation was further explained in the Region's prehearing submissions. Region's Prehearing Memorandum at 3 and 7-9. Ocean State II also was afforded a full, formal evidentiary hearing on the record with formal admission of evidence, followed by an opportunity to submit post hearing briefs and a right to appeal to this Board. At no time has Ocean State II argued that notice or its opportunity for hearing was inadequate. Significantly, Ocean State II did not even file a reply brief in opposition to the Region's appeal. On these facts, we hold that the notice and opportunity for hearing was more than sufficient to satisfy the requirements of due process under both the CAA and the U.S. Constitution. Accordingly, we hold that the Presiding Officer erred by rejecting the proposed penalty increase as a matter of law, and we increase the Presiding Officer's penalty determination by $5,000.

III. *CONCLUSION*

For the reasons set forth above, a civil penalty of $17,500 is assessed against respondent Ocean State Building Wrecking and Asbestos Removal, Inc. Ocean State II shall pay the full amount of the civil penalty within sixty (60) days of receipt of this final order, unless otherwise agreed by the parties. Payment shall be made by forward-

ing a cashier's check or certified check in the full amount payable to the Treasurer, United States of America at the following address:

EPA - Region I
(Regional Hearing Clerk)
P.O. Box 360197
Pittsburgh, Pa. 15251-6197

So ordered.