IN RE CITY OF WILKES-BARRE, A.R POPPLE, INC., & WYOMING S. & P.

CAA Appeal No. 06-03

FINAL DECISION AND ORDER

Decided July 11, 2007

Syllabus

Region III ("Region") of the United States Environmental Protection Agency appeals from an Initial Decision issued by Administrative Law Judge ("ALJ") Spencer T. Nissen on November 14, 2006. The Region initiated this enforcement action against the Respondents, City of Wilkes-Barre ("the City"), A.R. Popple, Inc. ("Popple") and Wyoming S. & P., Inc. ("Wyoming"), based on alleged violations of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q, in connection with the 2002 demolition of a steam heat plant in Wilkes-Barre, Pennsylvania. Specifically, the Region alleged that the Respondents violated the CAA's National Emission Standard for Hazardous Air Pollutants ("NESHAP") for asbestos by: (1) failing to provide adequate notice of the demolition (Count I); (2) failing to keep regulated asbestos-containing material ("RACM") adequately wet until treated or contained in preparation for disposal (Count II); (3) failing to have a trained supervisor present during the demolition activities (Count III); and (4) failing to dispose of all waste material containing asbestos as soon as practical (Count IV). Relying on the Agency's civil penalty policies relevant to asbestos demolition, the Region proposed a total penalty of $36,850 to be assessed jointly against the Respondents.

In the above-referenced Initial Decision, the ALJ dismissed Count I but concluded that the Region had proven the violations in Counts II, III, and IV. The ALJ dismissed Count III as to Wyoming, finding that only Popple and the City should be held liable for this count. All three Respondents, however, were held liable for Counts II and IV. The ALJ did not impose a joint penalty as proposed, but instead allocated the penalty among the Respondents. For Count II, the ALJ assessed against Wyoming a penalty that was 20% of the Region's proposed penalty for this count; Popple and the City each were assessed an amount that was 33% of the proposed penalty. For Count III, the ALJ assessed Popple and the City each a penalty that was 33% of the penalty proposed by the Region for this count. For Count IV, the ALJ assessed Wyoming and Popple each an amount that was 20% of the penalty proposed by the Region, and assessed a 33% share against the City. The total penalty ultimately assessed was $25,884, which was $8,216 less than the amount proposed by the Region for these three counts ($34,100). The ALJ did not provide an explanation for the reduced total penalty.

Region III appeals the ALJ's penalty assessment on the grounds that the ALJ failed to provide sufficient justification for assessing a total penalty for Counts II, III, and IV that was less than the one proposed by the Region, which was derived using the applicable penalty policies. The Region requests that the Environmental Appeals Board ("Board")

remand the case for further explanation of the rationale for the ALJ's penalty assessments. None of the Respondents filed a response to the Region's appeal brief, nor has any Respondent cross-appealed.

Held: The ALJ erred in assessing, without explanation, a penalty for the violations that was lower than the proposed penalty, which was derived from Agency penalty policies. The Board determines that the reduced penalty is the result of the ALJ's method of allocation, more particularly the ALJ's decision to allocate the penalty among the Respondents rather than assess a joint penalty. However, both the General CAA Penalty Policy and the Asbestos Penalty Policy set forth proposed penalty amounts that are specifically intended to yield a penalty figure for the case as a whole. The relevant penalty policies explain that civil violations of the CAA are strict liability violations and the government's interest is in recovering an appropriate penalty based on the facts of the violation, not based on the relative fault of the individual defendants. The guidance further provides that, in cases involving multiple violators, the violators can "allocate among themselves as they wish." Thus, the Board finds that the ALJ's allocation contravened relevant penalty policies, without adequate reason. Accordingly, the Board overturns the ALJ's civil penalty assessment.

Although ordinarily, in cases where a penalty is not adequately explained, the remedy is to remand to the ALJ for further explanation, the Board does not do so in this case. In the interest of resolving this case expeditiously, the Board opts to examine the penalty assessment de novo and assesses a total penalty of $34,100 for Counts II, III and IV. The penalties for Counts II and IV are assessed jointly against all three Respondents. The penalty for Count III is assessed jointly against the City and Popple.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Anna L. Wolgast.

Opinion of the Board by Judge Wolgast:

I. *INTRODUCTION*

Region III of the United States Environmental Protection Agency ("EPA" or "Agency") appeals from an Initial Decision issued by Administrative Law Judge ("ALJ") Spencer T. Nissen on November 14, 2006. The appeal arises out of an administrative enforcement action initiated by Region III ("Region") against the City of Wilkes-Barre ("the City"), A.R. Popple, Inc. ("Popple") and Wyoming S. & P., Inc. ("Wyoming") (collectively "Respondents"), for alleged violations of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §§ 7401-7671q, in connection with the 2002 demolition of a steam heat plant in Wilkes-Barre, Pennsylvania. More specifically, the Region alleged that the Respondents violated the CAA's National Emission Standard for Hazardous Air Pollutants ("NESHAP") for asbestos by: (1) failing to provide adequate notice of the demolition (Count I); (2) failing to keep regulated asbestos-containing material ("RACM") adequately wet until treated or contained in preparation for disposal (Count II); (3) failing to have a trained supervisor present during the demolition activities (Count III); and

(4) failing to dispose of all waste material containing asbestos as soon as practical (Count IV).

Relying on the Agency's civil penalty policies relevant to asbestos demolition, the Region proposed a total penalty of $36,850 to be assessed jointly against the Respondents. The ALJ dismissed Count I, but concluded that the Region had proven the violations in Counts II, III, and IV. Notably, the ALJ dismissed Count III as to Wyoming, finding that only Popple and the City should be held liable for that count. All three Respondents, however, were held liable for Counts II and IV. Rather than imposing a joint penalty for each of the counts as proposed by the Region, the ALJ instead allocated the penalty among the Respondents. In particular, with respect to Count II, he assessed a penalty against Wyoming that was 20% of the Region's proposed penalty, with Popple and the City each being assessed an amount that was 33% of the proposed penalty. For Count III, the ALJ assessed Popple and the City each a penalty that was 33% of the penalty proposed by the Region. For Count IV, he assessed Wyoming and Popple each an amount that was 20% of the penalty proposed by the Region, and assessed a 33% share against the City. Ultimately, the total penalty assessed, $25,884, was $8,216 less than that proposed by the Region for these three counts – a result due to the fact that the percentages referenced above, relative to each count, do not add up to 100% of the proposed penalty for that count.

In this appeal, the Region does not contest the ALJ's dismissal of Count I or his finding that Wyoming should not be liable for Count III. Rather, the only issue on appeal is the penalty assessment, with respect to which the Region argues that the ALJ failed to provide sufficient justification for assessing a total penalty for Counts II, III, and IV that is less than the one proposed by the Region. The Region requests that the Environmental Appeals Board ("Board") remand the case for further explanation of the rationale for the ALJ's penalty assessments. Brief of Complainant-Appellant, U.S. EPA Region III ("EPA Br.") at 1, 9. None of the Respondents has filed a response to the Region's appeal brief, nor has any Respondent cross-appealed. Thus, the only issue on appeal is the penalty assessment. In reviewing the ALJ's penalty assessment, we address the Region's argument that the penalty reductions were inadequately explained, as well as the discrete issue of whether the ALJ erred in apportioning the penalty as he did. For the reasons stated below, we overturn the ALJ's civil penalty assessment, but we decline to remand the case for further proceedings. Instead, we review the penalty de novo and assess a civil penalty totaling $34,100 for Counts II, III, and IV, with the penalty for Counts II and IV to be assessed against all three Respondents jointly and the penalty for Count III to be assessed against the City and Popple jointly.

II. *BACKGROUND*

A. *Statutory and Regulatory Background*

Section 112 of the CAA identifies pollutants, including asbestos, that Congress has determined present, or may present, a threat of adverse human health or environmental effects and directs the Administrator of EPA to adopt emission standards and, in some cases, work practice standards for the listed pollutants. CAA § 112, 42 U.S.C. § 7412. Pursuant to this authority, EPA promulgated the NESHAP for asbestos, found at 40 C.F.R. part 61, subpart M. *See* National Emission Standards for Hazardous Pollutants; Amendments to Asbestos Standard, 49 Fed. Reg. 13,658, 13,661 (Apr. 5, 1984).

The asbestos NESHAP requires each owner and operator of a demolition activity[1] involving RACM[2] to, among other things: (1) provide EPA with written notice of intent to demolish or renovate, in accordance with 40 C.F.R. § 61.145(b); (2) keep the RACM wet until it is collected and contained or treated in preparation for proper disposal, in accordance with 40 C.F.R. § 61.145(c)(6)(i); (3) have at least one on-site representative present who is trained in the provisions of the asbestos NESHAP and the means of complying with those provisions whenever RACM is being stripped, removed, or otherwise handled or disturbed, in accordance with 40 C.F.R. § 61.145(c)(8); and (4) dispose of all RACM as soon as practical, in accordance with 40 C.F.R. § 61.150(b).

Violators of the asbestos NESHAP are subject to civil administrative penalties under CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1). Section 113 also provides general criteria that the Agency must consider in assessing a civil administrative penalty. Specifically, section 113(e) provides:

> 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

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[1] The "owner or operator of a demolition * * * activity means any person who owns, leases, operates, controls, or supervises the facility being demolished * * * or any person who owns, leases, operates, controls, or supervises the demolition * * * operation, or both." 40 C.F.R. § 61.141.

[2] RACM is further defined under 40 C.F.R. § 61.141.

> benefit of noncompliance, and the seriousness of the violation.

CAA § 113(e)(1), 42 U.S.C. § 7413(e)(1).

In an effort to ensure consistent application of the Agency's statutory civil penalty authorities, the Agency issued the Clean Air Act Stationary Source Civil Penalty Policy (the "General CAA Penalty Policy") to serve as a guide in assessing civil penalties for violations of the CAA. U.S. EPA, *Clean Air Act Stationary Source Civil Penalty Policy* 1 (Oct. 25, 1991) [hereinafter Gen. CAA Pen. Pol.]; *see also In re FRM Chem Inc.*, 12 E.A.D. 739, 754 (EAB 2006) (noting that "one of the primary objectives of EPA's various penalty policies is to provide a consistent framework and methodology for application of statutory penalty criteria so that like violations produce comparable penalties"). The General CAA Penalty Policy incorporates the statutory factors enumerated in CAA Section 113(e), 42 U.S.C. § 7413(e). Gen. CAA Pen. Pol. at 2.

Although the General CAA Penalty Policy applies to most CAA violations, some types of violations, such as asbestos NESHAP violations, have characteristics requiring separate guidance tailored more specifically to the particular type of violation. *Id.* Appendix III to the General CAA Penalty Policy (the "Asbestos Penalty Policy") provides specific guidelines for determining the penalty for violations related to asbestos demolition and renovation. U.S. EPA, *Asbestos Demolition and Renovation Civil Penalty Policy* (rev. May 5, 1992) [hereinafter Asbestos Pen. Pol.]. 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, including adjustments for second and subsequent violations, duration of the violation, and size of the violator. Asbestos Pen. Pol. at 2, 4-6. The gravity component for asbestos NESHAP violations is subdivided into two types of violations – notice violations and other violations. *Id.* at 2-3. In the Asbestos Penalty Policy, various notice violations are listed and assigned a specific penalty amount ranging from $200 to $15,000, based on their seriousness. *Id.* at 15. The Asbestos Penalty Policy also contains a chart with recommended initial gravity-based penalties for work-practice, emissions, and other violations. *Id.* at 17. That chart assigns an amount to be assessed for the first day of documented violation and for each additional day of violation in the case of a continuing violation. *Id.* There are graduated amounts for second and subsequent violations. The gravity amount for these violations also depends on the amount of asbestos involved in the operation, with higher penalties as the amount of asbestos involved increases. *Id.* The Asbestos Penalty Policy explains that the amount of asbestos involved is relevant because it relates to the potential for environmental harm that is associated with the improper removal and disposal of asbestos. *Id.* at 3. Additionally, the Asbestos Penalty Policy provides that adjustment factors to the gravity component (such as degree of wilfulness and/or

negligence, history of noncompliance, and ability to pay) should be applied in accordance with the General CAA Penalty Policy. *Id.* at 1.

With respect to adjusting the gravity component, the General CAA Penalty Policy establishes factors that promote flexibility while maintaining national consistency. Gen. CAA Pen. Pol. at 15. Those factors include: degree of wilfulness or negligence, degree of cooperation, history of noncompliance, and environmental damage. *Id.* Under the penalty policy, the only one of these adjustment factors that may be used to mitigate, or decrease, the gravity component of a penalty amount is the degree of cooperation factor.[3] *Id.* at 15-16. All four of the factors may serve to aggravate, or increase, the gravity component. *Id.*

Pursuant to the Agency's 1997 and 2004 guidance for modifying EPA penalty policies to implement the Civil Monetary Penalty Inflation Rule, the gravity component of a civil penalty should be adjusted for inflation by multiplying the amount derived from the Asbestos Penalty Policies by 1.10, prior to adding it to the economic benefit component and prior to applying any applicable adjustment factors. *See* Region III's Exhibits ("EPA Exs.") C-40 at 3, C-41 at 2. The adjusted gravity component is then added to the economic benefit component, which captures the economic benefit the violator gained through noncompliance. Asbestos Pen. Pol. at 1, 6-7.

Finally, the Asbestos Penalty Policy makes clear that the guidance as to penalty amounts is "intended to yield a penalty figure *for the case as a whole*" and that, in cases involving multiple violators, the violators can "allocate among themselves as they wish." Asbestos Pen. Pol. at 7 (emphasis added). This is consistent with the General CAA Penalty Policy, which goes on to explain that "[c]ivil violations of the Clean Air Act are strict liability violations and it is generally not in the government's interest to get into discussions of the relative fault of the individual defendants." Gen. CAA Pen. Pol. at 23-24.

The regulations governing the administrative assessment of civil penalties under CAA section 113(d) require the Presiding Officer, in this case the ALJ,[4] to determine the amount of the civil penalty in accordance with the penalty criteria set forth in the Act and to explain in detail in the Initial Decision how the penalty to be assessed corresponds to such criteria. In addition to these statutory criteria, the regulations require the ALJ to consider any civil penalty criteria issued under the Act. 40 C.F.R. § 22.27(b). If the ALJ decides to assess a penalty different in amount from the penalty proposed by the complainant, the ALJ must explain the

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[3] Although not at issue in this case, the overall penalty may also be adjusted downward based on the inability to pay. *See* Gen. CAA Pen. Pol. at 20.

[4] The regulations refer to the Presiding Officer who, under 40 C.F.R. § 22.3, is the Administrative Law Judge, except in certain circumstances that are not relevant here.

specific reasons for doing so. *Id.*; *accord In re EK Assocs., L.P.*, 8 E.A.D. 458, 473 (EAB 1999) (citing *In re DIC Americas, Inc.*, 6 E.A.D. 184, 190 n.10 (EAB 1995); *In re Pac. Ref. Co.*, 5 E.A.D. 607, 612 (EAB 1994); *In re A.Y. McDonald Indus., Inc.*, 2 E.A.D. 402, 414 (CJO 1987)).

B. *Factual Background*

1. *The Demolition*

The following facts were adopted by the ALJ as the basis for his Initial Decision and are not contested on appeal. The case arises from violations of the asbestos NESHAP that occurred in connection with the 2002 demolition of the former Wilkes-Barre Steam Heat Plant (the "Plant" or "Site") located in Wilkes-Barre, Pennsylvania. *In re City of Wilkes-Barre*, Docket No. CAA-03-2005-0053, at 4, 6 (ALJ Nov. 14, 2006) (Initial Decision).[5] The Plant had been abandoned for many years and had become structurally hazardous. Init. Dec., Findings of Fact ("FOF") ¶ 6, at 1, 6. On or about June 19, 2002, a City official received a telephone call from a resident across the street from the Plant informing the official that she had heard something in the building collapse and that she was worried that the entire building was going to collapse. *Id.*, FOF ¶ 8, at 7. On that same day, the City inspected the property and observed that a forty-foot-high wall was "weaving like a snake." *Id.* The inspector opined that the structure was in immediate danger of collapse, and that "[i]f the wall collapsed, five homes across the street would have been destroyed." *Id.* City officials concluded that a collapse would likely impact a nearby power line as well. *Id.*, FOF ¶ 9, at 7-8. The City immediately entered into a contract with Popple[6] for the demolition of the Plant and issued a Demolition Order the next day, June 20, 2002. *Id.*, FOF ¶¶ 10-11, at 8. On June 20, 2002, employees of Popple began the demolition. *Id.*, FOF ¶ 10, at 8.

The City submitted an initial Asbestos Abatement and Demolition/Renovation Notification Form to the Region on June 21, 2002. *Id.*, FOF ¶ 18, at 10. That notification lacked certain information required under 40 C.F.R. § 61.145(b). *Id.*, FOF ¶¶ 18-19, at 10-11; *see also* 40 C.F.R. § 61.145(b). It was not until July 22, 2002, after the notification had been amended and resubmitted three times, that the Region accepted it as complete. *Id.*, FOF ¶¶ 19-20, at 11.

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[5] The Initial Decision will be cited throughout this decision as "Init. Dec."

[6] Twice prior to the June 2002 emergency, the City solicited and received bids for the demolition of the Plant. Init. Dec., FOF ¶ 7, at 6-7. Popple was the low bidder during the second, October 2001, bidding session; however, the contract was never awarded. *Id.*

Suspecting that the Plant contained asbestos,[7] the City also contacted Wyoming to make arrangements to have an asbestos-trained supervisor present during the demolition. *Id.*, FOF ¶¶ 12-13, at 8. The record is unclear as to when exactly the initial call to Wyoming was made, but it appears to have been no sooner than the afternoon of June 21, 2002. *Id.*, FOF ¶ 12, at 8.[8] Moreover, the daily log sheets demonstrate that employees of Wyoming did not appear at the Site until June 22, 2002. *Id.*, FOF ¶ 38, at 18. A representative from the Pennsylvania Department of Environmental Protection ("PADEP") inspected the Site on June 20 and again on June 21, 2002. *Id.*, FOF ¶¶ 22-23, at 11-12. In a Notice of Violation later drafted by PADEP, the inspector noted that at no time during the inspection on either June 20 or June 21 was an individual trained and certified to supervise RACM removal present, and that during those inspections, heavy machinery was observed separating steel from other demolition debris and placing the steel into containers to be transported away. *Id.*, FOF ¶ 25, at 12-13.[9]

Following the PADEP inspections of June 20 and 21, 2002, Wyoming was hired to monitor the demolition of asbestos-containing materials and to remove asbestos-containing materials from the Site. *Id.*, FOF ¶¶ 13, 36, at 8-9, 17. Bruce Postupak, the president of Wyoming, signed two of the four Asbestos Abatement and Demolition/Renovation Notification Forms submitted (including the final form). In doing so, he identified Wyoming as the asbestos abatement contractor and certified that an individual trained in the asbestos NESHAP would be present during demolition and that all work would be done in accordance with applicable state and local agency rules and regulations. *Id.*, FOF ¶ ¶ 14, 19-20, Conclusions and Discussion (hereinafter "conclusions of law" or "COL") ¶ 15, at 9, 11, 28-29. Those notification forms were dated June 27, 2002, and July 18, 2002, respectively. *Id.*, FOF ¶¶ 19-20, at 11; EPA Exs. C-29, C-31. Further, in response to a

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[7] Typically, prior to any demolition or renovation, an inspection occurs that is intended to ascertain the presence and quantity of asbestos. 40 C.F.R. § 61.145(a). Because the building in this case was in danger of collapse, however, an inspection was not possible prior to demolition. Init. Dec., FOF ¶ 21, at 11. Apparently aware of that danger in advance of the June 2002 emergency, the City had specified, in an addendum to the bid package that the City created for the demolition, that "all materials shall be treated as asbestos[-]contaminated and that materials and metal shall be removed from the pile and placed in an area where a certified asbestos technician can examine the debris and remove any detected asbestos in accordance with federal and state requirements." *Id.*, FOF ¶ 25 n.7, at 12.

[8] Although contacted and, practically speaking, directed by the City, Wyoming was technically (apparently for federal funding purposes) a subcontractor of Popple. Init. Dec., FOF ¶¶ 12, 14, 15, 17, at 8-10.

[9] The PADEP inspection report does not indicate that the inspector observed any asbestos NESHAP violations because, at the time of the inspection, the inspector was operating under the understanding that an asbestos inspection had been done and that the Site had been determined to be free of asbestos-containing material. Init. Dec., FOF ¶ 22, at 12. When the PADEP inspector later found out that no such inspection for asbestos had been done, she drafted the Notice of Violation, which was issued on July 18, 2002. *Id.*, FOF ¶ 25, at 12-13.

Notice of Noncompliance and Request to Show Cause issued by EPA in June 2004, Wyoming indicated that the City had requested that Wyoming provide a Pennsylvania-licensed asbestos-certified person to monitor the demolition and remove asbestos-containing materials as the safety conditions permitted. Init. Dec., FOF ¶ 36, at 17.

The Region inspected the Site on July 16, 2002, and again on July 31, 2002. *Id.*, FOF ¶¶ 27, 34, at 13, 16. Both times, the inspector found, among other things, material suspected to be dry RACM scattered throughout the Site. *Id.*, FOF ¶¶ 29, 34, at 14, 16. On July 16, 2002, the inspector discovered that no one was present at the Site, the building was three-quarters demolished, some signs warning of asbestos were lying on the ground, and there was crushed, dry RACM all over the Site, most of which was accessible to the public in the parking lot or near the sidewalk. *Id.*, FOF ¶ 29, at 14-15. He took photos of the Site, documented his findings, and gathered samples of suspected RACM. *Id.* Subsequent laboratory tests of samples collected confirmed that the material suspected to be RACM was indeed RACM. *Id.*, FOF ¶ 31, at 15. On July 31, 2002, the same inspector returned to the Site. *Id.*, FOF ¶ 34, at 16. When he arrived, he found some excavation and debris removal work being done. *Id.* There was still RACM debris scattered throughout the Site and most of it was dry. *Id.*, FOF ¶¶ 34-35, at 16-17. Again, he took samples that later were confirmed to contain RACM. *Id.*, FOF ¶ 35, at 17.

The ALJ found that the City, for the most part, led the demolition. *Id.*, FOF ¶¶ 7, 8, 10, 14, 16, 49, at 6-7, 8, 9-10, 22. Among other things, the City undertook, through its fire department, to wet demolition debris at the Site, and the ALJ concluded that the fire department generally applied copious amounts of water to the Site on a regular basis. *Id.*, COL ¶ 14, at 28. There was testimony that both Popple and Wyoming would occasionally direct the fire department to apply water to a certain area and that the fire department would follow such directions. *Id.*, FOF ¶ 47, at 21.

The ALJ found that Wyoming was directly responsible for disposing of the RACM that its workers collected and placed into bags and drums at the Site, whereas Popple was directly responsible for disposing of the remainder of asbestos-contaminated debris. *Id.*, FOF ¶¶ 42-43, at 19-20; *see also* ALJ Hearing Transcript ("ALJ Tr.") at 328, 419. Daily log sheets show that Wyoming collected RACM at the Site periodically between June 22 and September 10, 2002. Init. Dec., FOF ¶¶ 38-44, at 18-20. Significantly, Wyoming was not present at the Site between July 11 and July 21 and did not collect any asbestos material between July 22 and July 28, 2002. *Id.*, FOF ¶ 38, at 18. Therefore, the debris scattered across the Site that was observed and photographed during the Region's inspection on July 16, 2002, existed and remained at the Site from at least July 16 through July 29, 2002. Additionally, although the logs show that Wyoming collected fourteen bags of RACM from July 29 through July 31, the EPA inspection

on July 31 documented a significant amount of RACM throughout the Site on that day. *Id.*, FOF ¶¶ 34, 38, at 16, 18.

Once the RACM was picked up by Wyoming employees, it was double-bagged, labeled, and placed in secure trailers, along with waste from other projects, on the property of Wyoming. *Id.*, FOF ¶ 45, at 20-21. The material was stored in the trailers until sent to the landfill. *Id.* Although Mr. Postupak, Wyoming's president, testified that shipments were sent from the trailers to the landfill on July 16 and August 22, 2002, and January 3, 2003, Wyoming's waste manifests indicate otherwise. *Id.*, FOF ¶ 45, at 21; EPA Ex. C-27, tab C.

The first manifest indicates that 30 bags were on Wyoming's trailer and in Wyoming's possession from June 24 through June 26, and then were transferred to another transporter on June 26, and arrived at the landfill on July 2, 2002. EPA Ex. C-27, tab C. The second manifest indicates that 71 bags were on Wyoming's trailer and in Wyoming's possession from July 26 through August 13 and arrived at the landfill on August 14, 2002. *Id.* The third manifest indicates that 240 bags and 19 barrels were collected in Wyoming's trailer on August 8 and arrived at the landfill on August 14, 2002. *Id.* The final manifest indicates that material in 174 bags was in Wyoming's possession, on Wyoming's trailer, from August 26, 2002, until January 14, 2003, and was eventually delivered to the landfill on January 15, 2003. *Id.* These manifests illustrate that RACM was stored in Wyoming's trailers for periods of up to four-and-a-half months. *See* Init. Dec., FOF ¶ 45, at 20-21.

Mr. Postupak testified that the last shipment was delayed because the City contemplated doing additional clean-up work at the Site. *Id.; see also* ALJ Tr. at 325. The funding for the additional work did not materialize and, in late November or early December, the City informed Mr. Postupak that no further work would be done and that the job was complete. Init. Dec., FOF ¶ 45, at 20-21; ALJ Tr. at 325.

2. *Procedural History*

EPA Region III commenced an administrative proceeding against the City, Popple, and Wyoming on December 30, 2004.[10] In Count I of its Complaint, the Region alleged that the Respondents violated the asbestos NESHAP by failing to provide adequate notice of the demolition in accordance with 40 C.F.R. § 61.145(b). Compl. ¶¶ 56-59, 61, at 9-10. Count II alleged that the Respondents failed to keep RACM adequately wet in violation of 40 C.F.R. § 61.145(c)(6),

[10] Because the violations were more than one year old at the time the Complaint was filed, EPA sought and obtained a determination from the United States Department of Justice, as required by CAA § 113(d), 42 U.S.C. § 7413(d), that the violations were appropriate for administrative penalty action. Init. Dec. at 22 n.14; EPA Ex. C-34.

based on EPA's direct observation of dry RACM at the Plant during its site inspections on July 16 and 31, 2002. Compl.¶¶ 62-71, at 10-11. Count III alleged that the Respondents failed to have a trained supervisor present during the demolition activities, in accordance with 40 C.F.R. § 61.145(c)(8), on June 20 and June 21, 2002. *Id.* ¶¶ 72-77, at 11-12. This count was based on the observations of the PADEP representative during his site inspection on those days. *Id.* ¶ 76, at 12. Count IV alleged that the Respondents failed to dispose of all waste material containing asbestos as soon as practical, as required by 40 C.F.R. § 61.150(b), based on asbestos identified during the Region's two site inspections and on Wyoming's shipment records. *Id.* ¶¶ 78-84, at 12-13.

The Region proposed a civil penalty of $36,850 to be imposed jointly against all of the Respondents, for all four of the violations alleged. *Id.* § VI, at 13. In deriving that penalty, the Region took into consideration the factors in CAA § 113(e), 42 U.S.C. § 7413(e), as set forth in EPA's General CAA Penalty Policy, as well as the Asbestos Penalty Policy appended to the general policy. Init. Dec., FOF ¶ 50, at 22-23. The Region then adjusted the penalty amount upward in accordance with the Adjustment of Civil Monetary Penalties for Inflation Rule, 40 C.F.R. part 19.[11] *Id.*, FOF ¶ 55, at 24. Ultimately, EPA proposed the following:

Count I		$500
Count II		$10,000 (First Day)[12] $1,000 (Second Day)
Count III		$10,000 (First Day) $0 (Second Day)[13]
Count IV		$10,000 (First day)
Size of Violator Adjustment		$2,000
	Subtotal	**$33,500**

[11] EPA did not propose to include an economic benefit component in the penalty evidently because EPA did not possess "exact dollar figures" for the labor and equipment costs that the Respondents saved by not complying with the asbestos NESHAP. Init. Dec., FOF ¶ 51, at 23.

[12] All penalty amounts for Counts II, III, and IV are based on an estimated quantity of asbestos ranging between ten and fifty units. Init. Dec., FOF ¶ 55 & n.16, at 24. This estimated range of asbestos was based solely on Wyoming's shipping manifests, was accepted by the ALJ, and is not challenged on appeal. *Id.*

[13] As explained, *infra* Part III.B.3.b, the Region exercised its discretion to seek a penalty for one day of violation only, notwithstanding the fact that there were two days of violation.

Inflation Adjustment (10% upwards)	$3,350
Total Proposed Penalty	**$36,850**

Compl. § VI, at 13-14.

A hearing on the matter was held on August 23 and 24, 2005. Init. Dec. at 5. On November 14, 2006, the ALJ issued his Initial Decision. In that decision, the ALJ dismissed Count I[14] based on the emergency nature of the demolition, stating that "the deficiencies in the initial Notification were substantially cured by the second." Init. Dec., COL ¶ 13, at 28. As noted above, that dismissal is not challenged in this appeal, and, as explained further below, *infra* Part III.B, we will not address the merits of that dismissal here.

The ALJ found all three Respondents liable for Count II. Init. Dec., COL ¶¶ 14-15, at 28-29. Although the ALJ recognized that Wyoming had certified that an individual trained in the asbestos NESHAP would be present at the Site and that all work would be done in accordance with applicable state and local agency rules and regulations, the ALJ determined that Wyoming's ability to control the events at the Site, including the wetting of RACM, was limited.[15] *Id.*, COL ¶ 15, at 28. As such, the ALJ concluded that Wyoming should be assessed a penalty totaling 20% of the amount claimed for Count II. *Id.*, COL ¶ 15, at 29. In reducing Wyoming's penalty assessment, the ALJ purported to rely on the General CAA Penalty Policy, stating, "the degree of control the violator had over the events constituting the violation is a factor to be considered in determining the degree of willfulness or negligence." *Id.* (citing Gen. CAA Pen. Pol. at 16).

With respect to Count III, the ALJ determined that once the unstable wall was taken down on June 20, 2002, the initial emergency had passed and the Respondents should have waited until an asbestos-trained supervisor was present at the Site before further disturbing the RACM. Init. Dec., COL ¶ 16, at 29. However, the ALJ concluded that Wyoming was not hired until late afternoon on June 21, 2002, and therefore likely did not contribute to the violation set forth in Count III. *Id.* Thus, the ALJ dismissed Count III against Wyoming, and found the City and Popple each liable. *Id.*

The ALJ also concluded that all three Respondents were liable for the failure to dispose of RACM as soon as practical as alleged in Count IV. *Id.*, COL ¶¶ 17-18, at 29; *id.* at 32. The ALJ determined, however, that the allegations in

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[14] The ALJ actually concludes that "no penalty will be assessed for Count I," which is the equivalent of a "dismissal" of Count I, and we refer to it as such throughout this opinion. *See* Init. Dec., FOF ¶ 13, at 28; *see also id.* at 32.

[15] The ALJ does not articulate specifically why he concluded Wyoming's control over the wetting of RACM was limited. *See* Init. Dec., COL ¶ 15, at 28-29.

the Complaint were limited to the RACM disposed of by Wyoming and did not include general demolition debris, which was treated as asbestos-contaminated, and which was disposed of by Popple. *Id.*, COL ¶ 17, at 29. The ALJ noted that, even though it was determined that Popple was not involved in and had little or no control over the disposition of the asbestos at issue, Popple could not escape liability for this violation because Popple remained an operator of the demolition activity. *Id.* The ALJ also noted that Wyoming's ability to dispose of the RACM was limited because "the Site was unsafe to enter until early August 2002," and because Wyoming "was not authorized to dispose of the remaining RACM until it was directed to do so by the City, which did not happen until late November or early December 2002." *Id.*, COL ¶ 18, at 29. As such, the ALJ determined that an appropriate penalty assessment for Popple and Wyoming was 20% of the amount proposed for Count IV for each. *Id.*, COL ¶¶ 17-18, at 29.

Because the ALJ concluded Count III should be dismissed as to Wyoming, and perhaps also because he found the Respondents' relative contributions to each violation differed, the ALJ determined that apportionment of the penalty among the parties was appropriate. *Id.*, COL ¶ 19, at 29-30. Ultimately, the ALJ assessed the penalty as follows:

Count I	(Dismissed)		$0
Count II	Against the City		$3,666
	Against A.R. Popple		$3,666
	Against Wyoming		$2,200
		Total	**$9,532**[16]
Count III	Against the City		$3,333
	Against Popple		$3,333
	Against Wyoming		$0
		Total	**$6,666**
Count IV	Against the City		$3,333
	Against Popple		$2,000
	Against Wyoming		$2,000
		Total	**$7,333**

[16] The ALJ's decision does not provide the subtotals for each individual count or the total amount of the penalty. Instead, each Respondent's total is provided including the 10% adjustment for inflation rounded to the nearest dollar. *See* Init. Dec., COL ¶ 19, at 30. The subtotals and totals are provided here for the purpose of comparing the ALJ's assessment to the Region's proposed penalty.

Size of Violator Adjustment		$0[17]
	Subtotal	**$23,531**
Inflation Adjustment (10% upwards)		$2,353[18]
	Total Penalty	**$25,884**

See id. The above figures demonstrate that the ALJ's apportionment resulted in a total penalty that was $8,216 less than the total penalty proposed by the Region for Counts II, III, and IV, taking inflation into account.[19] With respect to the overall penalty, the ALJ concluded that the Region had closely followed the Asbestos Penalty Policy and that the Region appeared to have considered all the factors that the CAA requires. *Id.* The ALJ then noted that his discussion would be "limited to instances where the penalty assessed differ[ed] from that determined by [the Region]." *Id.* Notably, the Initial Decision contains *no* discussion concerning the reduction in the total penalty or in the subtotal for each count, nor does it reflect consideration of the fact that the Asbestos Penalty Policy is intended to yield a penalty figure for the case as a whole.

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[17] The Region proposed the lowest penalty adjustment for size of business based on Wyoming's net worth of $141,014, as reported by Dun & Bradstreet. *See* Complainant's Post-Hearing Brief ("EPA's Post-Hearing Br.") at 43; Gen. CAA Pen. Pol. at 14; *see also* Init. Dec., COL ¶ 20, at 30. The Region used Wyoming's net worth because Wyoming was the Respondent that actually handled or disposed of the asbestos. ALJ Tr. at 187. The Region conservatively chose to adjust the penalty upward by $2,000, which, under the General CAA Penalty Policy, is the smallest adjustment available and applies to companies with assets *under* $100,000. Gen. CAA Pen. Pol. at 14. Wyoming's president, Mr. Postupak, testified that the value of Wyoming was below zero. Init. Dec., FOF ¶ 57, at 25; ALJ Tr. at 327. Ultimately, the ALJ determined that EPA's size of business adjustment as computed by the Region was arbitrary and that no such adjustment would be imposed. Init. Dec., COL ¶ 20, at 30. In so concluding, the ALJ stated: "The essentially arbitrary nature of the size of business adjustment under Appendix III [, the Asbestos Penalty Policy,] is illustrated by [the Region's] assertion that, even if Mr. Postupak's unsupported testimony that Wyoming's net worth is now less than zero were accepted, the size of business adjustment would still be $2,000." *Id.* We note first that the size of business adjustment is calculated in accordance with the General CAA Penalty Policy and not under the Asbestos Penalty Policy, as the ALJ suggests. *See* Asbestos Pen. Pol. at 6; Gen. CAA Pen. Pol. at 14. Additionally, while we do not agree with the ALJ's characterization that the size of business adjustment under the relevant penalty policy is "essentially arbitrary," the Region did not challenge the ALJ's determination on this issue. Accordingly, we do not address that portion of the penalty in this decision.

[18] The ALJ did not expressly provide that $2,353 was assessed for inflation, but did indicate that he had adjusted the total penalty assessment for inflation by a factor of 1.1, which, when applied, yields a product of $2,353. *See* Init. Dec., COL ¶ 19, at 30.

[19] The total proposed by the Region for Counts II, III, and IV (excluding both the proposed penalty for Count I and the size of business adjustment) was $31,000 plus 10% for inflation, or $34,100. The total assessed for Counts II, III, and IV was $25,884. Thus, the differential between the proposed and assessed penalty was $8,216 ($34,100 minus $25,884).

On December 13, 2006, the Region timely appealed, contending that the ALJ assessed a reduced total penalty without making clear his reasoning for doing so. EPA Br. at 1. As previously noted, Respondents did not file a response to the Region's appeal. The Region requests that the Board remand the case for further explanation of the penalty assessment. *Id.*

III. *DISCUSSION*

A. *Standard of Review*

The regulations governing the Board provide that the Board "shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in [a] decision * * * being reviewed." 40 C.F.R. § 22.30(f). The regulations also provide that the Board may assess a penalty that is higher or lower than the amount recommended to be assessed in the decision.[20] *Id.* In implementing these requirements, the Board has noted that, while the regulations grant the Board de novo review of a penalty determination, in cases where the ALJ assessed a penalty that "falls within the range of penalties provided in the penalty guidelines, the Board will generally not substitute its judgment for that of the [ALJ] absent a showing that the [ALJ] has committed an abuse of discretion or a clear error in assessing the penalty." *In re Friedman*, 11 E.A.D. 302, 341 (EAB 2004) (quoting *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994)), *aff'd*, No. 2:04-CV-00517-WBS-DAD (E.D. Cal. Feb. 25, 2005), *aff'd*, No. 05-15664, 2007 WL 528073 (9th Cir. Feb. 15, 2007); *accord In re Chempace Corp.*, 9 E.A.D. 119, 131 (EAB 2000); *In re B&R Oil Co.*, 8 E.A.D. 39, 64 (EAB 1998); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 536 (EAB 1998); *In re Pac. Ref. Co.*, 5 E.A.D. 520, 524 (EAB 1994).

However, the Board has also "reserve[d] the right to closely scrutinize substantial deviations from the relevant penalty policy and may set aside the ALJ's penalty assessment and make its own de novo penalty calculations where the ALJ's reasons for deviating from the penalty policy are not persuasive or convincing." *Friedman*, 11 E.A.D. at 341 (quoting *In re Capozzi*, 11 E.A.D. 10, 32 (EAB 2003)); *see also In re CDT Landfill Corp.*, 11 E.A.D. 88, 117 (EAB 2003); *In re Chem Lab Prods.*, 10 E.A.D. 711, 724 (EAB 2002) (rejecting ALJ's penalty assessment where ALJ's reason for departure was based on an impermissible comparison of penalties derived in a settlement context with the penalty to be assessed in a fully litigated case); *In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 611, 613 (EAB 2002) (rejecting ALJ's penalty assessment where ALJ's departure from penalty policy was based on ALJ's misunderstanding as to how the penalty policy

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[20] In the case of a default order, which does not apply here, the Board may not increase the penalty. 40 C.F.R. § 22.30(f).

should be applied); *In re Carroll Oil Co.*, 10 E.A.D. 635, 656 (EAB 2002) (rejecting ALJ's penalty assessment in part because the ALJ's departure from the penalty guidance would undercut the application of the statutory penalty factors); *Birnbaum*, 5 E.A.D. at 124.

B. *Analysis*

As noted above, the ALJ dismissed Count I of the Region's Complaint but concluded the violations had occurred as alleged in Counts II, III, and IV. *See supra* Part II.B.1. The ALJ also determined that, as to Count III, the claim against Wyoming should be dismissed due to Wyoming's non-involvement with the demolition at the time the violation occurred. Neither of these determinations was challenged on appeal, and we see no reason to disturb the ALJ's decision with respect to these conclusions. Thus, at its core, this appeal concerns only the ALJ's penalty assessment for Counts II, III, and IV and, in particular, his assessment of a total penalty that, without explanation, fell short of theRegion's proposed penalty, which was derived from the applicable penalty policies. As explained more fully below, we find the ALJ erred in assessing a lower penalty without explanation. We do not remand for that explanation, however, because we find that the reduced penalty is the direct result of the ALJ's decision to allocate that penalty rather than assess a joint penalty, in contravention of the relevant penalty policies and without adequate reason. We also decline to remand for further justification of his departure from the penalty policies in allocating the penalty in this case. Rather, in the interest of resolving this case expeditiously, we opt to examine the penalty assessment de novo. *See* C.F.R. § 22.30(f) (granting the Board authority to review ALJ penalty determinations de novo); *see also In re FRM Chem Inc.*, 12 E.A.D. 740 (EAB 2006); *In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 612 (EAB 2002).

1. *The ALJ Erred in Assessing, Without Explanation, a Penalty Lower Than the Proposed Penalty Derived from Agency Penalty Policies*

The total penalty assessed by the ALJ for Counts II, III, and IV was less than that proposed by the Region, which had been calculated in accordance with the applicable penalty policies. The ALJ does not acknowledge or explain why the total proposed penalty of $34,100[21] is not appropriate for the violations at issue. Deviation from the proposed penalty is permissible under the regulations, but it requires an explanation. *See* 40 C.F.R. § 22.27(b) ("[i]f the [ALJ] decides to assess a penalty different in amount from the penalty proposed by [the Region],

[21] As previously explained, *see supra* note 19, $34,100 is the amount proposed by the Region for Counts II, III, and IV and excludes the proposed penalty for Count I and the size of violator adjustment.

the [ALJ] shall set forth in the initial decision the specific reasons for the increase or decrease"); *see also In re EK Assocs., L.P.*, 8 E.A.D. 458, 473 (EAB 1999) (citing *In re DIC Americas, Inc.*, 6 E.A.D. 184, 190 n.10 (EAB 1995); *In re Pac. Ref. Co.*, 5 E.A.D. 607, 612 (EAB 1994); *In re A.Y. McDonald Indus., Inc.*, 2 E.A.D. 402, 414 (CJO 1987)). Accordingly, we find the ALJ erred in assessing, without explanation, a lower penalty than the one the Region proposed based on the relevant penalty policies.

Ordinarily, in cases where the ALJ fails to explain a penalty assessment that is different in amount from that which was proposed, the remedy is to remand to the ALJ for further explanation. In this case, however, it is clear from the Initial Decision that the reduction in the penalty amount is the direct result of the ALJ's method of assessing the penalty. The ALJ appears to have begun his assessment by equally dividing the penalty among the three Respondents. Then, as to certain counts, the ALJ further reduced the share attributable to one or more Respondents. This method of allocating the proposed penalty resulted in a reduced overall penalty attributable to the violation.[22] The ALJ does not explain why, even if the penalty were allocable, the allocated amounts should add up to a reduced penalty amount for the violation. Additionally, as explained further below, we believe the ALJ's method of assessing the penalty represents a fundamental deviation from Agency guidance regarding the assessment of joint penalties against multiple parties.[23] Moreover, we find no persuasive reason for the ALJ's departure from the penalty policies in allocating the penalty in this case.

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[22] For example, with respect to Count II, the ALJ allocated 20% of the $11,000 proposed penalty to Wyoming, or $2,200. But, rather than allocating the balance of the proposed penalty (i.e., 80% or $8,800) among the two remaining Respondents, the ALJ assigned each a one-third share (or 33%) of the original penalty amount. This resulted in a total penalty for Count II of $9,532 – only 86% of the amount proposed for Count II. The ALJ provided a basis for reducing Wyoming's share of the penalty but did not provide any explanation for why the total penalty amount for the violation was less than that which was proposed.

[23] We recognize that an ALJ is under no obligation strictly to follow the penalty guidance and certainly could reject a penalty generated in accordance with the penalty policy if appropriate given the facts of a particular case. *See In re Employers Ins. of Wausau*, 6 E.A.D. 735, 759 (EAB 1997) ("the ALJ [is] under no obligation to accept the factual assertions or legal interpretations in the Penalty Policy at face value, because * * * the Penalty Policy has never been subjected to the rule making procedures of the Administrative Procedure Act, and thus does not carry the force of law"); *see also In re Rybond, Inc.*, 6 E.A.D. 614, 639 (EAB 1996). In this case, however, the ALJ gave no indication that he intended to deviate from the relevant guidance. On the contrary, the ALJ noted that the penalty had been derived in accordance with the Asbestos Penalty Policy and further indicated that, except where noted, he saw no reason to disturb the Region's penalty proposal. Init. Dec., COL ¶ 19, at 29-30. Moreover, in at least one instance, the ALJ expressly indicated that he was relying (albeit erroneously in our view) upon the General CAA Penalty Policy. *Id.*, COL ¶ 15, at 28-29; *see also infra* Part III.B.2.b.

2. *The ALJ Erred in Allocating the Penalty*

To better understand why the ALJ's method of assessing the penalty represents a fundamental deviation from Agency guidance, it is useful to begin with a discussion of the guiding principles concerning the assessment of CAA civil penalties against multiple parties and then apply those principles to the facts of this case.

a. *The Penalty Policy Contemplates Joint Penalties in Cases Like This One*

As previously explained, both the General CAA Penalty Policy and the Asbestos Penalty Policy set forth proposed penalty amounts that are specifically intended to yield a penalty figure for the case as a whole. Gen. CAA Pen. Pol. at 23-24; Asbestos Pen. Pol. at 7. The relevant penalty policies explain that civil violations of the CAA are strict liability violations and the government's interest is in recovering an appropriate penalty based on the facts of the violation, not based on the relative fault of the individual defendants. Gen. CAA Pen. Pol. at 23-24. Rather, the guidance provides that, in cases involving multiple violators, the violators can "allocate among themselves as they wish." Asbestos Pen. Pol. at 7. Thus, when the application of the guidance to a particular violation yields a proposed amount of $10,000, for example, that amount represents the total for the violation, and, to the extent that there are multiple parties responsible for that violation, the $10,000 is assessed against them *jointly*.

Nevertheless, allocation in some circumstances is contemplated. For example, the General CAA Penalty Policy provides guidance on allocating penalties in circumstances where one party in a multi-defendant case is willing to settle and others are not. In that circumstance, the guidance provides that if there is a portion of the penalty that is attributable to a particular party, such as the enhancement of the penalty based on prior violations, then that party should pay the portion solely attributable to it, in addition to a reasonable portion of the penalty not directly attributable to any single party.[24] Gen. CAA Pen. Pol. at 24. None of the circum-

[24] In that same vein, the Asbestos Penalty Policy also points out that, depending on the circumstances, the economic benefit component (which makes up *no* portion of the proposed penalty in this case) could be split among the parties in any combination. Asbestos Pen. Pol. at 7. For example, the Asbestos Penalty Policy explains that "if the contractor charges the owner fair market value for compliance with asbestos removal requirements and fails to comply, the contractor has derived an economic benefit and the owner has not." *Id.* Conversely, "[i]f the contractor underbids because it does not factor in compliance with asbestos requirements, the facility owner has realized * * * financial savings." *Id.* But if, in this latter instance, the contractor also receives a benefit, by virtue of obtaining the contract through a low bid, then the economic benefit is shared and difficult to disaggregate. Indeed, it is because economic benefits can be difficult to disaggregate with precision that the policy contemplates seeking a sum for the case as a whole and allowing the parties to allocate among themselves. *See id.*

stances contemplated by the guidance as justifying allocation is present in this case, however.

b. *The ALJ Erred in Declining to Assess a Joint Penalty*

Notwithstanding the penalty policies' provisions for joint penalties in cases like this one and the fact that the Region accordingly proposed a joint penalty, the ALJ did not assess a joint penalty in this case. The ALJ's sole stated reason for assigning individual penalty amounts to each Respondent, rather than assessing a joint penalty, was that he had dismissed Count III against Wyoming. Init. Dec., COL ¶ 19, at 30 ("[Region III] made no attempt to apportion the penalty among the three Respondents. Apportionment is necessary here, however, because of the dismissal of Count III as to Wyoming."). The ALJ provides no further explanation for why the dismissal of Count III would necessitate a reduction in the overall penalty or the allocation of Count III among the remaining two Respondents, nor does he provide any explanation for the necessity of allocating the assessments for Counts II and IV. Contrary to the ALJ's conclusion, we do not agree that the dismissal of Wyoming from Count III prevents the imposition of a joint penalty against the remaining Respondents for Count III or justifies an apportionment of the penalties assessed for Counts II and IV.[25] Thus, we find the ALJ's stated reasons for allocating the penalty in lieu of imposing a joint penalty far short of persuasive. Additionally, our review of the record does not reveal any other basis for allocating the penalty among the Respondents.

The ALJ's conclusions concerning the differing levels of culpability of the Respondents, alone, do not justify the decision to reduce the penalty total or to allocate the penalty, given that one of the purposes for assessing a joint penalty is to recover an appropriate penalty in a manner that generally *avoids* getting into consideration of the relative fault of the respondents. *See* Gen. CAA Pen. Pol. at 23-24. Thus, for example, there is no apparent basis under the guidance for the ALJ to consider whether Wyoming's share of the penalty for Count II should have been limited relative to the other Respondents.

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[25] Further, the ALJ's decision to reduce the proposed penalties and to allocate among Respondents is inconsistent with his own method of calculating the penalty. For example, the question before the ALJ in Count III was whether the failure to have a trained supervisor present during demolition activities on June 20 and 21, 2002, warranted the proposed penalty of $10,000, or some other amount. The ALJ determined that Wyoming had no liability for Count III, reduced the penalty by one-third, and assessed the remaining two Respondents a one-third share of a $10,000 penalty. The implicit determination is that $10,000 is an appropriate overall penalty for Count III. We agree that the overall penalty is appropriately assessed at $10,000, but we find that the ALJ deviated from the purpose of the penalty policy by in essence allowing the number of parties to drive the total penalty assessed. The ALJ's Initial Decision provides no substantive rationale for a reduction of the proposed penalty, and we find none based on our review of the record.

Moreover, even if the differing culpabilities could serve as a basis for imposing individual (rather than joint) penalties, we find the ALJ's rationale wanting. With respect to Count II, the ALJ found Wyoming to be less culpable due to its "lack of control over the Site" and lack of control over "the application of water" to the Site. Init. Dec., COL ¶ 15, at 28-29. Purporting to rely on the General CAA Penalty Policy, the ALJ stated that "the degree of control the violator had over the events constituting the violation is a factor to be considered in the degree of wilfulness or negligence." *Id.* (citing Gen. CAA Pen. Pol. at 16). Consequently, the ALJ determined that Wyoming's liability for Count II should be limited to 20% of the penalty for that Count and reduced Wyoming's share accordingly. *Id.*, COL ¶¶ 15, 19, at 29-30. This constituted error for several reasons.

First, the penalty factor to which the ALJ refers is designed to serve as a basis for adjusting the gravity component of a *joint* penalty. It is not presented as a basis for allocating a smaller share to any one respondent. Second, the ALJ's reliance on the penalty guidance to *reduce* the penalty is misplaced. As explained previously, the penalty policy provides that "degree of wilfulness or negligence" on the part of the violator may be used only as a basis to *raise* the gravity component of a penalty; it is not to be used as a basis to *mitigate* that portion of the penalty. Gen. CAA Pen. Pol. at 16.

Finally, we are not persuaded by anything in the record that Wyoming lacked control over the application of water at the Site. As the ALJ explained, Wyoming's president certified to the EPA that an individual trained in the asbestos NESHAP would be present at the Site during demolition and that all work would be done in accordance with applicable state and local agency rules and regulations, which include the responsibility to keep RACM adequately wet. Init. Dec., COL ¶ 15, at 28. Wyoming's president also acknowledged in his July 14, 2004 letter to EPA that Wyoming was contracted by the City to "provide a [Pennsylvania] licensed asbestos certified person to monitor the demolition and remove asbestos containing materials as the safety conditions permitted." *Id.*, FOF ¶ 36, at 17 (citing EPA Ex. C-26, at 1). In that letter, Wyoming further indicated that the City "provided the demolition contractor with a fire department water gun to keep all operations wet." *Id.* The mere fact that the City provided the fire department's services for the purpose of wetting the asbestos cannot abrogate Wyoming's responsibility to keep the RACM wet. Moreover, a fire department official testified that both Popple and Wyoming sometimes would direct the fire department on what to do at the Site and that the fire department would follow their direction. *See id.*, FOF ¶ 46, at 21; *see also* ALJ Tr. at 291-92. Thus, it appears from the record that Wyoming had both the responsibility and the capability to ensure that the RACM was kept adequately wet. Specifically, we find nothing in the record to suggest that the City ever overruled direction by Wyoming or that Wyoming was ever denied, in any other way, the ability to control the application of water to the Site or to ensure that the RACM was kept adequately wet, as was its responsibility. The sole basis for the ALJ's conclusion in this regard appears to be the bald

and unsupported statement by Wyoming's president that he had no power with respect to when the Site would be watered down. Init. Dec., FOF ¶ 13, at 8-9 (citing ALJ Tr. at 320). Again, based on the record before us, we are not persuaded that Wyoming lacked control over the application of water to the RACM and thus conclude that the ALJ clearly erred in concluding otherwise. Thus, even if the ALJ's theory for allocation were sound, the facts do not support the ALJ's decision.

Similarly, we find the ALJ's bases for reducing the penalty assessed against Wyoming and Popple for Count IV to be factually unfounded. With respect to Wyoming, the ALJ appears to have determined that because the Site was unsafe to enter until early August, 2002, and because Wyoming was "not authorized" to dispose of the final collection of RACM "until it was directed to do so by the City," Wyoming's liability for Count IV should be limited. Init. Dec., COL ¶ 18, at 29. The record belies the conclusion that Wyoming could not dispose of asbestos because the Site was unsafe to enter. Wyoming's president, Mr. Postupak, testified that beginning in June, his workers were bagging "quite a bit" of debris. ALJ Tr. at 323. He further testified that the debris was double-bagged, labeled, and put in a trailer on Wyoming's property, with waste from other unrelated projects. *Id.* at 323-25; *see also* Init. Dec., FOF ¶ 45, at 21. It is not clear from the record that the City "controlled" the disposal of asbestos in Wyoming's possession. With respect to the final load, Mr. Postupak testified that the City was "going to do extra work underneath the sidewalk and clean up that area, and they told us to wait [to ship the asbestos on our property]." ALJ Tr. at 324-25. There is nothing in the record that indicates that Wyoming, the asbestos contractor for the Site charged with assuring compliance with asbestos regulations, ever discussed with the City that, pursuant to regulations, the asbestos in Wyoming's possession needed to be transported to the landfill, nor is there any evidence that the City ever prevented Wyoming from complying with the regulations. Mr. Postupak's testimony that the City told him to wait because more work would be done, by itself, is simply insufficient to conclude that Wyoming was not "authorized," had limited control over the asbestos already in its possession, or was otherwise unable to fulfill its own regulatory obligation properly to dispose of the RACM in question.

With respect to Popple, the ALJ, correctly in our view, acknowledged that, as operator of the demolition activity at the Plant, Popple was liable for the failure to dispose of the asbestos in a timely manner. The ALJ nevertheless reduced Popple's penalty assessment, based on his determination that Count IV was limited to the RACM disposed of by Wyoming and did not include the general demolition debris of which Popple was directly responsible for disposing. Init. Dec., COL ¶ 17, at 29. We disagree with the ALJ's determination in this regard. Count IV alleged the failure to deposit *all* asbestos-containing waste materials in an authorized waste disposal site as soon as practical. Compl. ¶ 84, at 13. The factual basis in the Complaint included the asbestos identified as scattered across the Site during the Region's inspections (July 16 and 31, 2002), in addition to the asbestos

collected at the Site on June 24, July 26, August 8, and August 26, 2002 (dates that correlate to ones found on Wyoming's shipment records). Compl. ¶¶ 81-83, at 12-13. The record demonstrates that the debris observed during the July 16 inspection existed and remained at the Site from July 16 through at least July 29, 2002. *See supra* Part II.B.1.In short, it is plain that the Complaint alleged, and the record verifies, the presence of asbestos debris for which Popple had disposal responsibility.

The record is thus clear that Wyoming and Popple shared responsibility for disposing of asbestos waste from the demolition. ALJ Tr. at 406, 419. Even if the Respondents were not jointly liable, we find nothing in the record that would support limiting Popple's responsibility for the non-timely disposal of the asbestos identified during the inspection. Moreover, according to Mr. Popple's testimony, Popple did not begin disposing of asbestos-contaminated debris until after the building was demolished (on approximately August 12, 2002). ALJ Tr. at 428-29. And, in any case, as already established, Popple is liable for the disposal of all RACM from the Site as an owner/operator of the demolition. Thus, we find the ALJ's basis for limiting Popple's penalty assessment for Count IV to be unfounded.

As explained previously, where an ALJ has deviated from the penalty policy, the Board will closely scrutinize the ALJ's reasons for doing so, and if those reasons are not persuasive or convincing, the Board may conduct its own penalty assessment de novo. *In re Friedman,* 11 E.A.D. 302, 341 (EAB 2004) (citations omitted), *aff'd*, No. 2:04-cv-00517-WBS (E.D. Cal. Feb. 25, 2005), *aff'd*, No. 05-15664, 2007 WL 528073 (9th Cir. Feb. 15, 2007); *see also supra* Part III.A. Having found no persuasive reason for the ALJ's deviation from the applicable penalty policies, we reject the ALJ's penalty assessment in this case. Additionally, as noted above, we decline to remand to the ALJ, and instead, in the interest of efficiency, opt to examine the penalty assessment de novo in accordance with the penalty policies. *See* 40 C.F.R. § 22.30(f) (granting the Board de novo authority to review ALJ penalty determinations); *see also In re FRM Chem Inc.,* 12 E.A.D. 753 (EAB 2006); *In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 612 (EAB 2002).

3. *De Novo Penalty Determination*

We previously have held that the General CAA Penalty Policy "facilitate[s] the application of the statutory penalty factors to individual cases in a systematic fashion, and thus provide[s] a sound framework for the exercise of an appellate tribunal's discretion." *Friedman,* 11 E.A.D. at 342 (citing *In re House Analysis Assoc.*, 4 E.A.D. 501, 509 n.29 (EAB 1993)). We have also frequently followed the Asbestos Penalty Policy's guidance in determining the amount of penalties to assess in contested cases appealed to this Board. *See id.* (citing *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 534-59 (EAB 1998)); *see also FRM Chem,*

12 E.A.D. at 752-53 (noting that penalty policies, while not rules, "'offer a useful mechanism for ensuring consistency in civil penalty assessments'") (quoting *In re William E. Comley, Inc.*, 11 E.A.D. 247, 262 (EAB 2004)). In this case, none of the parties disputes the relevance of these penalty policies. Accordingly, because we conclude that it produces an appropriate penalty for the case at hand, our penalty assessment will generally follow the guidance of the Asbestos Penalty Policy and the General CAA Penalty Policy.

After reviewing the record, we find the Region's deployment of the relevant penalty policies sound and appropriate. As described below, the penalty amounts proposed for each violation are consistent with those set forth in the Asbestos Penalty Policy, and we find them to be reasonable. Accordingly, as reflected below, we adopt the majority of the Region's proposed penalty as our own. We note, again, that there are two portions of the Region's proposed penalty that the ALJ declined to impose, but that the Region did not raise on appeal. Those are: (1) the penalty for Count I, which was dismissed; and (2) the size of the violator adjustment. As explained previously, in Part II.B, we address neither of these uncontested aspects of the ALJ's decision here, and take them as a given in our penalty assessment. We also take as given the ALJ's determinations regarding: (1) the adjustment for inflation of 10% (or multiplier of 1.1); (2) the estimated amount of asbestos involved (between ten and fifty units of asbestos[26]), which was used to determine the penalty amounts; and (3) the determination not to include an economic benefit component to the penalty. All other aspects of the proposed penalty are addressed below.

a. *Count II*

Count II involved the failure to keep the RACM wet on July 16, 2002, and again on July 31, 2002, in violation of the requirements of 40 C.F.R. § 61.145(c)(6). Compl. ¶¶ 62-71, at 10-11. For these violations, the Region proposed an $11,000 penalty, consisting of $10,000 for the first day of violation and $1,000 for the second day of violation. *See id.* § VI at 13; *see also* EPA's Post-Hearing Br. at 46. These penalty amounts are consistent with the gravity amounts proposed by the guidance for a two-day continuing work practice violation involving a quantity of asbestos between ten and fifty units. Asbestos Pen. Pol. at 17. We note that the proposed penalty could have been significantly higher under the guidance. Specifically, the violations occurred on two non-consecutive days during the same demolition. The penalty guidance categorizes such violations as "successive." *Id.* at 5-6. With exceptions not relevant here, the guidance provides that successive violations occurring at a single demolition "will *each* be treated as first violations," which would produce a total penalty of $20,000 ($10,000 for each violation). *Id.* at 6. That guidance notwithstanding, the Region

[26] *See supra* note 12.

proposed to treat these two violations as though the second day was a "continuation" of the first, even though there were fifteen intervening days on which no such violation was alleged.[27] Thus, the Region proposed a penalty equivalent to a two-day continuing violation, or $11,000 ($10,000 for the first day and $1,000 for the second). Adjusted for inflation, that penalty becomes $12,100. Because the Region's approach generated a penalty that was considerably less than what could have been assessed under the penalty policy, we see no basis for further reduction in the gravity component of the penalty. Moreover, the Region considered the relevant adjustment factors for decreasing the gravity component of the penalty and reasonably determined that no such adjustments were appropriate. EPA's Post-Hearing Br. at 48 (citing ALJ Tr. at 186). We agree.

Having found that the penalty proposed for Count II was reasonable and consistent with the Asbestos Penalty Policy, and having found no cause to alter the proposed penalty, we assess a joint penalty of $12,100 for Count II against the City, Popple, and Wyoming.

b. *Count III*

Count III involved the failure to have an asbestos NESHAP-trained representative present during demolition activities on June 20 and 21, 2002, in violation of the requirements of 40 C.F.R. § 61.145(c)(8). Compl. ¶¶ 72-77, at 11-12. For these violations, the Region proposed a $10,000 penalty. *See id.* § VI at 14; *see also* EPA's Post-Hearing Br. at 46. That amount is consistent with the Asbestos Penalty Policy recommendation for a single day one-time work practice violation involving between ten and fifty units of asbestos. *See* Asbestos Pen. Pol. at 17. Adjusted for inflation, that penalty would be $11,000. Again, the proposed penalty was conservative. Although the Region exercised its discretion and proposed only a one-day penalty of $10,000, the violation actually was based on two consecutive days of observation. However, given the emergency nature of the demolition, we find this exercise of discretion to be reasonable and find no basis in the record to further alter the proposed penalty for this count. Accordingly, for Count III, we impose a joint penalty of $11,000 against the City and Popple – the two parties liable for this count.

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[27] Although the Region suggested, in its post-hearing brief, that it could have used the "second violation" column for the July 31, 2002 violation, based on the notification to the City on July 29, 2002, we do not agree. *See* EPA's Post-Hearing Br. at 46 n.35. According to the Asbestos Penalty Policy, "[a] 'second' or 'subsequent' violation should be determined to have occurred if, after being notified of a violation * * * *at a prior demolition or renovation project*, the owner or operator violates the Asbestos NESHAP regulations during *another* project[.] * * * Violations should be treated as second or subsequent offenses only if the new violations occur *at a different time and/or a different job site*." Asbestos Pen. Pol. at 4 (emphases added).

c. *Count IV*

Count IV involved the failure to dispose of RACM as soon as practical, in violation of the requirements of 40 C.F.R. § 61.150(b). Compl. ¶¶ 78-84, at 12-13. For this work practice violation, the Region proposed a $10,000 penalty. *See id.* § VI at 14; *see also* EPA's Post-Hearing Br. at 47. As with Count III, this amount is consistent with the Asbestos Penalty Policy's recommendation for a single day one-time work practice violation involving between ten and fifty units of asbestos. *See* Asbestos Pen. Pol. at 17. The proposed penalty for Count IV was, again, conservative. Although the record demonstrated that RACM was allowed to remain at the Site uncollected from at least July 16 through July 29, 2002, and some of the RACM was not disposed of in an authorized waste disposal site until months after it was collected, the Region exercised its discretion and treated the violation as a single, non-continuing violation and proposed a penalty of only $10,000, or $11,000 when adjusted for inflation. Again, we see no cause to reject this exercise of discretion with respect to the penalty for Count IV. Similarly, we see no reason to adjust the penalty further. Accordingly, we assess a joint penalty of $11,000 against the City, Popple, and Wyoming.

IV. *CONCLUSION*

Based on the foregoing, we assess a total penalty of $34,100 for three counts of violating the asbestos NESHAP. The penalties for Counts II and IV are assessed jointly against all three Respondents. The penalty for Count III is assessed jointly against the City and Popple. Payment of the entire amount of the civil penalty shall be made within thirty (30) days of service of this Final Decision and Order, by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

U.S. EPA, Region III
Regional Hearing Clerk
P.O. Box 360582M
Pittsburgh, PA 15251

A transmittal letter identifying the case name and the EPA docket number, plus the Respondent's name and address, must accompany each check. 40 C.F.R. § 22.31(c).

So ordered.