Final

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	**)**	
	)	
Gypsum North Corporation, Inc.	**)**	**Docket No. CAA 02-2001-1253**
	)	
	)	
	)	
	)	

INITIAL DECISION

I. Introduction. This proceeding under Section 113(d) of the Clean Air Act, ("CAA"), 42 U.S.C. § 7413(d), originally involved three counts.[1] Subsequent to the June 7, 2001 filing of the Complaint, two of the counts were settled.[2] The remaining count (Count I) asserted that Respondent, Gypsum North Corporation, Inc. ("Gypsum"), violated 40 C.F.R. § 61.145(b)(1) and (b)(3)(i).[3] Those provisions require owners and operators of a demolition activity to provide EPA with written notice of intent to demolish at least 10 working days in advance of the activity. On April 10, 2002, the Court issued an Order finding, in an Accelerated Decision, that liability for Count I had been established. Accordingly, this Initial Decision concerns a single issue: the

[1]Originally, the Complaint included Frank Kearney, as a Respondent. On February 22, 2002, Counsel for Respondents filed a Motion to Dismiss all counts against Kearney. EPA then filed, on March 14, 2002, a response to the motion, stipulating that all counts be dismissed against Kearney. The Court issued an Order, dismissing Kearney as a Respondent on March 19, 2002.

[2]The Second Count, charging a failure to remove regulated asbestos-containing material ("RACM") prior to demolition, was withdrawn after Respondent "provided proof that a licensed inspector had certified that no asbestos was present before demolition, [which caused EPA to determine that] the Respondent had done all it reasonably could have to avoid demolishing a building with RACM present." EPA Post-hearing Brief at 2. Count III, involving failure to keep RACM adequately wet, was settled.

[3]Section 61.145 (b)(1) provides: "*Notification requirements.* Each owner or operator of a demolition or renovation activity to which this section applies shall: (1) Provide the Administrator with written notice of intention to demolish or renovate... ." Section 61.145 (b)(3)(i) continues the notification requirements, providing: "Postmark or deliver the notice as follows: (i)At least 10 working days before asbestos stripping or removal work or any other activity begins... ."

determination of an appropriate penalty for Count I. EPA has proposed a penalty of $17,600 for this Count. A hearing on this issue was held on April 26, 2002.

II. The evidence adduced at the hearing.

EPA called Mr. Robert Fitzpatrick, an EPA team leader with the asbestos section of the Air Compliance Branch. Fitzpatrick, who has conducted about 750 inspections for this section, supervises the receiving, inputting, coding and filing of demolition notifications. He stated that a number of factors determine whether a notification will result in an inspection. In this instance, Fitzpatrick came to the demolition site after the Hudson Regional Health Commission informed him that a demolition was occurring.[4] Fitzpatrick also was the EPA official who first calculated the penalty in this instance. He stated that he used the CAA, the Stationary Source Civil Penalty Policy, and Appendix III to that policy, the Asbestos Demolition and Renovation Civil Penalty Policy, in deriving the proposed penalty amount. Fitzpatrick stated that the Policy provides for a $15,000 penalty for a first time "failure to provide notice of demolition" violation. This amount was then increased by 10% by the Debt Collection Improvement Act, which is intended to compensate for the diminishment of penalties brought about by inflation. The $17,600 sought for this Count by EPA was derived by starting with the $15,000 directed under the Policy for all first time, failure to notify violations. To this was added $1,500, attributable to a 10% inflation adjustment under the Debt Collection Act, and another $1,100 for the "size of the violator" component.

During cross-examination, Fitzpatrick agreed that the policy provides that the process by which the gravity component is computed is to be memorialized in the case file. Fitzpatrick stated that such a calculation had been done, but did not know if this had ever been provided to the Respondent. Tr. 42. The Court also inquired whether Fitzpatrick performed this calculation and he confirmed that he did, adding that the amount could be adjusted by the regional counsel's office. Tr. 43. When asked for a third time, the witness affirmed that he did a penalty calculation in this instance and that his case file notes would reflect the original calculation. Tr. 44. Still later, the witness stated that he provided EPA counsel with his specific calculation worksheet or a memo regarding the calculation, which would have included a breakdown of the amounts sought for each count. Tr. 52-53. When shown the Complaint, Fitzpatrick agreed that it did not contain a breakdown reflecting how EPA arrived at the proposed penalty.[5]

Despite the many times Fitzpatrick confirmed that he performed the penalty calculation, on redirect examination he reversed himself, maintaining that he misunderstood all the questions

---

[4]The Hudson Regional Health Commission learned of the demolition after the Kearny Fire Department called and informed the Commission that there had been a fire at the site. Tr.26.

[5]At the hearing the parties stipulated that the prehearing exchange did not include a breakdown of the calculations that Fitzpatrick said he performed nor did it include his case file. Tr. 62.

pertaining to this issue. At that point, he admitted that actually there was no calculation breaking down the penalty computation and that, in fact, he had simply used the $16,500 figure from the policy. Tr. 79-80. Although he agreed that EPA is seeking $16,500 plus an additional $1,100 for the "size of the violator" component, and stated that the total penalty amount was set forth in the Complaint, he then backed off the assertion that the amount was listed in the Complaint, stating that the Policy provides for the additional amount attributable to the size of the violator.[6] Tr. 50.

Regarding EPA's practice of conducting inspections upon receiving the required notice of intent to conduct a demolition, Fitzpatrick stated that his office receives about fifty notifications per day, a figure which translates into about 13,000 notifications per year.[7] However, out of all those notifications, this EPA region conducts only about 50 inspections per year. Tr. 54-55.

As with EPA's case, the Respondent produced a single witness for its presentation. That witness was Frank Kearney, the former named Respondent in this matter, and the principal[8] for Gypsum North Corporation. Kearney testified that he purchased the property in question[9] for $475,000. As of the time of the hearing, there was a mortgage on the property with a remaining balance of $403,147. Kearney paid the rest of the funds for the purchase. A December 31,2001 balance sheet for Gypsum shows current cash assets as $314. R's Ex. 3. The remaining assets, consisting of the value of the land and the buildings on it, total $469,732. This is offset by liabilities totaling $502,407. *Id*. EPA did not challenge the accuracy of the balance sheet.

With respect to the circumstances surrounding the violation, Kearney testified that he first

---

[6]The Complaint is not a model of clarity with regard to the penalty sought. This is because each Count appears to state, with some finality, the dollar amount proposed. For example, Count I states: "Accordingly, EPA is proposing that a penalty of $16,500 be assessed against Gypsum North ... for failing to submit written notification to EPA prior to carrying out the demolition of the building on the Lawter Chemical site." Complaint at 10. However, after concluding the amounts sought for each count, the Complaint then adds that "EPA is proposing that an economic benefit penalty of $11,620 ... be assessed" and that it "proposes that a size of the violator penalty of $5,500 be assessed against Gypsum..." Complaint at 11-12. From the four corners of the Complaint, it is impossible to determine whether these amounts apply jointly for all the Counts, separately for each Count, or whether, somehow, these amounts were subsumed within the amounts sought for each Count. This is because nowhere does the Complaint actually total up the amount EPA proposes.

[7]Some of these notifications involve renovations, others involve demolitions. EPA's witness had no idea as to the percentage of notifications attributable to each category.

[8]Kearney owns 100% of the Gypsum North Corporation. Tr. 96.

[9]The demolition occurred at 20 Jacobus Avenue, Kearny, New Jersey.

contacted the local building department for the Town of Kearny,[10] which provided him with a "punch list" of items, as evidenced in Respondent's Exhibit 5, that had to be completed prior to obtaining a demolition permit. Item 6 from that list provides: "Before a structure can be demolished or removed, the owner or agent shall document that the requirements of U.S. EPA 40 CFR 61, subpart M have been or shall be met. A permit to demolish or remove the structure shall not be issued until the owner or agent notifies the enforcing agency that all friable asbestos or asbestos-containing material that will become friable during demolition or removal has been or will be properly abated prior to demolition."

Kearney believed that he had complied with Item 6 because:: "... when we hired the asbestos licensed person, when he issued his report that there was no asbestos on the property, when the building inspector himself came down, went through the property, and confirmed there was no asbestos on the property, [we believed] that [item] number six had been met." Tr. 108. Kearney noted that Item 6 does not inform that there is a duty to notify EPA if *no* asbestos is found. As reflected in Respondent's Exhibit 4, Kearney hired Mr. Greenwood, with E-Con Services, to perform an inspection of the property. This inspection occurred on September 20, 2000 and E-Con's report informed Kearney that no asbestos was found. *Id*. A "no asbestos" certification was issued by E-Con. Kearney then took his no asbestos certification and the other documentation required by the punch list to the Town. Thereafter the Town reviewed the papers, informed Kearney that everything was in order and, following an inspection by an official from the Town, told Kearney that he could "knock it down." Tr. 111. Exhibit R 6. Kearney, who had never had any previous dealings with EPA, acknowledged that he never sent a notification to EPA and he did not know if the Town ever sent any notification to it. On cross-examination Kearney agreed that item 6 from the punch list required Gypsum to certify that it had complied with 40 C.F.R. Subpart M, but he did not agree that he was required to notify EPA of a demolition because he interpreted the need to notify as contingent upon finding the presence of asbestos. Tr. 127. He added that this appeared to be the Town's interpretation of the notification requirement as well. *Id*.

Kearney also explained why the E-Con inspection failed to detect the presence of asbestos at the site. When inspected, the asbestos was confined within three large tanks. Each tank was encased by a steel jacket and the asbestos was beneath the jackets. During the demolition, a grappler ripped through the steel jackets, exposing the previously hidden asbestos. Kearney confirmed that E-Con had access to the entire structure during its inspection.

[10]For the curious, the Town of Kearny and Frank Kearney are not related financially, historically, or otherwise.

The Post-hearing Arguments

EPA's Brief

EPA contends that the $17,600 penalty it seeks for the Respondent's failure to notify EPA of the demolition it conducted, in violation of the Asbestos NESHAP provision at 40 C.F.R. § 61.145(b), is appropriate. That amount was calculated in accordance with the Clean Air Act Stationary Source Civil Penalty Policy ("Policy") and Appendix III to that Policy, the Asbestos Demolition and Renovation Civil Penalty Policy ("Appendix"). Using the Policy and Appendix, EPA calculated the economic benefit first, deriving $11,620 for that aspect of the penalty. It then assessed the gravity, imposing the $15,000 called for a first time "no notice" violation. Last, EPA evaluated the size of the Respondent's business, determining that its net worth was between $100,000 and $1,000,000. The figure derived from the penalty factors, except for the economic benefit calculation, is then increased by 10% to account for the Debt Collection Act of 1996. EPA Brief at 2. Later, EPA determined that the economic benefit was actually "zero," as Respondent's clean-up costs were more expensive than the costs it would have incurred had the asbestos been detected before the demolition started. EPA also determined that the second count, involving the failure to remove regulated asbestos containing material ("RACM") before demolition, should be dropped because "a licensed inspector had certified that no asbestos was present before demolition, [and] thus the Respondent had done all that it reasonably could have to avoid demolishing a building with RACM present." *Id*. After examining the Respondent's balance sheet, (R's ex. 3), EPA decided to reduce the size of the violator component to $2200.

EPA then related the terms of its settlement with Respondent regarding Count III, declaring that half the size of the violator component (i.e. $1,100) would be built into the settled penalty for that Count. EPA Br. at 2. It also asserts that "[i]t was agreed between the parties that the other $1,100 would be part of the judgement (sic) of this Court, in the penalty to be paid here." EPA states there was no written memorial regarding this for Count I "because the penalty amount, $16,500, was taken directly from Complainant's Ex. C-14, at page 15." Thus, after adding in $1,100 for the size of the business component, EPA continues to maintain that the $17,600 proposed penalty is appropriate.

Referring to the Policy Appendix, EPA maintains that a high gravity penalty may be warranted, as "notification is essential to Agency enforcement." Faced with the fact that the Agency rarely inspects upon receiving these notifications, EPA contends that the penalty must still be high "to act as a deterrent." It asserts that "[b]y notifying, one puts their activity into the spotlight, and no matter how small the odds are that one will actually be looked at, knowing that it is possible moderates their actions." *Id*. at 3.

As applied here, EPA submits that there is no evidence that Respondent would not be able to continue in business if assessed a large penalty. Beyond that contention, EPA suggests that it is Kearney, as the sole shareholder and the operating officer of Gypsum and another company, who is paying all the bills and that Gypsum was established only to hold title. Regarding Gypsum's

good faith, EPA admits that it showed "limited good faith" because it paid for an asbestos inspection and completed most of the items on the Town's punch list. It views this good faith as limited, however, because "it did not ask its hired and licensed abatement contractor if it should notify EPA of the upcoming demolition, and it did not correctly read ... [the] demolition checklist ... that 'the requirements of USEPA 40 CFR 61, Subpart M have been or shall be met.', and that a permit will not be issued until 'the owner notifies the enforcing agency that all friable asbestos ... has been or will be abated." *Id*. at 4. Last, citing decisions by other administrative law judges involving TSCA, EPCRA and pesticide violations, EPA rejects Gypsum's argument that the violation consists of a 34 cent stamp. It maintains that the fact that EPA rarely inspects does not mean that the violation is insignificant because failure to notify deprives the Agency of necessary information and consequently weakens the statutory scheme.

In reply to EPA's brief, Gypsum contends that EPA's economic benefit analysis is unsubstantiated, apparently overlooking that the Agency reevaluated this aspect shortly before the hearing and determined that the economic benefit was zero.[11] *See* EPA Br. at 2. Gypsum also challenges EPA's assertion that the parties had agreed on $1,100 as the size of the violator figure for Count I. It observes that the settlement letter pertaining to the other Counts makes no reference to such an agreement. The Court notes that the April 18, 2002 letter, a copy of which was attached to Gypsum's Reply Brief, supports Gypsum's contention as it only indicates a total settlement figure for the remaining Counts.

Last, Gypsum contends that an analysis of the statutory penalty factors supports its view that no additional penalty should be imposed beyond the amount already settled for the other counts. It asserts that the 'size of the business' reveals that Gypsum has no assets or income and that the corporation is in significant debt. It adds that EPA's contentions about its 'ability to pay' are misplaced as that is not a statutory factor in these cases. Regarding Gypsum's good faith, it notes that EPA concedes that it attempted to comply with the regulations by retaining an inspector and by completing the items on the list provided by the Town of Kearny before demolition started. Addressing the seriousness of the violation, Gypsum notes that if it had notified EPA before the demolition, the outcome would have been the same, as EPA concedes that it would not have had an inspector visit the property. Gypsum Reply at 4. It contends that this demonstrates that the notice violation was not serious as compliance would not have produced any actual consequence.

[11]Although, in the Court's view, the issue of economic benefit became moot, for the sake of completeness Gypsum's arguments are summarized. Respondent contends that EPA's calculation is based on the estimate of the quantity of asbestos listed in the Notice of Abatement Form which was created by E-Con Services, Gypsum's asbestos abatement company. However, Gypsum notes that the document was never made part of the record and that, in any event, the form does not identify the material as RACM.

Gypsum's Brief

Gypsum notes that neither the Complaint nor the explanation of the proposed penalty detail how the calculation was derived. It contends that the Complaint merely declares that EPA is seeking a $16,500 penalty for Count I. In addition, although EPA seeks an additional $1,100 for the "size of the violator" component, Respondent argues that this component is only referenced for Counts II and III. It also notes that EPA later conceded that it had overestimated the size of Gypsum.

Respondent believes that the circumstances surrounding the proposed penalty warrant the Court's deviation from the penalty policy and a penalty assessment based on the statutory penalty criteria found at 42 U.S.C. § 7413(e). Proceeding to address those criteria, it notes, regarding the size of the business, that Gypsum had not yet begun to operate. Its balance sheet shows no positive balance and EPA offered no evidence to suggest that it had revenues at the time of the hearing. In terms of the economic impact of the penalty, EPA has conceded that the clean-up costs exceeded the costs it would have incurred had the asbestos inspector detected the asbestos. As to its compliance history, EPA acknowledges Gypsum has no prior violations. Regarding Gypsum's good faith efforts to comply, it notes that it retained a licensed asbestos abatement contractor and that it relied upon that company's report that there was no asbestos. Frank Kearney testified that he had no idea that there is still a duty to notify EPA when property is certified to be free of asbestos. Gypsum's counsel contends that it is a reasonable interpretation of the regulation to conclude that the duty to notify EPA does not exist where no asbestos is found. It contends that the words "less than" in 40 C.F.R. § 145(a) means that at least *some* asbestos must be found in order to trigger the reporting requirement. Last, when the asbestos was discovered, Gypsum stopped the demolition immediately and did not resume that activity until all approvals were obtained.

Speaking to the "duration of the violation" criterion, Gypsum notes the failure to notice is not a "continuing" violation. As the Respondent has no prior violations, there have been no penalties paid for previous violations of the same regulation. Nor did Gypsum realize any economic benefit from noncompliance. The cost of compliance with this regulation was the cost of a first-class stamp.

Addressing the seriousness of the violation criterion, Gypsum asserts that its failure had no practical effect because EPA only carries out about fifty inspections per year. It notes that "EPA does nothing in response to over 99% of the demolition notifications it receives." Gypsum Br. at 9-10. It also notes that had the notice been sent, it would have informed EPA that no asbestos was found. EPA acknowledged that only a small number of those notifications reporting "no asbestos" are among the fifty inspections it conducts.

Gypsum believes that, in similar situations, EPA has sought much smaller penalties. It points to *In the Matter of LVI Environmental Services, Inc.*, 2000 WL 968318 (EPA) ("*LVI*") as an example. While *LVI* sent a notice to EPA, it was not received until after demolition had begun.

Thus it argues that the practical effect was the same because EPA did not have the opportunity (statistically remote as it was) to inspect. Under those circumstances, *LVI*'s penalty was only $2,160. Gypsum also contends that the a reduced penalty is appropriate in no notice situations because it is a procedural violation which does not present potential health dangers. It notes that in *Testa Excavating Co.*, 1995 WL 265077 (EPA) the court imposed a $5,000 fine for each violation of the same notice requirement involved in this case and that the fine included a size of violator component.[12]

Addressing the "other factors"[13] element, Gypsum contends that EPA's effort to seek a penalty representing over 70% of the statutory maximum is inappropriate where the violation is not egregious, knowing or intentional. It contends that insufficient consideration has been afforded to the fact that it relied upon E-Con in this matter. Further, it believes that the language of the regulation was not used in the usual sense, creating uncertainty about its obligations, and the Town of Kearny's issuance of the demolition permit led Gypsum to believe that it was in full compliance. Last, Gypsum believes that the "size of the violator" component does not apply to Count I because that component was only discussed following the penalty discussion for Count III. *Id*. at 12.

EPA, in reply, emphasizes that it withdrew Count II because it determined that Respondent, armed with the survey that no RACM was present, believed that to be the case. It reiterates that it decided to drop any claim of economic benefit for the Respondent.

Speaking to the appropriate penalty, it explains that it "did not break down the penalty from $16,500 because there were no factors to consider except Respondent's good faith efforts to comply....[and that the] penalty policy calls for $16,500 as the penalty to plead for failure to notify." While Gypsum cites to *LVI*, EPA contends that the judge in that case did not deviate from the policy. Rather that court determined that as a renovation, as opposed to a demolition,

---

[12]*Testa* involved two counts for failure to provide the demolition notice. As a default decision, it therefore acted as an admission that the facts in the complaint were true, and offered nothing in terms of the substantive violation. Originally EPA had sought a $32,000 penalty but reduced the proposed penalty to $5,000 for each violation and another $2,000 for the "size of the violator," upon determining that there had been "no notice but probable substantive compliance." Ultimately while *Testa* paid a total penalty of $10,000, the reduction was based on information the respondent provided concerning the nature of the violation, the respondent's size, and because EPA settled with the other respondent, an individual who was named in the complaint, who agreed to a $2,000 penalty. Because the penalty in *Testa* was based upon the respondents' probable substantive compliance, it is not useful to the penalty analysis here. 1995 WL 265077. Docket No. CAA I - 92 - 1061, March 28, 1995

[13]Gypsum also argued that its penalty should be halved because originally the Complaint named Frank Kearney personally along with Gypsum. The Court rejected that contention at the hearing, noting that liability is joint and several. Tr. 15.

was involved and as the notice did arrive before that work was completed, the $2,000 called for under the Policy was appropriate.[14] While Gypsum cites to *LVI*, EPA contends that the judge in that case did not deviate from the policy.[15] It also distinguishes the Gypsum facts from those in *CDT Landfill Corporation*, Docket No. CAA 5-99-047, because in this case it did modify the size of violator component, determined there was no economic benefit, settled one count and dropped the other. Further, it asserts that the permit application for the Town of Kearny stated that Gypsum "should comply with 40 C.F.R. 61.145, Subpart M.." While conceding that "EPA has not the manpower to inspect even a small portion of the demolition notices it receives," it still asserts that notifications "are the backbone of the asbestos enforcement scheme..." EPA Reply at 2.

---

[14]EPA notes that the Policy provides, at page 15 of Exhibit C-14, for a $2,000 penalty.

[15]In *LVI*, the Respondent submitted a "courtesy" notification of NESHAP renovation and demolition activities a day before it began the work. Thus, it did not provide the required 10 working days of advance notice. Beyond that, the notification had other deficiencies. Following an asbestos NESHAP inspection, respondent submitted a revised notification, which complied with the notification requirements. The complaint also charged the respondent with a failure to keep RACM adequately wet. EPA sought a total penalty of $34,280 for the two counts, but the judge assessed a total penalty of $9,160. Of that $9,160, the judge ascribed $2,160 for the failure to notify violation.

While EPA is literally correct, since the judge stated that "the record support[ed] use of the [CAA Policy and the Asbestos Policy] as a basis for determining the penalty amount," it is difficult to determine how the judge actually applied those policies in arriving at the penalties he imposed. Initial Decision at 18. 2000 WL 968318 (EPA ALJ). The judge determined that a notification submitted after an inspection, while not very useful, still suggested good faith efforts to comply. On that basis the judge considered the late submission as evidence of good faith, which was required to be considered under Section 113(d). The judge concluded that respondent's initial courtesy notice, as a "late" notice, qualified it for the $2,000 gravity assessment, even though that first notice had other deficiencies. He also concluded that the respondent's efforts to come into compliance after the violation was identified were "extraordinary" and warranted a "slight" gravity mitigation. To the gravity assessment the judge added $200 for failing to include a building inspector's certification in the notification and $200 for submitting the notification late and then reduced the total by 10 percent "for Respondent's prompt submittal of the revised Notification after the inspection."

When the judge addressed the size of business criterion, he determined, in contrast to EPA's assessment that the Respondent had 2.9 million in equity, that it had a negative net worth. On that basis the judge assessed a $2,000 penalty for size, as called for under the penalty . The judge also disagreed with EPA's determination that the respondent gained an economic benefit from noncompliance with the requirement that asbestos be kept wet. The upshot of this discussion is the Court's conclusion that *LVI* is not useful to the penalty discussion in for this case.

Discussion

Application of the Penalty Policy

As reflected above, in performing the penalty calculation under the Policy, Mr. Fitzpatrick asserted several times that he had made a such a calculation, and that it was memorialized in the case file.[16] He agreed that the process by which the gravity component is calculated must be part of the case file. Indeed, the Policy expressly provides that this be done: "The process by which the gravity component was computed must be memorialized in the case file." CAA Stationary Source Civil Penalty Policy at 15. EPA ex. 13. On redirect, he contradicted himself, and admitted that no such calculation had been made. Instead, he simply adopted the Policy's direction that a first time violation of the Section 61.145(b) notice violation receives a $15,000 gravity component.[17] Appendix III to Policy at 10.
Tr. 79-80.

Despite the Policy's direction that "it is essential that each case file contain a complete description of how each penalty was developed ... [and that this] should cover how the preliminary deterrence amount was calculated and any adjustments...," this did not occur in this instance, even though the Policy also provides that "[o]nly through such complete documentation can [the Agency] promote the fairness required by the Policy on Civil Penalties." Policy at 31.

Although EPA counsel argued that the Policy already factors in each penalty element, it is clear that no individualized calculation occurred. The process applied was simply that a first time failure to notify violation receives a $16,500 penalty. As Fitzpatrick conceded, there is no calculation at all. A "no notification" gets a $16,500 penalty. The witness agreed with the Court's observation that a "subhuman" could perform the "calculation" because every time there's a first time no notice violation, one gets a $16,500 penalty. Tr. 88. As he lamented: "Basically my hands are tied. It's taken out of my jurisdiction. I could not adjust [the amount] up or down based on this penalty policy." [18] Tr. 84.

---

[16]As one example, Fitzpatrick initially testified that he gave EPA counsel his specific calculation worksheet or a memo regarding his penalty calculation and that this included a breakdown of the penalty amounts. Tr. 52-53.

[17]As mentioned, the $17,600 sought by EPA is derived by starting with the $15,000 directed under the Policy. To this is added $1,500, attributable to a 10% inflation adjustment under the Debt Collection Act, and another $1,100 for the "size of the violator" component.

[18]Fitzpatrick did identify a single situation where less than $15,000 could be imposed. The Policy permits a $5,000 penalty where there is no notice, but probable substantive compliance. Appendix at 15. Tr. 87-88. He did not explain how one can fail to provide notice, yet have "probable substantive compliance. In any event, Fitzpatrick said it did not apply in Gypsum's

Because the Policy operated as an edict, affording no individualized assessment of the particular facts surrounding the violation, it failed to comport with the statutory command that the penalty criteria be considered. Accordingly, the Court departs from the Policy and looks to the statutory criteria to determine an appropriate penalty. The statutory penalty criteria to be considered are: "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 ..., payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation." 42 U.S.C. §7413(d).

Gypsum's full compliance history reveals that it had no prior environmental violations. Consequently, there is no payment for penalties for the same violation. Regarding the size of the business and the economic impact of the penalty on the business, it is clear that Gypsum falls in the smallest category, with a net worth of less than $100,000. Policy at 14. However the Policy fails to gradate businesses below that level. In this instance, as reflected by Gypsum's December 31, 2001 balance sheet, its liabilities exceeded its assets. Ex. R-3. While EPA originally assumed that Gypsum's net worth was between $100,001 and $1,000,000 for purposes of evaluating the Respondent's size, it never formally modified the size of the violator penalty when it was determined that Gypsum fell into the Policy's lowest category. Thus, the Complaint, per the Policy, called for $5,500 for the "size of the violator" penalty amount.[19] Instead, at the hearing, EPA sought $1,100 for this element. This figure was derived in a most unusual manner. Prior to the hearing, EPA recognized that the Policy calls for a $2,200 penalty for the size of business where the net worth is under $100,000. It then contended that, because it had settled one of the three Counts for half that amount, $1,100 should also apply to the remaining, disputed, Count.[20]

The Court rejects EPA's contention that it should look to its contentions regarding the settlement of one count to determine the size of the business for another count. Generally, a settlement agreement on one matter should not be taken into account in calculating the penalty

---

case.

[19]The Complaint is not a model of clarity regarding the penalty sought for the size of the business. It relates only that the "size of violator penalty shall be $5,500 for violators with a net worth in [the $100,001 to $1,000,000] range. Accordingly, EPA therefore proposes that a "size of violator penalty of $5,500 be assessed against Gypsum North and Kearny." Complaint at 12. One cannot determine, or even deduce, from the Complaint whether the $5,500 applies to *each* Count or *as a total amount* for all three Counts. The language does not make this clear and, because there is no grand total amount stated anywhere in the Complaint, one can not work backwards to conclude that EPA was seeking the $5,500 for each count.

[20]EPA contended that Respondent had agreed to this formulation. Respondent's counsel denied there was such an agreement. On this record there is no basis to make a conclusion on this issue.

amount on a non-settled matter. WRIGHT AND MILLER, 23 FED. PRAC. & PROC. EVID. § 5302. If the terms of settlement agreements could be used against the parties in non-settled cases (or counts), that would discourage settlements. *See id.*

The Consolidated Rules of Practice, which incorporate Rule 408 of the Federal Rules of Evidence, precludes admission of settlement agreements. While all evidence which is relevant, material, reliable, and of probative value is to be admitted, this does not include:

> ... evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) ...

40 C.F.R. § 22.22(a). Rule 408 of the Federal Rules of Evidence sets forth that:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, *is not admissible to prove liability for or invalidity of the claim* ***or its amount***. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations... .

(Emphasis supplied.)

Decisions in previous EPA administrative law cases have read the clear language of Rule 408 to exclude information regarding the penalty amounts reached in settlement agreements. In the *Newell Recycling* case, the judge had held both Newell Recycling and Oklahoma Metal Processing Co. d/b/a/ Houston Metal Processing Co. ("HMPC") liable but had not yet assessed a penalty. *In the Matter of Oklahoma Metal Processing Co, Inc. d/b/a/ Houston Metal Processing Co. and Newell Recycling Co, Inc.*, TSCA Docket No. VI-659C, 1997 EPA ALJ LEXIS 41, at *1 (ALJ, "Decision on Complainant's Motion for Assessment of Civil Penalty," Oct. 7, 1997), *aff'd sub nom In re Newell Recycling Co, Inc.*, 8 E.A.D. 598, 639-42 (EAB 1999), *aff'd*, 231 F.3d 204 (5th Cir. 2000), *cert. denied*, 122 S. Ct. 37 (2001). Then HMPC reached a settlement agreement with EPA but the penalty amount in the agreement was not disclosed to the Court. *Id.* That left Newell Recycling as the sole remaining, non-settling, respondent. EPA then filed a motion for assessment of a civil penalty against Newell. *Id.* In response, Newell argued that the penalty amount reached in the settlement with HMPC was relevant to the Court's determination of the appropriate penalty for Newell. *Id.* at *19.

In determining the penalty amount for the overall case, the judge relied, *inter alia*, upon Section 22.22(a) of the Rules of Practice and Rule 408 of the Federal Rules of Evidence. *Id.* at *19-22. He stated, "Settlement offers or terms are not indicative of, and should not be used as evidence of, the amount of the appropriate penalty in a proceeding to determine a

penalty." *Id.* at *19-20. On that basis he refused to consider the specific penalty amount reached in the HMPC agreement. *Id.* at *21-22. The ALJ issued a penalty order in the case and ruled that Newell would pay that amount minus whatever amount HMPC had agreed to pay. *Id.*

On appeal to the EAB, Newell argued that the ALJ abused his discretion by refusing to take into account the specific penalty amount of the settlement agreement in making his determination of a fair and appropriate penalty. 8 E.A.D. at 640. The EAB affirmed the judge's decision, holding that Rule 408 "[E]xpressly bars the use of settlement evidence to prove the 'amount' of a claim." *Id.* at 641. The EAB also agreed that it "'makes sense' to conclude that 'negotiated settlements with the agency cannot be compared to penalties imposed by an administrative law judge after hearing.'" *Id.* at 641 n.30.[21]

Accordingly, the Court finds that the settlement on another count has no place in evaluating the size of the business component for Gypsum. It is also determined that, given the present marginal worth of Gypsum, this penalty component should be nominal. Because Gypsum was not, as of the hearing, realizing income, the economic impact of any penalty would be especially adverse. Further, the Court rejects EPA's suggestion it should consider that Kearney has the money to pay the penalty by its reference to Kearney as the sole shareholder and operating officer of Gypsum and another company, and by its assertion that Gypsum was incorporated only to hold title. Apart from a lack of record evidence to support these claims, EPA is attempting to reinsert Kearney, personally, into the complaint. In so doing EPA is ignoring that it agreed to dismiss all counts against Kearney. It cannot now try to look to Kearney.

In terms of the "economic benefit of its noncompliance," EPA has conceded that Gypsum realized no benefit whatsoever. In fact, because its asbestos inspector did not detect the presence of asbestos, Gypsum incurred clean-up costs that exceeded those it would have faced had the inspection found the asbestos. The duration of the violation is reflected by Gypsum's failure to give the requisite 10 days notice in advance of its demolition.

Left for consideration are the seriousness of the violation, Gypsum's good faith efforts to comply, and other factors as justice may require. While failing to provide the requisite 10 day advance notification of intention to conduct a demolition is serious, one cannot completely ignore that, in practice, EPA seldom makes use of the advance notice to conduct an inspection. Because other regulations address related asbestos demolition problems, such as assuring that all RACM is removed prior to the demolition and that such RACM is kept wet, the apparent purpose of the notification provision is to allow EPA the opportunity to checkout the site in advance of the demolition. Although EPA has tried to deflect attention

---

[21] *See also In re Briggs & Stratton Corp.*, 1 E.A.D. 653, 666 (JO 1981), *cited in Newell Recycling*, 8 E.A.D. at 641 n.30 (concluding that one cannot make useful comparisons between payments made in settled cases and penalties assessed in litigated cases).

from this, by maintaining that notification "puts [the regulated communities'] activity into the spotlight" and that the requirement "moderates [the regulated communities'] actions" even though the odds of an inspection are small, the only action this regulation impacts is the duty to notify. Thus, with no substantive action regarding asbestos addressed by this regulation, and with EPA's very rare use of the notifications to conduct an inspection, it is hard to accept that notification represents "the backbone of the asbestos enforcement scheme."

This conclusion is supported by the regulatory record. In 1990 when EPA regulators adopted the revised asbestos NESHAP, a uniform 10-day notice requirement was applied to both demolition and renovation. Asbestos NESHAP Revision, Including Disposal of Asbestos Containing Materials Removed From Schools, 54 Fed. Reg. 902, 915 ("Proposed Rule," Jan. 10, 1989), *codified at,* 40 C.F.R. § 61.145(b) (current version).[22] At that time EPA stated that the change to the 10-day rule was intended to promote notification and increase compliance and that it was expected to improve compliance because it is simpler and easier to understand. *Id.* It acknowledged that the purpose of prior notice in general was to give enforcement personnel the opportunity to observe removal operations at demolition and removal sites:

> Further, § 61.145(b) is amended by prohibiting asbestos removal at demolitions and renovations from starting on any date other than the one contained in the applicable notification. The purpose of this amendment is to allow enforcement personnel to observe removal operations at demolition and renovation sites. This requirement is needed because some asbestos removal operations are completed before the starting dates specified in the notification, precluding inspections for compliance by enforcement personnel.

Id.

It stated that notice of the specific *date* of the renovation or demolition and re-notification when the planned date changes was necessary in order to avoid waste of enforcement resources resulting from visits on a date when the demolition or renovation is not ongoing:

> Nor does EPA wish to make useless visits to jobs that have been rescheduled because a written renotification of a change in start date was not received in time.

National Emission Standards for Hazardous Air Pollutants; Asbestos NESHAP Revision, 55 Fed. Reg. 48406, 48412 ("Final Rule," Nov. 20, 1990), *and cited by, In re Schoolcraft Constr., Inc.,* 8 E.A.D. 476, 484 (EAB 1999). Thus, clearly the notice provision contemplates that enforcement authorities will use such

---

[22] The new, "uniform" rule also allows for notification one (1) working day *after* commencing the demolition or renovation at the facility, if that activity was required due to certain emergency situations, such as when a building is in danger of imminently collapsing. 40 C.F.R. § 61.145(b)(3)(iii) (current version).

notices in order to know when to be at a job site so as to observe work practice procedures and determine whether there is compliance with the law.

The Ninth Circuit, in *United States v. Trident Seafoods Corporation*, agreed that the purpose of prior notice is to enable enforcement authorities to monitor asbestos removal and assure effective compliance with the asbestos work practice rules under the NESHAP:

> The district court acknowledged the ambiguity of the regulatory scheme and the lack of case law, and turned to an examination of the policy considerations underlying the Clean Air Act. The court determined that "the self-evident purpose of notification [is] to enable the enforcement agency to monitor asbestos removal and assure effective compliance with work rules." The court reasoned that "[o]nce the renovation is completed, it may be impossible to determine whether or not proper methods were employed." The conclusion that only timely notice assures compliance is unassailable, and thus we have no quarrel with the district court's analysis of the policy considerations supporting advance notification.

60 F.3d 556, 558-59 (9th Cir. 1995).

Apart from this observation, in the context of what transpired here, it is significant that EPA decided it could not hold Gypsum accountable for the most serious of the three counts --- the failure to remove the RACM prior to the demolition. It withdrew that count because it recognized that the wealth of the blame rested with E-Con services and its erroneous determination that no asbestos was present at the site. It is inconsistent and unfair, given EPA's acknowledgment of the failure by the asbestos firm, to still hold Gypsum fully responsible on the notification count. Given the myriad regulations faced by the regulated community, in assessing a penalty some credit must be afforded when the specialists fail to advise of, assist in or actually carry out the notification requirement for the client. Although the regulation places the burden on the owner or operator, in terms of a penalty, there must be some recognition that there is reliance that the specialists will guide people through the regulatory maze.

Certainly Gypsum acted in good faith. The Court rejects EPA's perspective that Gypsum had the duty to ask the abatement contractor "if it should notify EPA of the upcoming demolition." Similarly, it is too harsh to claim limited good faith on Gypsum's part because it "did not correctly read ... [the]demolition checklist..." The text of that item on the checklist provides:

> 6) Before a structure can be demolished or removed, the owner or agent shall document that the requirements of USEPA 40 CFR 61 subpart M have been or shall be met. A permit to demolish or remove the structure shall not be issued until the owner or agent notifies the enforcing agency that all friable asbestos or asbestos-containing material that will become friable during demolition or removal has been or will be properly abated prior to demolition.

R's ex. 5.

Under a fair reading of this requirement, one could reach the conclusion that if no asbestos is found, there is no need to notify EPA. This is especially so given the small size of this respondent, its lack of previous engagement with EPA, including the absence of any prior violations and its reliance on the licensed inspector's certification that no asbestos was present.

Thus, having gone before the local authority, followed the punch list and hired a certified asbestos inspection company, Gypsum acted responsibly, albeit imperfectly, in attempting to comply with the regulatory authorities. Given that conduct, the Court views it as inconsistent for EPA to acknowledge that the "Respondent had done all that it reasonably could have to avoid demolishing a building with RACM present" for Count II, while ignoring those same actions for Count I. Further, even if one were to conclude that these circumstances do not neatly fit within the evaluation of the seriousness of the violation or the respondent's good faith efforts to comply, they do merit consideration, as expressed by Congress, as part of "such other factors as justice may require." Having considered each of the statutory factors, as described above, the Court concludes that a $1,000 penalty is appropriate for this violation.

ORDER

A civil penalty in the amount of $1,000 (One Thousand Dollars) is assessed against the Respondent, Gypsum North Corporation, Inc. Payment of the full amount of the civil penalty assessed shall be made within 30 (thirty) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c). Payment shall be submitted by a certified check or cashier's check made payable to the **Treasurer, United States of America** and mailed to:

United States Environmental Protection Agency
Region II
Regional Hearing Clerk
Mellon Bank
P.O. Box 360188 M
Pittsburgh, PA 15251

A transmittal letter identifying the subject case and the EPA docket number, plus the Respondent's name and address must accompany the check. Failure of the Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty.

Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order 45 (forty-five) days after its service upon the parties and without further proceedings unless (1) a party moves to re-open the hearing within 20 (twenty) days after service of the Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the EAB is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.30(a), within 30 (thirty) days after the Initial Decision is served upon the parties; or (3) the EAB elects, upon its own initiative, under 40 C.F.R. § 22.30(b), to review the Initial Decision.

_____

William B. Moran
United States Administrative Law Judge

Dated: November 1, 2002