UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

Ocean State Asbestos Removal, Inc. / Ocean State Building Wrecking and Asbestos Removal Co., Inc.,

Respondents

Docket No. CAA-I-93-1054

INITIAL DECISION

Dated: January 24, 1997

Clean Air Act: The Respondent, Ocean State Building Wrecking and Asbestos Removal Co., Inc., is assessed a civil penalty of $12,500 for inadequately wetting asbestos stripped from a demolition project, in violation of the Asbestos National Emissions Standard for Hazardous Air Pollutants, 40 CFR §61.145(c)(6)(1) , promulgated pursuant to the Clean Air Act §112(d), 42 U.S.C. §7412(d).

Appearances:

For Complainant:

Hugh W. Martinez, Esq.
U.S. EPA, Region 1
Boston, Massachusetts

For Respondent:

Fred J. Volpe, Esq.
Mosca and Volpe
North Kingstown, Rhode Island

Proceedings

The Region 1 Office of the United States Environmental Protection Agency (the "Complainant" or "Region") filed a Complaint on March 31, 1993 against Ocean State Asbestos Removal, Inc. , of Cranston, Rhode Island. The Complaint charged Respondent with one count of failing to adequately wet regulated asbestos-containing material ("RACM") in violation of the Clean Air Act ("CAA")§112(d), 42 U.S.C. §7412(d), and the National Emissions Standards for Hazardous Air Pollutants ("NESHAPS"), 40 CFR §61.145(c)(6)(1).

As amended the Complaint seeks to assess a civil penalty of $25,000 against Respondent, pursuant to the CAA §113 (d) , 42 U.S.C. §7413(d). The Complaint was also amended to add as a respondent the Ocean State Building Wrecking and Asbestos Removal Co., Inc. ("Ocean State" or "Respondent"). Respondent's Answer denied the material allegations of the Complaint and contested the amount of the proposed civil penalty.

The administrative hearing convened before Administrative Law Judge Andrew S. Pearlstein on March 12, 1996 in Boston, Massachusetts. Complainant presented three witnesses, while Respondent elected not to present any direct case. The transcript of the hearing consists of 256 pages, and 17 exhibits were received into evidence. The parties each submitted post-hearing briefs and reply briefs. The record of the hearing closed on June 6, 1996upon the ALJ's receipt of the reply briefs.

FINDINGS OF FACT

The Respondent, Ocean State Building Wrecking and Asbestos Removal Co., Inc. is a corporation organized under the laws of Rhode Island. Its office is located at 1730 Pippin Road, Cranston, Rhode Island. Ocean State Asbestos Removal, Inc., located at the same address, ceased doing business in December 1990, and had its Certificate of Incorporation revoked by the Rhode Island Secretary of State in June 1993.(Ex.1).[1]

On July 15, 1992, Respondent filed a Notification of Demolition and Renovation with the Region for a renovation project at the Roger Williams Junior High School in Providence, Rhode Island (the "school" or "facility") . The notice

stated that Respondent intended to remove approximately 2675 linear feet of RACM from pipes in the school. The notice erroneously listed the removal contractor as Ocean State Asbestos Removal Co. Inc., instead of the current corporation, Ocean State Building Wrecking and Asbestos Removal Co., Inc. (Ex. 2).

On the morning of August 27, 1992, William A. Osbahr, a compliance inspector with the Region's Air Division, met with an inspector for the Rhode Island Department of Health, Louis Geremia, in Providence, Rhode Island, to conduct scheduled inspections of facilities. In response to a telephoned tip previously received by Mr. Geremia, they first went to the Roger Williams Junior High School to inspect the Ocean State asbestos removal job.

Upon arriving at the school, the inspectors waited for a time for the project supervisor to appear. They then spoke with David Macaruso, who identified himself as a supervisor. The job appeared to be nearly complete, as almost all the pipe lagging had been removed and placed in polyethylene plastic bags. Mr. Osbahr asked to see the dumpster at the rear of the building where the bags were placed while awaiting transfer to a disposal site. Michael Macaruso, the chief supervisor of the job for Ocean State then appeared on the platform adjacent to the dumpster. (Ex. 4).

The dumpster was about 90% filled with at least 60 poly bags containing debris from the renovation job. Mr. Osbahr randomly chose two bags from the dumpster for inspection. One, judging from its weight and feel, did not contain any RACM. The second bag was very light, and Mr. Osbahr opened it. It contained about a cubic foot of white, soft, crumbly, friable material that appeared to be RACM pipe lagging. It was completely dry, and there was no evidence of water in the bag. The bag had been sealed with duct tape and did not have any visible holes. Mr. Osbahr took a sample of the material inside the bag. Later laboratory analysis confirmed that the material was RACM, with a chrysotile asbestos content of 35%. (Exs. 3, 4, and 8).

The inspectors then returned to the school, and entered the containment area where the stripped pipe lagging had been bagged. Six sealed bags remained in the containment area. Mr. Osbahr randomly chose two bags for inspection. One contained apparent RACM pipe lagging that was adequately wet. The other contained about one and one-half cubic feet of white, soft, crumbly material that appeared to be RACM pipe lagging. It was completely dry and there was no evidence of water in the bag. Mr. Osbahr took a sample of the material inside

that bag. Later laboratory analysis confirmed that the material was RACM, with a chrysotile asbestos content of 30%. (Exs. 3, 4, and 8).

After finding the bags with dry RACM, Mr. Osbahr asked an Ocean State worker to wet the material before resealing the bags. A water hose was available in the containment area for that purpose. Mr. Osbahr then observed Ocean State workers wetting the last of the pipe lagging as it was being placed in about six more bags at the end of the tunnel to the steam pipe area. (Ex. 4, p. 5).

Mr. Osbahr then informed Michael Macaruso that he had found two bags apparently containing dry RACM. Mr. Macaruso replied that he was aware that the material was required to be wetted, and that he had so instructed his crew. He also commented to the effect that some workers may have been in a rush and neglected to wet the material before bagging it. (Exs. 4, 7; Tr. 55).

During his inspection, Mr. Osbahr observed several instances of what he considered to be negligent work practices. The vacuum pumps for the negative air pressure system were venting into the school building through ducts from the containment area, rather than to the outdoors. He also observed workers not properly suited up in the containment area; a worker with a beard that prevented his respirator from fitting properly; and a worker leaving the area without showering. (Exs. 4, 7; Tr. 25-30).

The Region issued Respondent an Immediate Compliance Order ("ICO") on March 25, 1993 based on the inspection by Mr. Osbahr of the Roger Williams renovation job on August 27, 1992. The ICO ordered Ocean State to comply with the Asbestos NESHAP in the future. It also warned that issuance of the ICO did not preclude the Region from undertaking further enforcement action based on the findings stated in the Order. (Ex. 6).

Complainant had previously issued an ICO to Ocean State on August 29, 1990 that found Respondent had not filed a prior notification of a demolition project at a McDonald's restaurant in Johnston, Rhode Island, as required by 40 CFR §6l.145. Respondent had subcontracted the demolition work from the general contractor, who had first been contacted by the Region. No asbestos or RACM was found in the McDonald's project. Unlike in the instant proceeding, that ICO was not followed by any further enforcement action to assess a civil penalty. (Exs. 10-14, 17).

The failure to adequately wet asbestos-containing material greatly increases the risk that asbestos fibers could be emitted into the atmosphere. People

inhaling asbestos fibers are subject to an increased risk of contracting lung diseases, including asbestosis, mesothelioma, and lung cancer. (Tr. 180-183).

Respondent has the ability to pay the proposed penalty. (Ex. 1, p. 9).

DISCUSSION

Liability

The parties stipulated to the jurisdictional elements of the alleged violation. Ocean State was an operator of a renovation project that involved the stripping of more than 260 linear feet of RACM, and was thus subject to the Asbestos NESHAPS. The Respondent is charged with violating 40 CFR §61.145(c)(6)(i) which states as follows:

"For all RACM, including materials that have been removed or stripped: (i) Adequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with §61.150."

That section, 40 CFR §61.150(1)(iii), in turn requires that after wetting, the RACM be "seal[ed]...in leak-tight containers while wet."

The testimony and evidence supplied by the Region's inspector, Mr. Osbahr, amply demonstrated that Respondent violated this requirement of the Asbestos NESHAP by inadequately wetting RACM and ensuring that it remained wet until disposal. Mr. Osbahr's testimony of his observations in discovering the dry RACM were consistent with the contemporaneous evidence consisting of his notes and inspection report (Exs. 7 and 4), as well as with the observations of the laboratory technician who performed the tests for asbestos content, Howard Davis.

Significantly, Respondent presented no direct case, and therefore no evidence whatsoever to contradict these facts. Michael Macaruso, Ocean State's foreman and the lead witness listed in its prehearing exchange, was present during Mr. Osbahr's inspection. He was available and present throughout the hearing, but did not testify. The failure of a party to present exculpatory evidence in these circumstances provides a basis to draw an inference that the facts do not support its position. In this case, that means that there is no basis to find that the RACM in those two bags was adequately wetted at any relevant time. In addition, Mr. Macaruso failed to refute Mr. Osbahr's testimony that Mr.

Macaruso admitted that some bags may have been inadvertently not wetted by some of Ocean State's workers.

Respondent contends that, since Mr. Osbahr did not observe the RACM at the time it was actually first bagged, Complainant cannot prove it was not adequately wet at that time. This argument must fail for two reasons. First, as Mr. Osbahr further testified, the bags were sealed and airtight. If the material had been wet when bagged, it would still have been wet when he opened the bags. The elementary principle of evaporation was explained by the Region's witnesses and unrefuted.

Further, it is enough to find a violation if the material is dry at any time before it is transported from the facility for disposal. The intent of these NESHAP provisions is to ensure that RACM is wetted when placed in leak-tight bags, and that it remains wet until disposal. The final collection for disposal had yet to take place so long as the bags remained on site. In addition, if the material had been wet when bagged, it could only dry out if the bag was not airtight. That would itself be a violation of §61.150, which is incorporated into §61.145.

For these reasons, I find that Respondent violated the Asbestos NESHAP, at 40 CFR §61.145 (c) (6) (i), by failing to adequately wet regulated asbestos-containing material as alleged in the Complaint.

Civil Penalty

The CAA §113(d)(1), 42 U.S.C. §7413(d)(1), provides that the Administrator may assess civil administrative penalties of up to $25,000 per day of violation of any rule promulgated under Subchapter I of the Act, which encompasses the Asbestos NESHAPS. In determining the amount of any penalty assessed under the CAA, the Administrator is directed to consider: "(in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation..... 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(e)(1).

In order to apply these statutory civil penalty factors in a consistent and fair manner in civil judicial and administrative proceedings, the EPA has promulgated the Clean Air Act Stationary Source Civil Penalty Policy, dated

October 25, 1991. (the "CAA Penalty Policy," Ex. 15) . Appendix III to the CAA Penalty Policy, entitled Asbestos Demolition and Renovation Civil Penalty Policy, dated and revised May 5, 1992 (the "Asbestos Penalty Policy," Ex. 16) was promulgated to provide specific guidance to the enforcement program on the gravity and economic benefit components for penalty determinations in asbestos NESHAP cases. In this proceeding, the Region followed the CAA and Asbestos Penalty Policies in arriving at its proposed penalty of $25,000, the maximum permissible under the statute.

The EPA Rules of Practice require the ALJ to consider such civil penalty policies issued under the relevant statute, and to state specific reasons for deviating from the amount of the penalty recommended in the Complaint. 40 CFR §22.27(b). In effect, this leaves the ALJ with discretion to "either approve or reject a penalty suggested by the guidelines," and "to either adopt the rationale of a particular penalty policy where appropriate or to deviate from it where circumstances warrant." In re DIC Americas, Inc., TSCA Appeal No. 94-2, p. 6 (EAB, September 27, 1992).

The Region's witness on the penalty calculation was Damien Houlihan, who, at the time of the filing of this proceeding, was the Region 1 Asbestos NESHAP coordinator. He keyed the Region's penalty calculation to the CAA and Asbestos Penalty Policies. While the Region's calculation is defensible under the Policies, I find it stretches the limits for this particular violation. In addition, I find that the Asbestos Penalty Policy's definition of prior violations is overly broad and can lead to an unjustified increase in the amount of the proposed penalty. For these reasons, further explained below, a substantial reduction in the amount of the proposed penalty is warranted in this case.

- Amount of RACM Involved in Project and Violation

The Region based its calculation on the table on page 17 of the Asbestos Policy, entitled Work Practice, Emission, and Other Violations. In determining the gravity component of the penalty here, the Region first placed the violation in the middle of three categories based on the "total amount of asbestos involved in the operation." This category is for more than 10, but less than 50 units of asbestos. A unit is defined as 260 linear feet. The notification for the project in this case stated that Respondent intended to strip 2675 linear feet of asbestos-containing material. This quantity is therefore barely more than the 10 units minimum for the middle category, which carries a penalty of $10,000 for a first violation.

However, the Asbestos Penalty Policy also states that, where there is evidence that only part of the project involved improper practices, "the Region may calculate the number of units based on the amount of asbestos reasonably related to such improper practice." (Ex. 16, p. 3) . This is logical in relating the penalty to the amount of RACM that could actually be emitted, potentially causing adverse health effects.

The Region here produced evidence that only two bags, or only a few linear feet, of RACM had been inadequately wetted by Respondent. The Region's inspector opened three bags, two of which were inadequately wetted. He also saw Respondent wetting the RACM in six other bags. The Region could have inspected additional bags in the dumpster, but elected not to. The Region bears the burden of persuasion with respect to the facts establishing liability. There is no basis in the evidence to project the number of bags containing inadequately wetted asbestos beyond the two that were actually inspected.

In view of the fact that the total project involved barely more than 10 units of RACM, and only two bags were shown to be inadequately wetted, it would be at least equally appropriate to place the violation here in the category for less than 10 units of asbestos involved in the project or violation. This would carry a penalty of $5000 for a first violation. However, there is no logical reason that violations in projects involving borderline amounts of RACM could not be assigned a gravity component between the two arbitrary choices offered by the Asbestos Penalty Policy. I find it appropriate in this case to assign such a median gravity component, $7500, based on the size of the job and the amount of RACM actually involved in the violation.

- Second Violation

The Asbestos Penalty Policy provides for drastically increased penalties -- $10,000 across the board -- if a violation is determined to be a second violation. (Ex. 16, p. 17). Treatment as a second or subsequent violation is triggered by any prior notification of a violation by a local agency, State, or EPA that "could range from simply an oral or written warning to the filing of a judicial enforcement action." (Ex. 16, p. 4). The Policy further states that, for such prior notification, "there is no need to have an admission or judicial determination of liability." (Id.). The CAA Penalty Policy similarly defines prior violations as including informal notifications that the enforcing agency believes a violation exists. (Ex. 15, p.18).

Under this provision of the Asbestos Penalty Policy, a prior unilateral notification of an alleged violation, even in the form of an oral warning, would require an increase of $10,000 in the amount of the penalty assessed for a "second" violation. This would apply regardless of the underlying merits of the alleged prior violation, or any consideration of its seriousness and the other statutory penalty factors. The respondent could well not even have had any opportunity to contest the merits of the alleged prior violation. Implementation of this provision in the Asbestos Penalty Policy can thus amount to the deprivation of a respondent's property -- the arbitrarily fixed amount of $10,000 -- without due process of law.

The Fifth Amendment to the Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law." The Supreme Court has "consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests." Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 16 (1978). The Due Process Clause requires that before deprivation of a property interest, an individual is entitled to notice and an opportunity to be heard. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950). The sum of $10,000 is undoubtedly a property interest for a business such as Ocean State. As discussed below, the implementation of the Asbestos Penalty Policy's rule on second violations would operate in this case to deprive a respondent of its property without "timely and adequate notice of the impending deprivation and a reasonable opportunity for a hearing." Hudson v. Chicago Teachers' Union Local No. 1, 743 F.2d 1187, 1192 (7th Cir., 1984).

This automatic penalty increase for a "second" violation that was never admitted or adjudicated also violates the enforcement provisions of the Clean Air Act itself. The CAA §113 (d) (1) , 42 U.S.C. §7413(d)(1), does provide for a penalty of up to $25,000 for a single violation. However, that penalty can only be assessed after an opportunity for a hearing in accord with the Administrative Procedure Act, and any penalty must be determined in accord with specified penalty assessment criteria. 42 U. S. C. §§7413 (d) (2) (A) , 7413(e)(1). Implementation of the second violation rule of the Asbestos Penalty Policy for prior notifications, where the respondent had no opportunity for a heating, in effect contravenes these provisions of the statute. The effect is to penalize a party $10,000 without an opportunity for a hearing to contest either liability or the appropriateness of the amount of the penalty. The requirement of an opportunity for a hearing before assessment of a penalty is, of course, the essence of due process of law.

This due process deficiency cannot be remedied by attempting to deal with the facts underlying the prior notification in the later proceeding concerning the "second" violation. Initially, under the Asbestos Penalty Policy, the underlying facts of the prior alleged violation are irrelevant. The notification alone is enough to trigger treatment of any subsequent violations as a second violation with a $10,000 penalty increase. The Policy does not mention or require any consideration of the underlying facts concerning the prior violation. Even if evidence on the prior violation is submitted in the hearing on the second violation, that cannot substitute for the due process that would be afforded by a legitimate adjudication directed at the prior allegation.

The Clean Air Act §113 (e) (1), 42 U.S. C. §7413 (e) (1), does require consideration of a respondent's "full compliance history" as one of the civil penalty assessment criteria. The mere introduction of a unilateral notification of an alleged prior violation as the basis for a $10,000 penalty increase does not, however, allow for a genuine consideration of the party's "full" compliance history. There would be no allowance for possible defenses and mitigating factors as there would be if the prior violation had been resolved by consent or adjudication. A prior warning for improperly sealing one bag of asbestos would carry the same $10,000 penalty increase in a later proceeding, as would a prior final decision, after a hearing, that assessed a $100,000 penalty for improperly stripping thousands of cubic feet of RACM, causing asbestos emissions into the atmosphere. The Asbestos Penalty Policy's second violation rule makes no distinctions with regard to the prior violation's seriousness and respondent's culpability, even apart from the issue of whether the respondent was actually guilty at all. The blanket increase of $10,000 for a "second" violation is thus arbitrary and contrary to the CAA's own directive to consider various penalty assessment criteria, including the respondent's full compliance history.

Perhaps in recognition of the harshness and arbitrariness of the application of this policy, the Complainant here did introduce evidence beyond the actual Immediate Compliance Order that constituted prior notification of the violation (Ex. 12). Complainant also submitted the written responses of Ocean State and the general contractor in an attempt to show that Respondent did in fact commit the prior violation of failing to notify the Region of a demolition job. But the Complaint in this proceeding of course provided no notice that the facts underlying the 1990 McDonald's restaurant demolition notification were to be adjudicated. There were no witnesses presented with firsthand knowledge of the arrangements made with respect to that project. In this hearing, Respondent had

no reasonable opportunity to address the merits with respect to liability or penalty for the 1990 violation. It would obviously be impractical, as well as a violation of due process, to adjudicate prior violations in a proceeding founded on a Complaint that gives no notice of the prior charges. Therefore, no findings will be made in this decision on the liability or penalty factors with respect to the alleged prior violation.

The Agency is authorized to issue compliance orders under the CAA §113 (a) (3) (B), 42 U.S.C. §7413 (a) (3) (B) . The purpose of these orders is to protect the environment in an expeditious manner by requiring immediate compliance when the EPA believes a respondent is committing a violation. The ICO is a unilateral summary order that, by not seeking to penalize a respondent, is not required to include due process protections. The cover letter accompanying the ICO sent to Ocean State for failing to provide advance notification of a demolition job did say that EPA was not precluded from pursuing additional enforcement action on the violation, in accord with the CAA §113(a)(4). (Ex. 12). The option to pursue further action was entirely within EPA's discretion. EPA chose not to do so. Nowhere in the cover letter or ICO and accompanying Reporting Requirement was Ocean State offered the opportunity to contest the charge in a hearing or in any other manner. Nowhere in those documents was Respondent informed that it could be subject to an automatic increase of $10,000 in any future civil penalty assessed for any subsequent violations of the Asbestos NESHAPS. Thus an ICO designed only to bring about immediate compliance without a penalty, without offering the due process protection of a hearing, is later used to penalize Respondent $10,000 anyway. If Respondent had been made aware of that possibility, it might have insisted on somehow contesting its liability at the time of the filing of the 1990 ICO.

A review of the penalty policies promulgated for the enforcement of other statutes administered by EPA reveals a split with respect to the definition of prior violations that could support an increase in the amount of the penalty for a second violation. All the penalty policies seek to assess higher penalties for second or subsequent violations. Most of the other penalty policies (four of the six found) do define prior violations as only encompassing those resulting in a final order or consent order, where there was an opportunity for a hearing. Typical is the following language in the Polychlorinated Biphenyls (PCB) Penalty Policy, dated April 9, 1990, that is used in the enforcement of the Toxic Substances Control Act ("TSCA") in proceedings brought under TSCA §16:[2]

"In order to constitute a prior violation, the prior violation must have resulted in: a final order, either as a result of an uncontested complaint, or as a result of a contested complaint which is finally resolved against the violator; a consent order, resolving a contested or contested complaint by the execution of a consent agreement; or the payment of a civil penalty by the alleged violator in response to the complaint, whether or not the violator admits to the allegations of the complaint . . . . However, a notice of noncompliance does not constitute a prior violation for the purposes of penalty assessment, since no opportunity has been given to contest the notice." (p. 16; emphasis in original).

This definition of prior violations explicitly recognizes the need to have afforded the respondent an opportunity to contest the prior violation, in order to satisfy due process concerns when increasing a penalty for a second violation.

The Resource Conservation and Recovery Act (RCRA) Civil Penalty Policy, dated October 1990, is the only other statute-specific penalty policy that, like the CAA and Asbestos Policies, includes informal notifications of violations in its definition of prior violations. (RCRA Civil Penalty Policy, p. 35). [3] The RCRA Policy, at least, is less arbitrary than the Asbestos Policy in its implementation of penalty increases for second or subsequent violations. Rather than a blanket increase of $10,000 for any prior notification, the RCRA Policy lists several factors that enforcement personnel must consider, such as the similarity of the prior violation, its recency, and the violator's corrective response. (Id.). The Asbestos Policy is thus unique in its broad definition of prior violations and its blanket arbitrary penalty increase for a second or subsequent violation. The majority of the EPA's penalty guidelines however recognize the due process implications of this policy, and define prior violations as only encompassing final orders and consent orders, where there was an opportunity for a hearing.

For these reasons, I find that any increase in the amount of a penalty based on a respondent's compliance history must be based only on prior violations that have resulted in a final order where there was an opportunity to contest the violation. The prior Immediate Compliance Order issued to Respondent here does not meet this criterion. Therefore, the consideration of Respondent's compliance history in this case provides no reason to increase the amount of the civil penalty. At this juncture, the penalty remains at $7500 based on the size of the job and the amount of asbestos found to be inadequately wetted.

- Negligence of Respondent and Other Penalty Factors

The Region contended that "negligent work practices" observed during the inspection warranted a $5000 increase in the amount of the civil penalty assessed on Respondent. These practices included venting the air from the containment area into the school building, and workers appearing improperly suited. These work practices were not alleged to constitute violations of the CAA or its regulations, although they may constitute violations of workplace rules promulgated under other statutes. The CAA and Asbestos Penalty

Policies do not address the violation of rules that are outside the jurisdiction of the EPA as the basis for adjusting the amount of a civil penalty. In the absence of such legal basis, and the corresponding lack of factual context, I find the evidence concerning these allegedly improper work practices gratuitous and not sufficient reason for a significant increase in the amount of the penalty.

The circumstances surrounding the actual violation found here, however, are indicative of a negligent attitude warranting a substantial penalty increase. Respondent knew of the requirement to adequately wet asbestos-containing material and to keep it wet until disposal. Respondent had complete control over this portion of the project and could easily have complied. Respondent presented no evidence and thus demonstrated no excuse for its failure to comply, or any reason for its failure to adequately wet the two bags that were inspected. While there is no evidence of wilfulness, in these circumstances the violation can only be ascribed to a high degree of negligence. (See Ex. 15, p. 16) . This merits a $5000 increase in the amount of the penalty, to a total of $12,500.

- Other Penalty Factors - Size of Business

Complainant also added $2000 to its proposed penalty in accord with a table in the CAA Penalty Policy, based on the size of Respondent's business. (Ex. 15, p. 14) . Respondent's business was placed in the smallest category, for businesses with a net worth of less than $100,000. The table requires some addition to the gravity component of the penalty, ranging from $2000 to $70,000 or more (for businesses with a net worth of more than $70 million) for all violations. Respondent stipulated to its ability to pay the proposed penalty of $25,000. (Ex.1). The Region did not adjust the penalty based on the statutory penalty criteria of economic impact on the Respondent or economic benefit of noncompliance. 42 US.C. § 7413 (e) (1) .

The CAA statutory penalty factors, at 42 U.S.C. §7413(e)(1), do also require consideration of "the size of the business" in determining an appropriate penalty. Neither the CAA Penalty Policy nor Complainant's witness on this issue, Mr. Houlihan, explained why the Policy only adjusts the amount of the penalty upward for this criterion, even for the smallest businesses. The statutory language is neutral, leading to the presumption that this factor, like other penalty criteria in general, could also be applied to reduce the amount of the penalty. I find nothing in the statute or the record of this proceeding to support an arbitrary increase in the amount of all penalties based on the size of a respondent's business. Where, as here, Respondent has stipulated to its ability to pay the proposed penalty and has not challenged the amount of the penalty based on any other economic penalty criteria, those factors are not placed at issue, and should not provide any basis for adjusting the amount of the penalty, either upward or downward.

- Conclusion

The figure of $12,500 represents an appropriate penalty for this violation in the larger context of this case and the Clean Air Act enforcement scheme. The failure to adequately wet two bags of asbestos-containing material does not rise to the level of seriousness that should merit assessment of the maximum penalty permissible for a violation of the CAA -- the $25,000 sought by the Region. This violation is a serious one for which the Respondent was culpable, indicating a substantial penalty should be imposed. But there was no showing of any significant risk to the environment or human health. The violation involved only two bags containing only a few cubic feet of asbestos-containing material. The maximum penalty should be reserved for violations that actually cause adverse environmental or health effects, or have a greater potential to do so.

I find that the assessment of a penalty of $12,500 represents an appropriate consideration and balancing of these penalty factors in all the circumstances, based on the record of this proceeding.

Order

1. Respondent Ocean State Building and Wrecking and Asbestos Removal Co., Inc., is assessed a civil penalty of $12,500.

2. Payment of the full amount of this civil penalty shall be made within 60 days of the service date of this order by submitting a certified or cashier's

check in the amount of $12,500, payable to the Treasurer, United States of America, and mailed to:

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

3. A transmittal letter identifying the subject case and the EPA docket number, and Respondent's name and address, must accompany the check.

4. If Respondent fails to pay the penalties within the prescribed statutory time period, after entry of the final order, then interest on the civil penalty may be assessed.

5. Pursuant to 40 CFR §22.27(c) this Initial Decision shall become the final order of the Agency, unless an appeal is taken pursuant to 40 CFR §22.30 or the Environmental Appeals Board elects, sua sponte, to review this decision.

Andrew S. Pearlstein
Administrative Law Judge

Dated: January 24, 1997
Washington, D.C.

[1] Citations to the record are representativce only and are not intended to be complete or exhaustive. "Ex." means exhibit, and "Tr." means transcript, followed by the appropriate number or page.

[2] Substantially identical language defining prior violations is also found in the following penalty policies: Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), dated July 2, 1990 (p. B-3); Final Penalty Policy for Sections 302, 303, 304, 311, and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act, dated June 13, 1990 (p. 24); and the Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990), dated August 10, 1992 (p. 16).

[3] The other penalty policy that considers informal notifications as prior violations is the general Policy on Civil Penalties, dated February 16, 1984.

The definition here does require written notification of violation, and considers the similarity of the prior violation in determining how much to increase the penalty for the second violation (p. 22).