

**BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103**

In the Matter of:)	
)	
Madonna Enterprises, Inc.)	DOCKET NO. CAA-03-2014-0092
610 3rd St.)	
Port Carbon, PA 17965,)	
)	
and)	
)	
Whitehall Township)	
3219 MacArthur Rd.)	
Whitehall, PA 18052,)	
)	
RESPONDENTS.)	

I. COMPLAINANT'S INITIAL PREHEARING EXCHANGE

Pursuant to 40 C.F.R. § 22.19(a) of the Consolidated Rules of Practice, and in response to Administrative Law Judge M. Lisa Buschmann's October 23, 2014 Prehearing Order, Complainant, the Director of the Land and Chemicals Division, United States Environmental Protection Agency, Region III ("EPA"), hereby sets forth its Initial Prehearing Exchange.

A. NAMES OF EXPECTED WITNESSES

At this time, Complainant expects to call as witnesses the following individuals, whose testimony is expected to include, but may not be limited to, the matters described generally below. Complainant reserves the right to revise and supplement the matters about which each witness identified below may testify.

1. Mr. Richard Ponak
Environmental Scientist
Pesticides/Asbestos Programs and Enforcement Branch
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103

Mr. Ponak is the EPA official who conducted inspections at the property located at 896 3rd Street in Whitehall, Pennsylvania (the "Facility") on August 27, 2013, August 28, 2013, September 3, 2013, and September 18, 2013. Mr. Ponak is an EPA official responsible for performing inspections under the authority of the Clean Air Act, as amended, 42 U.S.C. § 7401 et seq. ("the CAA"), and its implementing regulations, the National Emission Standard for

Asbestos (“the Asbestos NESHAP”), codified at 40 C.F.R. Part 61, Subpart M, Sections 61.140 - 61.157. Mr. Ponak is also the case development officer in this matter and the temporary custodian of the samples of suspect asbestos-containing material that he collected during the August 27, 2013 inspection of the Facility.

In his capacities as inspector, case development officer, and sample custodian, Mr. Ponak may be called as both an EXPERT WITNESS and as a FACT WITNESS.

In his capacities as an EPA inspector and case development officer, Mr. Ponak may be called to testify with respect to: (a) his training and experiences in conducting inspections to determine compliance with, and his training and experiences in case development for violations of the CAA and Asbestos NESHAP; (b) the various types and categories of asbestos-containing materials (“ACM”) and the factors that determine whether ACM is regulated pursuant to the Asbestos NESHAP; (c) relevant provisions of the Asbestos NESHAP; (d) the bases for such regulatory requirements; (e) the facts and circumstances leading to the August and September 2013 inspections of the Facility; (f) the asbestos notifications submitted in connection with the demolition project at the Facility; (g) communications with representatives of the Pennsylvania Department of Environmental Protection (“PADEP”); (h) his observations, communications, sampling, photographs, and findings pertaining to the August and September 2013 inspections of the Facility; (i) the practices he employed during the inspections with respect to the collection of samples and the taking of photographs; (j) the chain of custody with respect to the samples; (k) analytical results of the samples provided by Criterion Laboratories, Inc.; (l) EPA’s November 10, 2014 Clean Air Act, Section 114 information collection request issued to Whitehall Township, Whitehall Township’s November 24 response thereto, EPA’s November 25 request to provide all information in the November 10 information collection request, and Whitehall’s December 3 and 4 responses thereto; (m) additional information provided by Respondent Whitehall and by Madonna Enterprises, Inc. pertaining to the Facility and the demolition; (n) applicable provisions of relevant EPA guidance documents (identified as exhibits herein) as they pertain to the present facts, circumstances, and conduct of Respondent; (o) reasons supporting Mr. Ponak’s conclusion that the Asbestos NESHAP applied to the demolition project at the Facility; (p) reasons supporting his conclusion that the Respondent violated provisions of the CAA and the Asbestos NESHAP; and (q) the calculation and appropriateness of the proposed penalty in consideration of the CAA Section 113(e) statutory factors, EPA’s “Clean Air Act Stationary Source Civil Penalty Policy,” and its Appendix III “Asbestos Demolition and Renovation Civil Penalty Policy.”

In his capacity as temporary custodian of the samples of suspect asbestos-containing material collected during the August 27, 2013 inspection of the Facility, Mr. Ponak may be called to testify as a witness concerning: (a) his role as the custodian for all suspect asbestos-containing material sample chain of custody records for the EPA Region III Pesticides/Asbestos Programs and Enforcement Branch; (b) the routine sampling and sample chain of custody procedures and practices employed by his office; and (c) the specific sampling and sample chain of custody procedures and practices employed by him with respect to the samples collected at the Facility.

Mr. Ponak also may be called to testify as a rebuttal witness to provide testimony in rebuttal to that provided by Respondent's witnesses.

2. Mr. James A. Weltz
Criterion Laboratories, Inc.
3370 Progress Drive, Suite J
Bensalem, PA 19020

Mr. Weltz is the President of Criterion Laboratories, Inc. ("Criterion"), located at 3370 Progress Drive in Bensalem, Pennsylvania. Mr. Weltz may be called as both an EXPERT WITNESS and FACT WITNESS to testify with respect to: (a) his background, training, and credentials as President, Laboratory Manager, and Quality Control Coordinator for Criterion; (b) Criterion's receipt of samples that were collected by Mr. Ponak during the August 27, 2013 inspection of the Facility; (c) the chain of custody methods and other relevant procedures employed by the laboratory, generally and with respect to the subject samples; (d) a description of samples provided by EPA; (e) the methods employed in the care and analysis of samples delivered by EPA; (f) the analytical results of each of these samples; (g) an explanation of the analytical results of these samples and the conclusions that properly may be drawn on the basis of these analytical results; and (h) Criterion's communication of results back to EPA.

Mr. Weltz may also be called to testify as a rebuttal witness to provide testimony in rebuttal to that provided by Respondent's witnesses.

3. Ms. Elizabeth A. Quinn
Toxicologist
Office of Technical and Administrative Support
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103

Ms. Quinn is toxicologist for the U.S. Environmental Protection Agency, Region III. Ms. Quinn may be called as an EXPERT WITNESS to testify as to: (a) her background, training, and experience as a toxicologist; (b) asbestos exposure pathways, which primarily include inhalation and, to a lesser extent, ingestion routes; (c) the adverse environmental and human health effects associated with asbestos, including that asbestos is a known human carcinogen that increases the risk of lung cancer, mesothelioma, asbestosis, and changes in the pleura in exposed individuals; (d) the factors that increase the likelihood of developing severe asbestos-related disorders, including exposure to high concentrations of asbestos, exposure for long periods of time, or exposure to longer, more durable asbestos fibers; and (e) that health effects from asbestos exposure may continue to progress even after exposure is stopped.

Ms. Quinn may also be called to testify as a rebuttal witness to provide testimony in rebuttal to that provided by Respondent's witnesses.

B. LIST OF EXHIBITS

The following exhibits may be introduced by Complainant at hearing. Pursuant to 40 C.F.R. § 22.19(a) of the Consolidated Rules of Practice, and in response to the Prehearing Order, a copy of the exhibits identified below has been filed with the Headquarters Hearing Clerk, and copies have been provided to Administrative Law Judge M. Lisa Buschmann and Respondent Whitehall.

Complainant's Ex.1: Copy of summary "NESHAP Inspection Report" by EPA inspector Rich Ponak pertaining to the August and September 2013 inspections of the Facility.

Complainant's Ex.2: Copy of inspection report of EPA inspector Rich Ponak pertaining to the August 27, 2013 inspection of the Facility.

Complainant's Ex.3: Copy of Photo Identification Log Sheet of EPA inspector Rich Ponak pertaining to twenty two (22) photographs taken during the August 27, 2013 inspection of the Facility.

Complainant's Ex.4: Print copies of the twenty two (22) photographs (numbered 1 through 22) taken by EPA inspector Rich Ponak during the August 27, 2013 inspection of the Facility. (Note that at hearing, Complainant also may present enlargements of one or more of these identified photographs in the nature of demonstrative aids).

Complainant's Ex.5: Copy of Sample Collection Log of EPA inspector Rich Ponak pertaining to samples collected during the August 27, 2013 inspection of the Facility.

Complainant's Ex.6: Copy of the Chain of Custody Record for the relinquishment for laboratory testing of the five (5) samples (082713-01RP to 082713-05RP) of suspect asbestos-containing material collected by EPA inspector Rich Ponak during the August 27, 2013 inspection of the Facility.

Complainant's Ex.7: Copy of the asbestos analysis by Criterion Laboratories, Inc., including the "Results of Polarized Light Microscopy" Report, Certificate of Analysis, and Chain of Custody Records pertaining to the results of Criterion's Polarized Light Microscopy ("PLM") laboratory testing of the five (5) samples sent by EPA inspector Rich Ponak for analysis.

Complainant's Ex.8: Copy of inspection report of EPA inspector Rich Ponak pertaining to the August 28, 2013 inspection of the Facility.

Complainant's Ex.9: Copy of inspection report of EPA inspector Rich Ponak pertaining to the September 3, 2013 inspection of the Facility.

Complainant's Ex.10: Copy of Photo Identification Log Sheet of EPA inspector Rich Ponak pertaining to six (6) photographs taken during the September 3, 2013 inspection of the Facility.

Complainant's Ex.11: Copies of prints of the six (6) photographs (numbered 1 through 6) taken by EPA inspector Rich Ponak during the September 3, 2013 inspection of the Facility. (Note that at hearing, Complainant also may present enlargements of one or more of these identified photographs in the nature of demonstrative aids).

Complainant's Ex.12: Copy of Phone Log of EPA inspector Rich Ponak pertaining to the September 4 and September 9, 2013 phone conversations with Vincent Madonna, owner of Madonna Enterprises, Inc.

Complainant's Ex.13: Copy of inspection report of EPA inspector Rich Ponak pertaining to the September 18, 2013 inspection of the Facility.

Complainant's Ex.14: Copy of EPA inspector Rich Ponak's penalty calculation.

Complainant's Ex.15: Copy of EPA's November 10, 2014 Clean Air Act Section 114 Information Request issued to Whitehall Township.

Complainant's Ex.16: Copy of Whitehall Township's November 24, 2014 narrative response (without enclosures) to EPA's CAA Section 114 information request.

Complainant's Ex.17: Copy of selected attachments to Whitehall Township's November 24, 2014 narrative response to EPA's CAA Section 114 information request:

- A. Specifications for Demolition Project
- B. Madonna Bid Proposal
- C. Whitehall - Madonna Contract
- D. Permit Application
- E. Whitehall 2012 Comprehensive Annual Financial Report
- F. Whitehall 2013 Comprehensive Annual Financial Report

Complainant's Ex.18: Copy of EPA's November 25, 2014 letter "Whitehall Refusal to Fully Respond to EPA's Section 114 Request."

Complainant's Ex.19: Copy of the EPA's June 1994 "Asbestos/NESHAP Demolition Decision Tree" Guidance.

Complainant's Ex.20: Copy of a list entitled "Penalty Assessment Criteria: Clean Air Act Section 113(e)".

Complainant's Ex.21: Copy of EPA's September 1992 "A Guide to Normal Demolition Practiced Under the Asbestos NESHAP."

Complainant's Ex.22: Copy of EPA's December 1990 "Asbestos/NESHAP Regulated Asbestos Containing Material Guidance."

Complainant's Ex.23: Copy of EPA's October 25, 1991 "Clean Air Act Stationary Source Civil Penalty Policy" (without Appendices).

Complainant's Ex.24: Copy of EPA's "Asbestos Demolition and Renovation Civil Penalty Policy," as revised May 11, 1992 (Appendix III to EPA's Asbestos Demolition and Renovation Civil Penalty Policy).

Complainant's Ex.25: Copy of EPA's December 29, 2008 "Amendments to U.S. Environmental Protection Agency's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule."

Complainant's Ex.26: Copy of EPA's December 6, 2013 "Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation."

Complainant's Ex.27: Copy of Dun & Bradstreet, Inc. report for Madonna Enterprises, Inc. (Duns No: 62-247-5551), printed December 4, 2013.

Complainant's Ex.28: Copy of Dun & Bradstreet, Inc. report for Whitehall Township (Duns No: 07-364-8768), printed December 4, 2013.

Complainant's Ex.29: Copy of Memorandum "Violator Size of Whitehall Township" prepared on December 1, 2014 by Gail Coad of Industrial Economics.

Complainant's Ex.30: Copy of EPA's Integrated Risk Information System "Record for Asbestos" as viewed on November 25, 2014.

Complainant's Ex.31: Copy of Agency for Toxic Substances and Disease Registry's "Toxicological Profile for Asbestos."

Complainant's Ex.32: Copy of EPA Office of Solid Waste and Emergency Response's "Framework for Investigating Asbestos-Contaminated Superfund Sites."

Complainant's Ex.33: Copy of Agency for Toxic Substances and Disease Registry's "ATSDR Case Studies in Environmental Medicine: Asbestos Toxicity."

Complainant's Ex.34: Copy of U. S. National Library of Medicine's Hazardous Substances Data Bank "Record for Asbestos" as viewed on November 25, 2014.

Complainant's Ex.35: Copy of the resume of Richard D. Ponak.

Complainant's Ex.36: Copy of the resume of James A. Weltz.

Complainant's Ex.37: Copy of the resume of Elizabeth A. Quinn.

Complainant's Ex.38: Five (5) actual samples (082713-01RP to 082713-05RP) of suspect asbestos-containing material taken by EPA inspector Rich Ponak during the August 27, 2013 inspection of the Facility. (At the time of filing this prehearing exchange, these samples are in the custody of Criterion Laboratories, Inc. Prior to the hearing, EPA Inspector Ponak may

request the return of the samples and upon receipt will be their sole custodian prior to the hearing.)

Complainant's Ex. 39 Copy of Whitehall Township's December 3 and 4 responses to EPA's November 25, 2014 letter.

Complainant reserves the right to offer additional documents or exhibits as may become necessary, including, but not limited to, any documents identified by Respondents in their Prehearing Exchange(s) and documents in rebuttal thereof.

C. CIVIL PENALTY CALCULATION/JUSTIFICATION

In accordance with 40 C.F.R. § 22.19(a)(3), Complainant provides the following explanation:

The proposed civil penalty has been determined in accordance with Section 113 of the CAA, 42 U.S.C. § 7413; 40 C.F.R. Part 19; U.S. EPA's Clean Air Act Stationary Source Civil Penalty Policy, dated October 25, 1991 ("CAA Penalty Policy" or "CAAPP"), and Appendix III thereto ("Asbestos Penalty Policy" or "APP"), revised May 11, 1992; and the memorandums "Amendments to U.S. Environmental Protection Agency's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule," dated December 29, 2008 ("2008 Inflation Memo") and "Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation," dated December 6, 2013 ("2013 Inflation Memo").

1. Overview of Laws and Policies

Section 113(d) of the CAA, 42 U.S.C. § 7413(d), authorizes the Administrator to assess penalties for violations of the CAA, including violations of the Asbestos NESHAP. Under 40 C.F.R. § 19.4, which adjusts EPA's statutory penalties for inflation, the Administrator may assess a penalty of up to \$37,500 per day for CAA violations, up to a total of \$295,000.¹

Section 113(e) of the CAA, 42 U.S.C. § 7413(e), enumerates the factors to be considered when assessing a CAA penalty: the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, the seriousness of the violation, and such other factors as justice may require. The CAA Penalty Policy was developed to apply these statutory factors in a consistent and equitable manner so that members of the regulated community are treated similarly for similar violations across the country. The CAA Penalty Policy seeks to achieve the goal of deterrence by deriving a penalty that removes the economic benefit of noncompliance and that reflects the gravity of the violation (CAAPP pg. 4).

¹ In order to assess a penalty larger than \$295,000, the Administrator and the Attorney General must jointly determine that this course of action would be appropriate for an administrative penalty action.

The Asbestos Penalty Policy, which is an appendix to the CAA Penalty Policy, was created specifically for asbestos demolition and renovation cases, due to their unique nature (see APP pg. 1). It provides separate guidance for determining the gravity and economic benefit components of the penalty, while referring to the CAA Penalty Policy for determining some of the factors within the gravity component, including size of violator (see APP pg. 6).

Finally, the 2013 Inflation Memo directs the EPA on amending the agency's existing civil penalty policies to account for inflation. Because all of the alleged violations occurred after January 12, 2009 and prior to December 7, 2013, the civil penalty should be calculated pursuant to the 2008 Inflation Memo (2013 Inflation Memo pg. 3). The 2008 Inflation Memo directs EPA to take into account inflation by first calculating economic benefit pursuant to the CAA and Asbestos Penalty Policies (2008 Inflation Memo pg. 3). Next, the gravity component is calculated pursuant to the CAA and Asbestos Penalty Policies and multiplied by 1.4163, because the Penalty Policies were issued prior to January 31, 1997 and the violations took place after January 12, 2009 (2008 Inflation Memo pg. 3). Lastly, the economic benefit component is added to the adjusted gravity component, and the CAA Penalty Policy's adjustment factors are applied (2008 Inflation Memo pg. 5).

2. Application of Policies

i. Units of RACM

The Asbestos Penalty Policy has a table outlining penalties for Asbestos NESHAP notice violations, which includes consideration of the type of notice deficiency and past violations (APP pg. 15). It also has a matrix setting out penalties for Asbestos NESHAP work practice and emission violations, which includes consideration of past violations, the amount of asbestos involved, and days of violation (APP pg. 17). The matrix groups penalties by "units" of asbestos involved, with one unit—260 linear feet, 160 square feet or 35 cubic feet—being the threshold for the applicability of the substantive requirements. Proposed penalties under the Asbestos Penalty Policy are smallest where there are between 1 and 10 units, greater where there are more than 10 units but 50 or fewer units, and greatest where there are more than 50 units of asbestos. Here, because the building was demolished before Inspector Ponak arrived and had not been surveyed before demolition, as was required by the Asbestos NESHAP, Inspector Ponak was only able to determine that there was some amount of asbestos greater than 1 unit present at the demolition site. Therefore, in taking a conservative approach to calculating the penalty, Complainant alleges that the amount of asbestos involved falls into the 1 and 10 grouping of the matrix.

ii. Economic Benefit

Complainant believes that Respondent likely derived an economic benefit from failing to follow Asbestos NESHAP work practice standards. But, Complainant cannot use the preferred method of comparing the winning bid with one that included proper asbestos removal (see APP pgs. 6 – 7), because Whitehall's bid sheet did not specifically ask whether the bid price included asbestos removal. Where EPA is unable to determine actual economic benefit, the agency may use a "rule of thumb" that it would cost \$20 per linear, square, or cubic foot to properly remove,

dispose of, and handle asbestos (APP pgs. 7, 17). But, because the building was demolished before Inspector Ponak arrived and had not been surveyed before demolition, as was required by the Asbestos NESHAP, Complainant does not possess sufficiently specific information to quantify the amount of asbestos present above the statutory minimum that Complainant alleged. Because there is uncertainty surrounding the total amount of asbestos present and the \$20 per square foot estimate as applied to the facts of this case, at this time Complainant is not including an economic benefit component in its proposed penalty.

iii. Gravity Based Penalty for Counts I - IV

In Count I, Complainant alleges that Respondent violated the 40 C.F.R. § 61.145(b) notification requirement to provide written notice of intention to demolish at the Facility. At the current time, Complainant is unaware of any prior violations on the part of the Respondent. Because no notice was provided to the EPA at any time, the Asbestos Penalty Policy recommends the assessment of an initial gravity-based penalty of \$ 15,000 for a first time violation (APP pg. 15). Because the submission of a notification form is a one-time requirement, Complainant does not consider a multi-day penalty assessment appropriate.

In Count II, Complainant alleges that Respondent violated the 40 C.F.R. § 61.145(c)(1) work practice requirement to remove all regulated asbestos-containing material ("RACM") from the facility being demolished before any activity began that would break up, dislodge, or similarly disturb the material. At the current time, Complainant is unaware of any prior violations on the part of the Respondent. Given that the total amount of asbestos associated with the alleged violation is being considered to be between 1 and 10 units, the Asbestos Penalty Policy recommends the assessment of an initial gravity-based penalty of \$5,000 for a first time violation (APP pg. 17). Because the removal of RACM before demolition is a one-time requirement, Complainant does not consider a multi-day penalty assessment appropriate.

In Count III, Complainant alleges that Respondent violated the 40 C.F.R. § 61.145(c)(6) work practice requirement to keep RACM wet prior to disposal. At the current time, Complainant is unaware of any prior violations on the part of the Respondent. Given that the total amount of asbestos associated with the alleged violation is being considered to be between 1 and 10 units, the Asbestos Penalty Policy recommends the assessment of an initial gravity-based penalty of \$5,000 for a first time violation (APP pg. 17). The evidence indicates that this violation occurred on at least two separate days, and Complainant is not invoking the presumption of continuing violation due to the nature of this count, so Complainant instead alleges two, separate successive violations (see APP pgs. 5-6). These separate successive violations occurred at a single demolition project, therefore they will each be treated as first violations (see APP pg. 6). So, the proposed gravity-based penalty for the two separate successive violations will be \$10,000 (see APP pg. 17).

In Count IV, Complainant alleges that Respondent violated the 40 C.F.R. § 61.145(c)(8) work practice requirement to have a trained supervisor present when RACM is being handled or disturbed. At the current time, Complainant is unaware of any prior violations on the part of the Respondent. Given that the total amount of asbestos associated with the alleged violation is being considered to be between 1 and 10 units, the Asbestos Penalty Policy recommends the

assessment of an initial gravity-based penalty of \$5,000 for a first time violation (APP pg. 17). The evidence indicates that this violation occurred on at least one day, and Complainant is not invoking the presumption of continuing violation due to the nature of this count, so Complainant alleges one violation.

iv. Size of Violator

The statute and the CAA and Asbestos Penalty Policies instruct Complainant to consider the size of a violator's business. The Asbestos Penalty Policy refers to the CAA Penalty Policy to calculate size of violator, only adding that the Region may choose to use the size of the more culpable defendant in a case with multiple defendants (APP pg. 6). The CAA Penalty Policy states that to determine the size of the violator, Complainant should calculate the net worth of corporations or the net current assets for partnerships or sole proprietorships (CAAPP pg. 14). When there were two respondents in this case, Complainant based the size of violator component of the penalty solely on the net worth of Madonna Enterprises, Inc. ("Madonna"), the party who performed and had direct control over the asbestos removal at the Facility. Complainant consulted and utilized a Dun & Bradstreet Report in an effort to determine Madonna's net worth. Based on the Dun & Bradstreet Report and other relevant information, Complainant considered Madonna to fall into the smallest size of violator category, i.e., "Under \$100,000", which translated to an assessment of \$2,000 for the size of violator component (CAAPP pg. 14).

Upon settling its case with Madonna, Complainant considered whether the size of violator component should be recalculated based on the litigating respondent Whitehall's size. The CAA Penalty Policy does not contemplate municipalities when it instructs how to calculate the size of violator. But, Section 113(e) of the CAA, 42 U.S.C. § 7413(e), instructs EPA to consider size of violator, as appropriate, in the proposed penalty. So, Complainant consulted with Industrial Economics to determine Whitehall's "net worth" and "net current assets." Industrial Economics found that for net worth—the difference between a company's assets and liabilities—the most comparable measure in township accounting would be the Unrestricted General Fund Balance. For Whitehall at the end of 2013, the unassigned general fund balance was \$4,756,656, which could translate into an assessment of \$10,000 for the size of violator component (CAAPP pg. 14). Additionally, Industrial Economics found that net current assets—current assets minus current liabilities, which represents an entity's ability to pay for bills that may come due within a year with relatively liquid resources—could easily be calculated by subtracting Whitehall's current liabilities (\$2,076,694) from the sum of cash and cash equivalents and other current assets (\$9,096,978). For Whitehall Township at the end of 2013, net current assets were \$7,020,284, which could translate into an assessment of \$20,000 for the size of violator component (CAAPP pg 14).

Even though Industrial Economics' analysis revealed that Whitehall's size falls within either the \$10,000 or the \$20,000 category, Complainant is taking a conservative approach and maintaining its \$2,000 penalty assessment for size of violator.

v. *CAA Penalty Policies Adjustment Factors*

None of the adjustment factors in the CAA Penalty Policy—degree of willfulness or negligence (CAAPP pg. 16); degree of cooperation, which includes prompt reporting of noncompliance, prompt correction of environmental problems, and cooperation during pre-filing investigation (CAAPP pgs. 16–17); history of noncompliance (CAAPP pgs. 17–19); or environmental damage (CAAPP pg. 19)—were deemed relevant to the penalty calculation.

vi. *Penalty Summary*

Complainant's proposed penalty can be broken down and summarized as follows:

Step I: Calculate Economic Benefit	\$ 0
Step 2: Calculate Gravity Component:	
<u>Count I</u> : Failure to provide written notice of demolition <i>August 27, 2013</i> (≤ 10 units) 40 C.F.R. § 61.145(b)	\$ 15,000
<u>Count II</u> : Failure to remove RACM prior to demolition <i>August 27, 2013</i> (≤ 10 units) 40 C.F.R. § 61.145(c)(1)	\$ 5,000
<u>Count III</u> : Failure to keep RACM adequately wet <i>August 27, 2013</i> (≤ 10 units) 40 C.F.R. § 61.145(c)(6)	\$ 5,000
<i>September 3, 2013</i> (≤ 10 units) 40 C.F.R. § 61.145(c)(6)	\$ 5,000
<u>Count IV</u> : Failure to have trained representative on site <i>August 28, 2013</i> (≤ 10 units) 40 C.F.R. § 61.145(c)(8)	\$ 5,000
Size of the Violator	\$ 2,000
SUBTOTAL	<u>\$ 37,000</u>

Step 3: Multiply Gravity Component by Inflation Adjustment Factor

\$37,000 x 1.4163 \$ 52,403

Step 4: Add Economic Benefit and Gravity Component (adjusted for inflation)

\$0 + \$52,403 \$ 52,403

Step 5: Apply CAA and Asbestos Penalty Policies adjustment factors

Economic Benefit + Adjusted Gravity \$ 52,403
Degree of Willfulness or Negligence \$ 0
History of Noncompliance \$ 0
Previous payment for Same Violation \$ 0

**TOTAL PROPOSED PENALTY AGAINST
BOTH REPENDENTS: \$ 52,403**

MADONNA ENTERPRISES, INC. SETTLEMENT: \$ 250

BALANCE OF PENALTY AGAINST WHITEHALL: \$ 52,153

D. LOCATION/TIME NEEDED FOR HEARING

Complainant prefers that the hearing be held in Philadelphia, Pennsylvania because of the support facilities that are available to all parties in Philadelphia, where EPA Region III's offices are located, and because of the proximity of Philadelphia to all parties and potential witnesses in this litigation. In the alternative, Complainant does not object to conducting the hearing at a suitable location in a county where the Respondent resides.

Counsel for Complainant estimates that Complainant will require one and a half days to present Complainant's case in chief.

II. COMPLAINANT'S RESPONSES TO COURT INQUIRIES

1. The documents in support of the factual allegation in the Complaint which were not admitted by Respondents can be found at:
 - a. Complainant's Ex.1
 - b. Complainant's Ex.2
 - c. Complainant's Ex.3
 - d. Complainant's Ex.4
 - e. Complainant's Ex.5
 - f. Complainant's Ex.6
 - g. Complainant's Ex.7
 - h. Complainant's Ex.8
 - i. Complainant's Ex.9

- j. Complainant's Ex.10
 - k. Complainant's Ex.11
 - l. Complainant's Ex.12
 - m. Complainant's Ex.13
 - n. Complainant's Ex.17A
 - o. Complainant's Ex.17C
 - p. Complainant's Ex.17D
2. The EPA guidance documents, policies, and/or preambles to regulations which support Complainant's application of regulations to particular alleged acts and finding of violation in the Complaint can be found at:
 - a. Complainant's Ex.19
 - b. Complainant's Ex.21
 - c. Complainant's Ex.22
 3. A narrative statement explaining in detail how the proposed penalty was calculated can be found in the prehearing exchange at Part I, Section C "CIVIL PENALTY CALCULATION/JUSTIFICATION." A penalty worksheet supporting the narrative statement by be found at Complainant's Ex.14.
 4. The penalty policies considered by Complainant in calculating the proposed penalty can be found at:
 - a. Complainant's Ex.23
 - b. Complainant's Ex.24
 - c. Complainant's Ex.25
 - d. Complainant's Ex.26

CERTIFICATE OF SERVICE

I hereby certify that, on the date below, the attached Complainant's Initial Prehearing Exchange was served upon the persons listed in the manner indicated.

Original and one copy via THE OALJ E-Filing System

Sybil Anderson, Headquarters Hearing Clerk

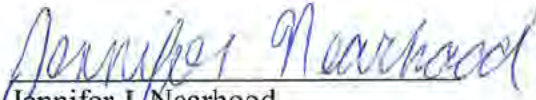
One copy via THE OALJ E-Filing System

M. Lisa Buschmann, Administrative Law Judge

Copy by UPS Next Day Air:

Kimberly G. Krupka
Charles J. Fonzone
Gross McGinley, LLP
33 South Seventh Street
P.O. Box 4060
Allentown, PA 18105-0406

12/4/14
Date


Jennifer J. Nearhood
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