UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR
Decision Published At Website - http://www.epa.gov/aljhomep/orders.htm

IN THE MATTER OF	)	
	)	
ASBESTEX, ENVIRONMENTAL GROUP COMPANY,	)	**DOCKET NO. CAA 3-2001-0004**
	)	
	)	
RESPONDENT	)	

DEFAULT ORDER AND INITIAL DECISION

Sections 113(a)(3) and (d) of the Clean Air Act, 42 U.S.C. §§ 7413(a)(3), (d): Pursuant to Section 22.17(a) of the Rules of Practice, 40 C.F.R. § 22.17(a), Respondent Asbestex, Environmental Group Company is found to be in default because of its failure to comply with the Administrative Law Judge's Prehearing Order without good cause, and such default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. Respondent violated Section 112 of the Clean Air Act, as amended, 42 U.S.C. § 7412, and the regulations promulgating the National Emission Standards for Hazardous Air Pollutants for Asbestos, 40 C.F.R. Part 61, Subpart M. The $29,500 civil administrative penalty sought in the Motion for Default is assessed against Respondent.

Issued: April 24, 2002

Barbara A. Gunning
Administrative Law Judge

Appearances:

For Respondent: Pro se[1/]

For Complainant: Russell S. Swan, Esq.
Assistant Regional Counsel
U.S. EPA, Region 3
1650 Arch Street
Philadelphia, PA 19103-2029

[1/] In an Order entered by the undersigned on January 17, 2002, Respondent's counsel's Motion to Withdraw From Representation was granted.

INTRODUCTION

This civil administrative penalty proceeding arises under the authority of Sections 113(a) and (d) of the Clean Air Act, 42 U.S.C. §§ 7413(a), (d). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32 (2000).

The United States Environmental Protection Agency ("Complainant" or the "EPA") initiated this proceeding by filing a Complaint against Respondents Ellwood Quality Steels Company, Asbestex, Environmental Group Company, and Linton Industries, Inc. The Complaint charges Respondents with violating Section 112 of the Clean Air Act, as amended, 42 U.S.C. § 7412, and the regulations promulgating the National Emission Standards for Hazardous Air Pollutants for Asbestos ("Asbestos NESHAP"), 40 C.F.R. Part 61, Subpart M. In its Complaint, Complainant seeks the imposition of a civil administrative penalty in the amount of $41,700 against Respondents.

A Partial Consent Agreement and Final Order filed on June 28, 2001, settled this matter between Complainant and Respondents Ellwood Quality Steels Company and Litton Industries, Inc. A penalty of $10,000 was assessed jointly against Respondents Ellwood Quality Steels Company and Litton Industries, Inc.

Complainant has filed a Motion for Default for Judgement Against Respondent Asbestex, Environmental Group Company, seeking an administrative penalty of $29,500. For the reasons discussed below, Complainant's Motion for Default will be granted. Respondent Asbestex, Environmental Group Company is found to be in default pursuant to Section 22.17(a) of the Rules of Practice, 40 C.F.R. § 22.17(a), and is assessed the penalty of $29,500 sought in the Motion for Default.

FINDINGS OF FACT

1. The EPA initiated this matter against Respondents Ellwood Quality Steels Company, Asbestex, Environmental Group Company, and Linton Industries, Inc. by filing an Administrative Complaint and Notice of Opportunity for Hearing ("Complaint") pursuant to Section 113 (a) and (d) of the Clean Air Act, 42 U.S.C. §§ 7413(a), (d).

In the Complaint, the EPA charges that Respondents violated Section 112(b) of the Clean Air Act, 42 U.S.C. § 7412(b), for failing to comply with the regulations codified at 40 C.F.R. Part 61, Subpart M. Specifically, Complainant charges that Respondents, the owners or operators of a renovation activity, failed to comply with the requirements of 40 C.F.R. § 61.145(c)(3) for failing to adequately wet Regulated Asbestos Containing Material ("RACM")while stripping (Count I) and § 61.145(b) for failing to provide the Administrator with written notice of intention to demolish or renovate (Count II). In the Complaint, the EPA proposes a civil administrative penalty of $41,700 for these alleged violations.

2. The Complaint was filed with the Regional Hearing Clerk on December 12, 2000, and copies were sent to Respondents by certified mail, return receipt requested. The Complaint advised Respondents that the Rules of Practice, 40 C.F.R. Part 22, govern this proceeding, and copies of 40 C.F.R. Part 22 were sent to Respondents along with the Complaint.

3. Respondent Asbestex, Environmental Group Company, through counsel, filed an Answer to the Complaint with the Regional Hearing Clerk on January 16, 2001. In its Answer, Respondent Asbestex, Environmental Group Company requested a hearing and denied that it violated the Clean Air Act in the manner alleged in the Complaint. Respondent Asbestex, Environmental Group Company objected to the proposed penalty, alleging that Complainant did not take into account the size of its business or the economic impact of the penalty on its business. Respondent Asbestex, Environmental Group Company alleged that the proposed penalty would jeopardize its ability to remain in business.

4. A Partial Consent Agreement and Final Order filed on June 28, 2001, settled this matter between Complainant and Respondents Ellwood Quality Steels Company and Litton Industries, Inc. A penalty of $10,000 was assessed jointly against Respondents Ellwood Quality Steels Company and Litton Industries, Inc.

5. On July 13, 2001, the undersigned entered a Prehearing Order setting forth a schedule for the parties to submit their prehearing exchange information. Complainant was directed to file its prehearing exchange by September 4, 2001, and Respondent Asbestex, Environmental Group Company ("Respondent")[2/] was directed

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[2/] Hereinafter Respondent Asbestex, Environmental Group Company is referred to as "Respondent."

to file its prehearing exchange by October 4, 2001.[3/] The parties were advised that failure to comply with the Order could result in the entry of a default judgment against the defaulting party. Respondent was specifically advised to submit a statement explaining why the proposed penalty should be reduced or eliminated. Respondent was also directed to furnish financial statements, tax returns, or other supporting documentation if Respondent intended to take the position that it would be unable to pay the proposed penalty or that the penalty would have an adverse effect on its ability to continue to do business. The July 13, 2001, Prehearing Order was sent to Respondent by regular mail.

6. On August 29, 2001, Complainant filed its prehearing exchange as directed. Complainant's prehearing exchange was accompanied by several exhibits which included, *inter alia*, the Clean Air Act Stationary Source Civil Penalty Policy, the Asbestos Demolition and Renovation Civil Penalty Policy, and a detailed narrative documenting Complainant's computation of the proposed penalty based upon the statutory penalty factors of Section 113(e)(1) of the Clean Air Act and in accordance with the aforementioned penalty policies. Complainant's prehearing exchange was sent to Respondent by certified mail and Complainant has submitted a photocopy of the signed return receipt.

7. Respondent has not filed its prehearing exchange.

8. Complainant filed a Motion for Default for Judgement Against Respondent Asbestex, Environmental Group Company on October 16, 2001. A response to the Motion has not been received from Respondent.

9. In an Order entered on January 17, 2002, Respondent's counsel's Motion to Withdraw From Representation was granted. Counsel for Respondent stated that Respondent had been advised of the Motion to Withdraw and of the pending default.

10. Ellwood Quality Steels Company ("Ellwood), a Pennsylvania corporation, retained Respondent Asbestex, Environmental Group Company, a contractor specializing in asbestos removal or encapsulation with an office located at 529 Greenwood Avenue, Pittsburgh, Pennsylvania 15207, to perform asbestos renovation work

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[3/] The July 13, 2001, Prehearing Order directed Respondent to file a statement of election to only conduct cross-examination of Complainant's witnesses as its manner of defense if it chose to forgo the presentation of direct and/or rebuttal evidence.

at the Ellwood facility ("Facility") located at 700 Moravia Street, New Castle, Pennsylvania.

11. At all times relevant to the Complaint, Respondent was engaged in the removal of asbestos containing material from the Facility and controlled, operated, and/or supervised the Facility being renovated and/or the renovation operation at the Facility.

12. Respondent is a "person" within the meaning of Sections 302(e) and 113(d) of the Clean Air Act, 42 U.S.C. §§ 7602(e), 7413(d).

13. Respondent was the "owner or operator of a demolition or renovation activity" as that term is defined at 40 C.F.R. § 61.141.

14. On December 22, 1999, the EPA conducted an Asbestos NESHAP inspection at the Facility. Before and during the inspection, Respondent was engaged in the renovation of the Facility which included the stripping, disturbing, and/or removal from the Facility of approximately 1,400 square feet of asbestos-containing Galbestos siding.

15. At the time of the December 22, 1999 inspection, the EPA inspector observed in and around the Facility, on the ground, and in dumpsters at the Facility debris that contained suspected asbestos-containing Galbestos siding and a pile of broken pieces of dry asbestos transite sheeting. The suspected asbestos-containing Galbestos siding and transite sheeting were weathered, damaged, and broken into small pieces and were crumbled, pulverized, and/or reduced to a powder or had a high probability of becoming crumbled, pulverized, or reduced to a powder by the renovation at the Facility.

16. During the December 22, 1999 inspection, the EPA inspector observed Respondent's representative picking up the dry friable suspected asbestos pieces from the ground that had come loose from the Galbestos siding without the use of any safety equipment or wetting agent.

17. During the December 22, 1999 inspection, the EPA inspector collected nine samples, took twenty-six photographs, and videotaped the suspected asbestos containing material around the premises and in the dumpster. All the material the inspector observed in and around the Facility and in the dumpster appeared to be weathered, very dry, and friable. Subsequent polarized light microscopy tests of the samples taken by the EPA inspector revealed that all nine samples contained more than one percent asbestos.

18. After the December 22, 1999 inspection, the EPA inspector spoke with Respondent's representative at the Facility who stated that he used a power saw to cut the Galbestos siding from the building.

19. The EPA did not receive an Asbestos Abatement and Demolition/Renovation Notification prior to the commencement of the asbestos abatement project at the Facility as required by 40 C.F.R. § 61.145(b).

20. On January 6, 2000, the EPA conducted a second inspection at the Facility. The EPA inspector observed dry friable suspected asbestos that had broken loose from the corrugated Galbestos metal siding. The dry pieces were scattered on the ground in the northeast and south sides of the Facility. There were also small broken pieces of dry suspected asbestos transite on the ground outside the northeast corner of the Facility.

21. During the January 6, 2000 inspection, the EPA inspector collected eight samples and took twenty-one photographs and a videotape of his observations. All the material the inspector observed in and around the Facility and in the dumpster appeared to be weathered, very dry, and friable. Subsequent polarized light microscopy tests of the samples taken by the EPA inspector revealed that all eight samples contained more than one percent asbestos.

22. Pursuant to 40 C.F.R. § 61.145(a), all the requirements of 40 C.F.R. §§ 61.145(b) and (c) apply to the owner or operator of a renovation activity if the combined amount of RACM is at least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components.

23. The Facility is a "facility" within the meaning of 40 C.F.R. § 61.141.

24. The asbestos-containing material referenced *above* constitutes "friable asbestos material" within the meaning of 40 C.F.R. § 61.141 because it contained more than one percent asbestos, as determined using the method specified in 40 C.F.R. Part 763, Polarized Light Microscopy, and it was able to be crumbled, pulverized, or reduced to powder by hand pressure.

25. The asbestos-containing material referenced above constitutes "RACM" and "asbestos containing waste material" as those terms are defined at 40 C.F.R. § 61.141.

26. The activities conducted by Respondent at the Facility in removing asbestos material and renovating the Facility

constitute a "renovation" or "renovation activity" within the meaning of 40 C.F.R. § 61.141.

27. Pursuant to 40 C.F.R. § 61.145(c)(3), RACM that is stripped from a facility component while it remains in place in the facility must be adequately wet during the stripping operation. At the time of the EPA inspections on December 22, 1999, and January 6, 2000, Respondent had stripped RACM and had failed to adequately wet the RACM during the stripping operation.

28. Pursuant to 40 C.F.R. § 61.145(b), each owner or operator of a covered demolition or renovation activity shall provide the Administrator with written notice of intention to demolish or renovate. The EPA never received such notification before the asbestos demolition/renovation project was conducted at the Facility.

29. Respondent, as well as other persons, may be deterred from future violations of the Clean Air Act and the Asbestos NESHAPs by the assessment of a penalty in this case.

30. Complainant's proposed civil administrative penalty was determined in accordance with the penalty factors listed in Section 113(e)(1) of the Clean Air Act and upon consideration of the EPA's Asbestos Demolition and Renovation Civil Penalty Policy as revised on May 5, 1992, and the Clean Air Act Stationary Source Civil Penalty Policy as clarified January 17, 1992. Complainant considered each statutory penalty factor identified in Section 113(e)(1) of the Clean Air Act, and its proposed penalty is supported by its analysis of those factors.

31. Under the applicable penalty policies, the EPA determined that the gravity-based penalty for the work practice violations and notice violation of the Asbestos NESHAP was $39,500 which was reduced by $10,000 to reflect the settlement and penalty paid by the two other Respondents. No adjustments to the penalty were made for good faith, compliance history, willfulness or negligence, cooperation, prior history of violation, economic benefit, size of business, ability to pay, or other factors as justice may require.

DISCUSSION

Liability on Default

The issues before me are whether a default order should be entered against Respondent and whether the proposed penalty of $29,500 should be assessed against Respondent. This proceeding

arises under the authority of Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d). The federal regulations governing such proceedings are found at the Rules of Practice, 40 C.F.R. Part 22. Section 22.17(a) of the Rules of Practice concerning default states, in pertinent part:

> A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer [4/]; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations.

40 C.F.R. § 22.17(a).

Section 22.17(c) of the Rules of Practice concerning default orders states, in pertinent part:

> When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.

40 C.F.R. § 22.17(c).

A party's failure to comply with an order of the Administrative Law Judge ("ALJ") may subject the defaulting party to a default order under Section 22.17(a) of the Rules of Practice. Although the ALJ is accorded some discretion in making the default determination under Section 22.17 of the Rules of Practice, such discretion is usually reserved for minor violative conduct or when

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4/ The term "Presiding Officer" refers to the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as the Presiding Officer. 40 C.F.R. § 22.3(a).

the record shows "good cause" why a default order should not be issued.[5/]

The file in this proceeding reflects that this matter was initiated by the filing of a Complaint against Respondent on December 12, 2000. Respondent's Answer to the Complaint, filed on January 16, 2001, was timely.[6/]

The parties were directed to file their prehearing exchange information by the ALJ's Prehearing Order entered on July 13, 2001. The Prehearing Order advised both parties that failure to comply with the Prehearing Order could result in the entry of a default judgment against the defaulting party. The EPA timely filed its prehearing exchange but no prehearing exchange information was filed by Respondent.[7/] On October 16, 2001, the EPA filed the

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[5/] The language of Section 22.17(a) of the Rules of Practice concerning the entry of a default order is discretionary in nature, providing that "a party may be found in default . . . upon failure to comply with an order of the Presiding Officer." The application of the regulation should be made as a general rule in order to effectuate its intent. Thus, when the facts support a finding that there has been a failure to comply with an ALJ's order without good cause, a default order generally should follow. Discretion may be exercised in instances of minor nonperformance, and lesser sanctions as appropriate, are available to the ALJ for violative conduct that does not reach the level of default. It is also noted that the entry of a default order avoids indefinitely prolonged litigation.

[6/] The EPA's assertion, in its Motion for Default, that Respondent's Answer was untimely is incorrect. The Complaint was sent to Respondent by certified mail with return receipt requested on December 12, 2000. The file before me does not contain the signed return receipt for the Complaint. Service of the complaint is complete when the return receipt is signed. 40 C.F.R. § 22.7(c). Service of all documents other than the complaint is complete upon mailing or when placed in the custody of a reliable commercial delivery service. *Id*. Respondent's Answer was sent to the Regional Hearing Clerk by Federal Express on January 15, 2001, and was date stamped by the Office of Regional Counsel on January 16, 2001.

[7/] Complainant has provided proof that its prehearing exchange was received by counsel, then of record for Respondent, on September 6, 2001. *See* Complainant's Motion for Default

(continued...)

instant Motion for Default Judgement, requesting that a default order be issued against the Respondent for failing to comply with the Prehearing Order. The Motion for Default Judgement, as with the Complaint, was sent to Respondent by certified mail, return receipt requested. Respondent has not filed a response to Complainant's Motion for Default Judgement.

A party's failure to comply with an order of the ALJ subjects the defaulting party to a default order under Section 22.17(a) of the Rules of Practice, unless the record shows good cause why a default order should not be issued. Here, Respondent failed to comply with the Prehearing Order. Further, Respondent has not responded to the Motion for Default. A party's failure to respond to a motion within the designated period waives any objection to the granting of the motion under Section 22.16(b) of the Rules of Practice, 40 C.F.R. § 22.16(b). As such, Respondent is found to be in default, and the record does not show good cause why a default order should not be issued.

As cited above, Section 22.17(a) of the Rules of Practice further provides that "[d]efault by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a). This regulatory provision, couched in mandatory language, requires, upon Respondent's default, that I accept as true all facts alleged in the Complaint. Thus, in the instant proceeding, I must accept as true all facts alleged in the instant Complaint. *Id*.

The facts alleged in the instant Complaint establish, by a preponderance of the evidence, Respondent's two violations of the Asbestos NESHAP codified at 40 C.F.R. Part 61, Subpart M, as charged in the Complaint. Specifically, the alleged facts, deemed to be admitted, establish that Respondent, an operator of a renovation activity, failed to adequately wet RACM while stripping (Count I) and failed to provide the Administrator with written notice of intention to demolish or renovate (Count II) in violation of 40 C.F.R. §§ 61.145(c)(3) and 61.145(b), respectively.

Penalty on Default

In its Motion for Default, the EPA proposes that Respondent be assessed a civil administrative penalty in the amount of $29,500

[7/] (...continued)
Judgement Ex. E.

for its two violations of the Asbestos NESHAP. Section 22.24(a) of the Rules of Practice places the burdens of presentation and persuasion on Complainant to prove that "the relief sought is appropriate." 40 C.F.R. § 22.24(a). Each matter of controversy is adjudicated under the preponderance of the evidence standard. 40 C.F.R. § 22.24(b). The Rules of Practice also direct that where a party is found liable in default, as is the case here, "[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act."[8/] 40 C.F.R. § 22.17(c).

As such, Complainant's burden of proof as to the requested relief is less demanding in a default case than in a contested case. *See* 63 Fed. Reg. 9464, 9470 (Feb. 25, 1998)(Proposed Rule). This does not mean, however, that Complainant is released from the requirement to make a *prima facie* case in regard to the appropriateness of the proposed penalty, as well as to liability. *See id*. at 9470. In other words, a finding of default as to liability may reduce what the EPA needs to show to support the proposed penalty but such finding does not disturb the EPA's underlying burdens of presentation and persuasion to establish that the relief sought is appropriate.

The appropriateness of the recommended penalty in this proceeding brought under the Clean Air Act must be examined in light of the statutory penalty factors set forth at Section 113(e)(1) of the Clean Air Act, 42 U.S.C. § 113(e)(1).[9/] Section 113(e) of the Clean Air Act sets forth the factors that the EPA and the ALJ must consider in determining the amount of any penalty for

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[8/] For purposes of discussion in this Default Order and Initial Decision, the phrase "record of the proceeding" refers to the pleadings, as well as other submitted material, including Complainant's prehearing exchange.

[9/] Section 113(d) of the Clean Air Act authorizes the imposition of a civil penalty in the amount of up to $25,000 per day for each violation, up to a total of $200,000. The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, requires the EPA to periodically adjust penalties to account for inflation. The EPA has issued a Civil Monetary Penalty Inflation Adjustment Rule which declares that the maximum civil penalty for violations of the Clean Air Act that occurred on or after January 31, 1997, and assessed under Section 113(d)(1), is $27,500 per violation and that the total penalty cannot exceed $220,000. *See* 40 C.F.R. Part 19; 61 Fed. Reg. 69360 (Dec. 31, 1996).

violations of Section 112 of the Clean Air Act. Section 113(e)(1) of the Clean Air Act, in pertinent part, provides:

> In determining the amount of any penalty to be assessed under this section . . . , the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), 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 addition to consideration of the statutory penalty criteria, the ALJ must also consider any applicable EPA penalty policy. Section 22.27(b) of the Rules of Practice, concerning the ALJ's initial decision provides, in pertinent part:

> If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act.

40 C.F.R. 22.27(b).

However, as shown by the Environmental Appeals Board's ("EAB") case *In re Employer's Insurance of Wausau and Group Eight Technology, Inc. ("Wausau")*, TSCA Appeal No. 95-6,6 E.A.D. 735, 761 (EAB, Feb. 11,1997), one cannot apply the penalty policy unquestionably as if the policy were a rule with binding effect, because such policy has not been issued in accordance with the Administrative Procedure Act ("APA") procedures for rulemaking. Furthermore, the EAB has held that the ALJ has "the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant." *In re DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB, Sep. 27, 1995). Although the EAB in *Wausau*, *supra*, ultimately upheld the use of the PCB Penalty Policy in assessing a civil administrative penalty in

that case, the EAB readily recognized the limitations of the role and application of the various EPA Penalty Policies. In discussing these limitations, the EAB noted that the relevant penalty Policy must not be treated as a rule and that in any case where the basic propositions on which the Policy is based are genuinely placed at issue, adjudicative officers "must be prepared 'to re-examine [those] basic propositions.'" *Wausau*, *supra*, at 761, *quoting, McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988).

In the instant matter, the proposed penalty was calculated on the basis of the guidelines set forth in the EPA's Asbestos Demolition and Renovation Civil Penalty Policy as revised on May 5, 1992, and the Clean Air Act Stationary Source Civil Penalty Policy as clarified January 17, 1992 (collectively referred to as the "Penalty Policies"). I note that the aforementioned Penalty Policies generally touch on all statutory factors listed in Section 113(e)(1) of the Clean Air Act.

The EAB has addressed the EPA's burden of proof with regard to establishing the appropriateness of a proposed penalty under the Toxic Substances Control Act ("TSCA"). *See In re New Waterbury, Ltd. ("New Waterbury"),* TSCA Appeal No. 93-2, 5 E.A.D. 529, 536-43 (EAB, Oct. 20, 1994). Before turning to the EAB's analysis in *New Waterbury*, it is important to note the differences between TSCA and the Clean Air Act statutory penalty factors as well as the procedural posture of the *New Waterbury* litigation as opposed to the instant proceeding.

Under TSCA, the EPA must consider, among other statutory penalty factors, a Respondent's "ability to pay" the penalty. Whereas, under the Clean Air Act, the EPA must consider the "economic impact of the penalty on the [Respondent's] business." Although the two statutes employ different terminology, "ability to pay" and "economic impact" are treated as interchangeable terms. *See United States v. Dell'Aquilla*, 150 F.3d 329, 338 (3rd Cir. 1998); *United States v. Vista Paint Corp.*, No. EDCV 94-0127 RT, 1996 U.S. Dist. LEXIS 22129, *31 (C.D. Cal. Apr. 16, 1996); *In re Mr. C.E. McClurkin d/b/a J-C Oil Company*, Docket No. VI-UIC-98-0001 (RJO, Feb. 10, 2000). Additionally, unlike the procedural posture of the instant matter, the EAB discussed the EPA's *prima facie* case as to the appropriateness of a proposed civil penalty in the context of a penalty hearing. Whereas, in the instant matter, Respondent has not proffered any financial information to support its assertion of adverse economic impact and has defaulted prior to the penalty hearing.

In *New Waterbury*, the EAB noted that the term "burden of proof" encompasses both the burden of production and the burden of persuasion. *See New Waterbury*, *supra*, at 536 n.16; *40 C.F.R. § 22.24(a)* The burden of production, the "duty of going forward with the introduction of evidence," can shift during the course of litigation. *Id*. *(quoting* 4 Stein, et al., *Administrative Law* 24-9 (1994)). Thus, once the EPA produces evidence to establish the appropriateness of the proposed penalty, the burden of production shifts to the Respondent to introduce rebuttal evidence. Yet, the burden of persuasion "comes into play only 'if the parties have sustained their burdens of producing evidence and only when all of the evidence has been introduced.'" *New Waterbury*, *supra*, at 536 n.16 (quoting 2 McCormick on Evidence at 426 (Strong, ed. 1992)).

In *New Waterbury* the EAB found that in order for the EPA "to make a prima facie case on the appropriateness of its recommended penalty, the Region must come forward with evidence to show that it, in fact, considered each factor identified in Section 16 [TSCA's statutory penalty factors] and that its recommended penalty is supported by its analysis of those factors." *New Waterbury*, *supra*, at 538. Recognizing that the level of consideration of the penalty factors varies from case to case, the EAB found that at least every factor must be "touched upon" and the penalty must be supported by the analysis. *Id*. In this regard, the EAB noted that "this type of analysis is routinely performed in enforcement cases and is required under the Agency's general penalty policy and the program-specific penalty guidelines." *New Waterbury, supra*, at 538 n.18.

Applying the Board's analysis in *New Waterbury* to the instant matter, I find that the EPA has met its burden of establishing its *prima facie* case as to the appropriateness of the recommended penalty. In this regard, I note that, as part of its prehearing exchange, the EPA submitted a detailed explanation of how the proposed penalty was determined, including a description of how the statutory penalty factors and the specific provisions of the Penalty Policies were applied. *See* Complainant's Prehearing Exchange at 9-18. This penalty calculation explanation shows that the EPA considered each penalty factor identified in Section 113(e)(1) of the Clean Air Act, including the "economic impact of the penalty on the business," in assessing the penalty.

According to the EPA's analysis supporting the proposed penalty, the EPA calculated a gravity-based penalty of $39,500 based on the seriousness of the violations as measured by the potential for environmental harm resulting from the violations and the duration of those violations, Respondent's full compliance history and good faith efforts to comply, and the size of

Respondent's business.[10] *See* Complainant's Prehearing Exchange at 16-18. Specifically, the EPA determined that Respondent's work practice violations are extremely serious, yielding a high gravity factor.[11] *Id*. at 12. An $11,500 penalty was assessed for the initial day of violation for Count I, a $16,500 penalty was assessed for Count II, and a "multi-day" penalty of $11,500 was assessed for Count I.[12] *Id*. at 16. The EPA made no additional assessment to account for the economic benefit to Respondent from its noncompliance. No adjustments were made for the factors of willfulness or negligence, cooperation, prior history of violation, environmental damage, or other factors as justice may require. *Id*. at 14-15. The proposed penalty of $39,500 was reduced $10,000 to $29,500 to reflect the settlement and penalty paid by the owners of the Facility.

Finally, no adjustment to the penalty was made by the EPA based on ability to pay or the economic impact of the penalty on Respondent's business. According to the EPA's analysis, the penalty of $29,500 reflects a presumption of Respondent's ability to pay and to continue in business as based on the size of its business and the economic impact of the penalty on its business.

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[10] In determining this component of the proposed penalty, the EPA relied upon a Dun & Bradstreet report for Respondent. Reportedly, the report did not provide adequate information for the EPA reasonably to determine Respondent's net worth. Complainant's Prehearing Exchange at 17. The EPA did not submit the Dun & Bradstreet report in its prehearing exchange.

[11] Respondent's notice violation is particularly egregious because its failure to notify the EPA of the intended renovation activity defeats enforcement of the Asbestos NESHAP.

[12] The work practice violation observed during the second EPA inspection on January 6, 2000, is more appropriately assessed as a "separate successive" violation or possibly "second" violation rather than a "multi-day" violation, thus warranting the penalty of $11,500. *See* EPA's Asbestos Demolition and Renovation Civil Penalty Policy as revised on May 5, 1992 at 4-6, 10-11. Given the facts of this case and in the context of this default, the assessment of $11,500 for each of the two work practice standard violations, observed during the December 22, 1999 inspection and the January 6, 2000 inspection, will not be disturbed. *Compare Lyon County Landfill*, 10 E.A.D. ____slip op. at 51-52, CAA Appeal No. 00-5 (EAB, Apr. 1, 2002) (where the EAB found a continuing violation rather than a separate successive violation, which is treated as a first violation).

In this regard, the EPA noted that the "Dun & Bradstreet report on the Respondent provided no information that the proposed penalty would have a significant adverse impact upon the Respondent or otherwise affect its ability to continue in business." *Id*. at 18.

In its Answer, Respondent claimed that payment of the proposed penalty would jeopardize its ability to remain in business and that the EPA had not taken into account the economic impact on Respondent's business. However, Respondent has offered no proof concerning any adverse economic impact of the penalty on its business and Respondent has not rebutted the EPA's *prima facie* case with respect to the appropriateness of the proposed penalty. During the course of this proceeding, Respondent has been advised that its inability to pay a civil penalty could serve as a reason to mitigate the penalty. In the Complaint, the EPA indicated that the proposed penalty could be "adjusted" if Respondent demonstrated an inability to pay. *See* Complaint at 12-13. Further, my Prehearing Order directed Respondent to submit a statement explaining why the proposed penalty should be reduced or eliminated, with specific recognition that Respondent could take the position of either an inability to pay the proposed penalty or an adverse effect on its ability to continue to do business. *See* Prehearing Order at 3 ¶ 3. This outreach notwithstanding, Respondent failed to demonstrate either its inability to pay the proposed penalty or the potential adverse economic impact of the penalty on its business.

In this connection, it is emphasized that Complainant has no specific burden of proof as to any individual penalty factor, including ability to pay. Rather, its burden of proof "goes to the appropriateness of the penalty taking *all* factors into account." *Id*. at 538 (emphasis in original). Contrary to Complainant's assertion in its prehearing exchange, "inability to pay" or "economic impact of the penalty on business" is not an affirmative defense for which the respondent bears the burden of proof. Complainant's Prehearing Exchange at 14 n. 1. As pointed out by the EAB in *New Waterbury*, consideration of the ability to pay or the economic impact of the penalty on business is part of the EPA's *prima facie* case and, thus, cannot be treated as an affirmative defense. *See New Waterbury, supra,* at 540. As such, inability to pay, in itself, does not defeat the assessment of a penalty.[13/] Id.

[13/] At the time a complaint is filed, a "respondent's ability to pay may be presumed until it is put at issue by a respondent." *New Waterbury, supra,* at 541. The mere allegation of an inability to pay in an Answer is not sufficient to put ability to pay in (continued...)

Rather, as is the case here, the economic impact of the proposed penalty on the Respondent's business is one of several statutory penalty factors that Complainant must take into consideration in establishing the appropriateness of the proposed penalty. *Id*. Thus, inability to pay more appropriately serves as a "potential mitigating consideration in assessing a penalty." *Id*. at 541.

Finally, I note that the Rules of Practice require a Respondent to indicate whether it will raise the issue of ability to pay, and if so, to submit evidence to support its claim as part of the prehearing exchange. *See* 40 C.F.R. §§ 22.15(a)-(b), 22.19(a)(3)-(4). "[W]here a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an ability to pay claim after being apprised of that obligation during the pre-hearing process, the [EPA] may properly argue and the [ALJ] may properly conclude that any objection to the penalty based upon ability to pay has been waived." *New Waterbury*, *supra*, at 542. Moreover, pursuant to Section 22.16(b) of the Rules of Practice, by virtue of Respondent's failure to respond to this Motion for Default Judgement, Respondent is deemed to have waived any objection to the granting of the requested relief. 40 C.F.R. § 22.16(b).

In conclusion, I find that the EPA has presented a *prima facie* case with respect to the appropriateness of the proposed penalty and that Respondent has not rebutted the EPA's *prima facie* case. Further, the proposed penalty is not clearly inconsistent with the record of the proceeding or the Clean Air Act. 42 U.S.C. § 7413(e)(1); 40 C.F.R. §§ 22.17(c), 22.24(a). Accordingly, the proposed civil administrative penalty of $29,500 is assessed against Respondent.

CONCLUSIONS OF LAW

1. Respondent is found to be in default because it failed to comply with the ALJ's July 13, 2001, Prehearing Order and the record does not show good cause why a default order should not be issued. 40 C.F.R. § 22.17(a).

2. The default by Respondent constitutes, for purposes of the above-cited matter only, an admission of all facts alleged in the Complaint and a waiver of its right to contest such factual allegations. 40 C.F.R. § 22.17(a).

[13/] (...continued)
issue. *See New Waterbury*, *supra*, at 542.

3. Respondent's failure to adequately wet the RACM during stripping and failure to provide the Administrator with written notice of intention to demolish or renovate constitute two violations of Section 112 of the Clean Air Act and the Asbestos NESHAP, thereby subjecting Respondent to the assessment of a civil penalty pursuant to Section 113(d) of the Clean Air Act. 42 U.S.C. § 7412; 40 C.F.R. Part 61, Subpart M, §§ 61.145(c)(3), 61.145(b).

4. The EPA has made a *prima facie* showing that the proposed civil administrative penalty of $29,500 is appropriate and Respondent has not rebutted this *prima facie* showing. The proposed penalty is not clearly inconsistent with the record of proceeding or the Clean Air Act. 42 U.S.C. § 7413(e)(1); 40 C.F.R. §§ 22.17(c), 22.24(a).

ORDER

1. Respondent is found to be in default and, accordingly, is found to have violated Section 112 of the Clean Air Act and the Asbestos NESHAP as charged in the Complaint.

2. Respondent, Asbestex, Environmental Group Company is assessed a civil administrative penalty of $29,500.

3. Payment of the full amount of this civil penalty shall be made within thirty (30) days of the service date of the final order by submitting a cashier's check or certified check in the amount of $29,500, payable to the "Treasurer, United States of America," and mailed to:

Mellon Bank
EPA Region 3
(Regional Hearing Clerk)
P.O. Box 360515
Pittsburgh, PA 15251

4. A transmittal letter identifying the subject case and EPA docket number (CAA-3-2001-0004), as well as Respondent's name and address, must accompany the check.

5. If Respondent fails to pay the penalty within the prescribed statutory period after the entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

This Default Order constitutes an Initial Decision as provided in Section 22.17(c) of the Rules of Practice, 40 C.F.R. § 22.17(c). Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice,

40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency, unless an appeal is filed with the Environmental Appeals Board within thirty (30) days after the service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this decision.

_____
Barbara A. Gunning
Administrative Law Judge

Dated: April 24, 2002
Washington, DC

In the Matter of Asbestex, Environmental Group Company, Respondent
Docket No. CAA-3-2001-0004

CERTIFICATE OF SERVICE

I certify that the foregoing **Default Order and Initial Decision**, dated April 24, 2002 was sent this day in the following manner to the addressees listed below.

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: April 24, 2002

Original and one Copy by Pouch Mail to:

Lydia A. Guy
Regional Hearing Clerk
Mail Code 3RC00
U.S. EPA
1650 Arch Street
Philadelphia, PA 19103-2029

Copy by Pouch Mail to:

Russell S. Swan, Esquire
Assistant Regional Counsel (3RC10)
U.S. EPA
1650 Arch Street
Philadelphia, PA 19103-2029

Copy by Certified Mail Return Receipt to:

Mr. Randy McLean, President
Asbestex, Environmental Group Company
529 Greenfield Avenue
Pittsburgh, PA 15207