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## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

### BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
First Capital Insulation, Inc.,	)	Docket No. CAA-III-
076	)	
	)	
Respondent	)	

#### INITIAL DECISION

By: Carl C. Charneski  
Administrative Law Judge

Issued: July 28, 1998  
Washington, D.C.

#### Appearances

For Complainant:

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For Respondent:

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#### I. Introduction

This civil penalty proceeding arises under Section 113(d) of the Clean Air Act.

42 U.S.C. § 7413(d) (the "Act"). The U.S. Environmental Protection Agency ("EPA") filed a complaint against First Capital Insulation, Inc. ("First Capital"), alleging two violations of the Act. EPA charges that in each instance First Capital failed to comply with the National Emissions Standards for Hazardous Air Pollutants ("NESHAP") for asbestos. 40 C.F.R.

Part 61, Subpart M.

In Count I of the complaint, EPA alleges a violation of 40 C.F.R. 61.145(c)(3) for failing to adequately wet regulated asbestos-containing material ("RACM") during its removal.<sup>(1)</sup> In Count II, EPA alleges a violation of 40 C.F.R. 61.145(c)(6)(i) for failing to ensure that the removed RACM was kept adequately wet until it was collected for disposal.<sup>(2)</sup> EPA seeks civil penalties totaling \$39,550 for these violations.<sup>(3)</sup> A hearing was held in this case on October 7-9, 1997, in Harrisburg, Pennsylvania.

For the reasons that follow, First Capital is held to have violated Sections 61.145(c)(3) and 61.145(c)(6)(i) of the asbestos NESHAP. A civil penalty of \$20,000 is assessed for these violations.<sup>(4)</sup>

## II. Facts

This case involves First Capital's removal of regulated asbestos-containing material from Harrisburg Hospital, a facility located in Harrisburg, Pennsylvania.<sup>(5)</sup> First Capital is a Pennsylvania corporation which engages in asbestos abatement.

First Capital was hired by Harrisburg Hospital to remove asbestos-containing pipe/fittings and heat exchanger insulation in an area identified as "the boiler room by the morgue." This is an area approximately 14 to 15 feet by 55 feet. Jt. Ex. 1, ¶ 21; Resp.

Ex. 1. The asbestos removal took place from February 19, 1996, until at least February 25, 1996. Jt. Ex. 1, ¶¶ 7 & 11.

The amount of RACM stripped and removed by First Capital during this period exceeded the threshold amounts set forth in 40 C.F.R. 61.145(a)(4). Jt. Ex. 1, ¶ 19. Accordingly, the asbestos abatement work practices contained in Section 61.145 applied to the Harrisburg Hospital project. It is these work practices which EPA claims were violated. As noted, both counts at issue involve respondent's failure to adequately wet regulated asbestos-containing material during and after its removal.

EPA Inspector John Daley conducted two inspections of respondent's Harrisburg Hospital boiler room work site. The first inspection occurred on February 21, 1996. The second inspection occurred on March 22, 1996. The purpose of these inspections was to determine whether First Capital was complying with the work practice requirements of the asbestos NESHAP. Jt. Ex. 1, ¶ 14

Inspector Daley collected samples of the suspected RACM during both inspections. These EPA samples were analyzed by an independent laboratory, using the Polarized Light Microscopy method. See n.5, below. This analysis showed that each of the samples contained more than one percent asbestos. Jt. Ex. 1, ¶¶ 15 & 16; Compl. Ex. 9.

During EPA's February 21 and March 22 inspections, Inspector Daley did not observe the actual removal by respondent of asbestos-containing material. Jt. Ex. 1, ¶ 23. Nonetheless, based upon the inspector's observations of the boiler room conditions on those dates, and based upon the suspected RACM sample results showing the presence of more than one percent asbestos, EPA charges First Capital with

violating 40 C.F.R. 61.145(c)(3) and 61.145(c)(6)(i).

### III. Discussion

#### A. Liability

While the key events in this case occurred on February 21, 1996, EPA argues that the cited NESHAP violations actually existed both before and after this date. In that regard, EPA asserts that the two NESHAP violations observed by Inspector Daley on February 21, also existed on the preceding two days, February 19 and 20. EPA further asserts that the failure to keep the removed RACM adequately wet, *i.e.*, the Section 61.145(c)(6)(i) violation, continued from February 21 until March 22, 1996. Thus, the issue of respondent's liability in this matter is considered against the time line advanced by EPA.

#### The Boiler Room Conditions on February 21

Inspector Daley first inspected respondent's Harrisburg Hospital asbestos abatement project on February 21, 1996. This inspection occurred in the midst of a trouble-filled day for First Capital. Mathew Wrightstone, respondent's on-site supervisor, recounted the events preceding the EPA inspection. Vol. II, Tr. 9.

Wrightstone testified that there was no lighting in the boiler room when respondent's abatement crew arrived on the morning of February 21. The hospital was promptly informed of this condition. Lighting was restored to this area sometime around 7:30 a.m. to 8:00 a.m. that day. Respondent's workers then suited-up in their protective clothing and entered the boiler room containment area. After removing piping for approximately one to one and one-half hours, respondent's crew again lost their lighting. A hospital maintenance employee proceeded to the electrical breaker panel and restored the lights in the boiler room. Once again, the abatement crew went back to work on the morning of February 21. Vol. II, Tr. 40.

A third blackout occurred in the boiler room at approximately 12:30 p.m. on February 21. This time, Wrightstone ordered his crew out of the containment area. Wrightstone testified that because the temperature of the pipes in the boiler room was as high as 260 degrees Fahrenheit, he was concerned that his men would contact the exposed piping in the dark and suffer severe burns. Vol. II, Tr. 42-44, 69, 76.

When Inspector Daley arrived on the scene at approximately 1:30 p.m. on February 21, First Capital's abatement crew was outside the boiler room. There was still no lighting in the containment area. Vol. I, Tr. 24, Vol. II, Tr. 45. Despite this lack of lighting, however, Inspector Daley put on protective clothing and proceeded to conduct an inspection with the aid of a flashlight. Vol. I, Tr. 24, 26.

Insofar as his February 21 inspection is concerned, Inspector Daley described the asbestos-containing material in the boiler room as extending approximately three feet in from an entryway known as the "three stage chamber," extending up to one of two tanks, up steps, and across a portion of an upper level. See Resp. Ex. 1. This RACM consisted of both thermal block and pipe insulation. Vol. I, Tr. 28. In addition, the inspector described the material as dry and friable. Vol. I, Tr. 28-29, 46. Also, he observed no signs of moisture in the boiler room. Vol. I, Tr. 29, 45.

Inspector Daley's testimony concerning the conditions in the Harrisburg Hospital boiler room on February 21, 1996, is found to be credible. The photographs taken by the inspector support his description as to the extent of the loose asbestos-containing material on the boiler room floor, as well as to the dry and friable condition of this material. See Compl. Exs. 6(a)-6(k). In that regard, the

photographs show substantial amounts of asbestos-containing thermal block and pipe insulation in scattered piles within the containment area. They also show the boiler room to be completely dry, with no sign of moisture on the RACM or on the plastic sheeting covering the boiler room floor.

In challenging EPA's assertion that it violated the asbestos NESHAP, First Capital primarily relies upon the testimony of Wrightstone, the abatement crew supervisor, as well as certain air sampling data collected by respondent. This challenge, however, is not sufficient to overcome EPA's showing that respondent violated Sections 61.145(c)(3) and 61.145(c)(6)(i).

First, Wrightstone testified that the abatement crew used wet abatement methods in removing the RACM. Vol. II, Tr. 33, 36. He stated that the workers wet the asbestos-containing material not only as it was removed, but also as it was placed into bags. For example, with regard to the piping, Wrightstone testified that razor knives were used to slice the casing. According to Wrightstone, a hose was then used to wet the inside of the material before it was taken down. Vol. II, Tr. 36.

Wrightstone's testimony as to the wet asbestos abatement methods employed by respondent on February 21 do not square with the boiler room conditions observed by Inspector Daley or the photographs comprising Complainant's Exhibit 6. The inspector testified that the boiler room containment area was completely dry when he conducted his February 21 inspection. This inspection began at approximately 1:30 p.m. If First Capital had adequately wet the RACM during its removal earlier in the day, as it alleges, there would have been some signs of wetness inside containment. Instead, the inspector observed no signs of water, not even under the plastic sheeting used to cover the floor. Vol. I, Tr. 29, 43, 98.

The fact that the air temperature in the boiler room exceeded 100 degrees does not explain the absence of any evidence of wetness.<sup>(6)</sup> Given the fact that RACM was being removed approximately one hour before the EPA inspection, it is found that if respondent had been adequately wetting the RACM there would have been some evidence of wetness despite the heat. This is so even if, as respondent maintains, the thermal block insulation did not readily absorb water. Resp. Br. at 12, *citing* Compl. Ex. 14.

Moreover, the photographs taken by Inspector Daley on February 21, *i.e.*, Complainant's Exhibits 6(a) through 6(k), show dry RACM spread throughout a large area of the boiler room. Referring to the photograph identified as Exhibit 6(c), the inspector testified that if the asbestos fibers had been wet, they would have given the appearance of "wet hair," instead of just "sticking out" as they did in the picture. Vol. I, Tr. 39. The photographs comprising Exhibit 6 support the inspector's testimony that there was no sign of moisture in the boiler room containment area on February 21. Vol. I, Tr. 43, 45.

Second, Wrightstone testified that on February 21, the abatement crew began to remove RACM from one of the two tanks in the boiler room just immediately prior to being withdrawn from containment as a result of the day's third power failure. Wrightstone further testified that as the crew began the removal of this insulation, it collapsed and fell to the floor. Wrightstone stated that he ordered the abatement crew to wet this fallen material as they exited the darkened containment area. Vol. II, Tr. 42-43. Thus, First Capital argues that it is this material which Inspector Daley observed on February 21, and not material that was removed without having been adequately wet.

First Capital's explanation for the RACM observed by Inspector Daley is not supported by the record evidence. Even assuming that asbestos-containing material fell from the tank at about the time that the final power failure occurred, it still does not account for the extensive quantities of RACM observed by the inspector throughout the boiler room. The photographs taken by Inspector Daley, Complainant's Exhibit 6, show considerable amounts of asbestos-containing material, all of which could not have been the result of the collapse of the tank insulation. Indeed, the inspector stated that the boiler room looked as if an "explosion" had occurred. He stated, "[i]t was just all over the place." Vol. I, Tr. 25.

In addition, Inspector Daley testified that he observed pipe insulation on the top of the block lying on the floor. Vol. III, Tr. 89. This observation is inconsistent with respondent's explanation that the RACM on the boiler room floor had fallen from one of the two tanks immediately prior to the third power failure. It is, however, consistent with EPA's allegation that this dry regulated asbestos-containing material was on the floor as a result of its removal by the respondent's abatement crew. Accordingly, EPA's explanation for the RACM discovered by the inspector on February 21, and not First Capital's, is accepted.

A third argument raised by First Capital involves the air sampling conducted by the respondent in the boiler room on February 21. First Capital submits that this air sampling data shows that the RACM was adequately wet during its removal.

In support of this argument, First Capital states that it routinely performs three types of air analysis during an asbestos abatement project. They are "personal sampling" of the workers, "area sampling" within the containment, and "outside sampling" of areas where asbestos removal is not taking place. Respondent's supervisor, Wrightstone, was responsible for this daily sampling at the Harrisburg Hospital site. Vol. II, Tr. 27-29.

The samples collected by Wrightstone were analyzed by Cumberland Analytical Laboratories, Inc. Vol. II, Tr. 30. The sample results are contained in Respondent's Exhibit 4. Richard Hoffman, an Industrial Hygienist, was called as a witness by First Capital to interpret these results. Hoffman concluded that the air sampling results contained in Respondent's Exhibit 4 show that the RACM was adequately wet when it was removed. He based his conclusion on the fact that the air readings were well below the OSHA permissible exposure level "under almost all circumstances." <sup>(7)</sup> If the RACM had been removed in a dry condition, Hoffman testified that he would have expected "to see much higher numbers in the order of one fiber or more per cc." Vol. II, Tr. 202.

First Capital's reliance upon the testimony of Hoffman is misplaced. First, the asbestos NESHAP requires that the regulated asbestos-containing material be adequately wet during its removal and further, that it be kept adequately wet until disposal. The focus of this case, therefore, is whether the RACM was adequately wet. To the extent that respondent seeks to focus instead on air monitoring and argues that clean air samples constitute compliance with Sections 61.145(c)(3) and 61.145(c)(6)(i), respondent is wrong. See, e.g., Resp. Br. at 13.

Second, in any event, First Capital has failed to show that the air sampling was properly conducted on February 21, and that it accurately reflected the conditions of the boiler room. As pointed out by EPA, there was little or no asbestos removal for a considerable period of time on that date. Compl. Br. at 26-29. Thus, there is no assurance that the air monitoring results contained in Respondent's Exhibit 4 accurately reflected the working conditions inside containment. Moreover, only sample No. 6 was taken inside the removal area on February 21, and in that case only for a three and one-half hour period. There is also no indication as to what activities the sampled employee engaged in while in containment. In short, Respondent's Exhibit 4 does not tend to prove that the RACM was adequately wet on February 21.

In sum, EPA has established that on February 21, First Capital's asbestos removal activities in the hospital boiler room constituted violations of Section 61.145(c)(3) and Section 61.145(c)(6)(i). Respondent's arguments to the contrary are rejected.

#### The Boiler Room Conditions on February 19 and 20

EPA argues that the violative conditions that existed in the Harrisburg Hospital boiler room on February 21, also existed on February 19 and 20. This time it is EPA that is wrong. EPA has failed to prove this theory of the case, other than arguing that it is reasonable to assume that the conditions were the same on all three

days. For example, EPA states that "[s]ince [Inspector] Daley did not observe any signs of moisture on February 21, he reasonably assumed that First Capital had failed to use water to adequately wet asbestos since the job started on February 19." Compl. Br. at 17-18. EPA simply has made no showing as to how this assumption was reasonable, particularly in light of Wrightstone's testimony that February 19 was a set up day during which no asbestos was removed. Vol. II, Tr. 22, 35.

EPA's burden of proof for establishing a violation on February 19 and 20 is the same as it is for establishing a violation on February 21. Because EPA has not satisfied this burden, it has failed to prove that First Capital violated the asbestos NESHAP on February 19 and 20.

#### The Boiler Room Conditions on March 22

EPA argues that the Section 61.145(c)(6)(i) violation (i.e., failure to maintain RACM adequately wet until collected for disposal) which occurred on February 21, 1996, continued until March 22, 1996. On March 22, Inspector Daley conducted a follow-up inspection of the hospital boiler room. At that time, the protective plastic sheeting had been taken down, the floor had been cleaned, and First Capital no longer was on site. Vol. I, Tr. 55-56.

During the March 22 inspection, Inspector Daley discovered asbestos-containing material in two areas.<sup>(8)</sup> One of the areas was the boiler room floor. The RACM on the floor was encapsulated. Vol. I, Tr. 122. The inspector, however, did not consider this condition to be a continuing violation. In his view, it was just a poor work practice. Vol. I, Tr. 158.

The other area of the boiler room where the RACM was discovered was under the framework of one of the tanks. This material, however, was not encapsulated. Inspector Daley described the non-encapsulated RACM as being approximately the size of a "golf ball," and that it was "white, fluffy, almost a powdery dry asbestos." Vol. I, Tr. 55-57. The inspector also testified that during the March 22 inspection Patricia Cumor, the owner of First Capital, told him that she too had "found more material." Vol. I, Tr. 159. There was no testimony, however, on what exactly Cumor found, including whether it was even non-encapsulated RACM.

EPA's case for the continuing violation is built upon very limited circumstantial evidence. Complainant essentially argues that the RACM discovered on March 22 must have been respondent's because it was discovered in an area where respondent had removed asbestos. Also, the inspector was of the opinion that if other asbestos removal had occurred after the February 21 inspection, but before the March 22 reinspection, Harrisburg Hospital officials would have so informed him. Vol. III, Tr. 91.

While this theory does have a certain appeal, in the final analysis, EPA's case simply lacks the kind of detail necessary to hold First Capital responsible for a continuation of the Section 61.145(c)(6)(i) violation of February 21.

For example, Inspector Daley's admission that he did not know what happened in the boiler room from the time that First Capital finished the abatement project, to the time that he conducted his March 22 follow-up inspection, is compelling. This is particularly so given the circumstantial nature of EPA's argument. Also compelling is the fact that the boiler room area was accessible for anyone doing maintenance work on the pipes. Not only was this area accessible for maintenance type work, but it was accessible for approximately a 30-day period. Anything could have happened during this time frame.

Obviously, EPA's case would have been stronger had the reinspection been closer in time to the initial inspection. Vol. I, Tr. 117, 125. The facts as presented here, however, raise considerable doubt as to whether First Capital was the responsible party for the RACM discovered on March 22. Certainly, First Capital could have been the responsible party. This possibility alone, however, is not enough for



complainant to satisfy its burden of proof.

In addition, after First Capital had completed its asbestos removal work in the boiler room, it hired Cumberland Analytical Laboratories to do a close-out inspection. This inspection was conducted on February 26, 1996, and First Capital was given a clean bill of health from Cumberland. Vol. III, Tr. 52-72; Resp. Ex. 5. The results of this independent asbestos inspection further support respondent's position on the continuing violation issue.

#### B. Civil Penalty Assessment

The factors that are to be taken into account in assessing a civil penalty under the Clean Air Act are set forth in Section 113(e). 42 U.S.C. § 7413(e). Rule 27(b) of the Consolidated Rules of Practice, 40 C.F.R. 22.27(b), requires that any civil penalty be assessed "in accordance with any criteria set forth in the Act." See *Predex Corporation*, EAB Appeal No. 97-8 (May 8, 1998); *Employers Ins. of Wausau*, 6 E.A.D. 735, 758 (1997). Accordingly, the civil penalty analysis must begin with these statutory civil penalty criteria.<sup>(9)</sup>

Based upon consideration of the penalty criteria contained in Section 113(e) of the Act, a civil penalty of \$20,000 is assessed against respondent. Of this amount, \$10,000 is assessed for each asbestos NESHAP violation. This penalty assessment is explained below.<sup>(10)</sup>

Several of the Section 113(e) criteria warrant only brief treatment. In that regard, the duration of each asbestos NESHAP violation is held to have been one day, *i.e.*, February 21. Also, EPA concedes that First Capital did not gain any economic benefit as a result of its noncompliance. EPA also acknowledges that respondent had no prior asbestos violations. Compl. Br. at 68. Insofar as respondent's good faith effort to comply is concerned, the facts of this case show clearly that First Capital did not comply with the two involved asbestos NESHAP work practices. The company did, however, promptly address the violations when they were pointed out by EPA. As for the size of respondent, EPA introduced into evidence a Dun and Bradstreet report indicating that the company had between 50 to 100 employees, with annual sales of \$4,000,000 and a net worth of \$363,868. Compl. Ex. 15.<sup>(11)</sup> There were no "other factors as justice may require" impacting upon the penalty one way or the other.

The "seriousness of the violation" penalty criterion requires more detailed treatment. It includes a consideration of the negligence of respondent, as well as the gravity of the violations at issue.

Clearly, the two asbestos NESHAP violations occurred as a result of First Capital's negligence. The facts of this case show that First Capital simply did not comply with the asbestos NESHAP work practices of adequately wetting the RACM during its removal, and keeping it adequately wet until its disposal. In that regard, both the testimony of the EPA inspector and the photographs contained in Complainant's Exhibit 6 establish that the NESHAP violations were the result of respondent's negligence. While the three power failures of February 21, and the high temperature of the boiler room, serve to lower the degree of this negligence, the fact remains that First Capital should have complied with the asbestos NESHAP, but didn't.

Regarding the gravity of the violation, Dr. Samuel Rotenberg testified on behalf of EPA. Dr. Rotenberg holds a Ph.D. in Biochemistry and is employed by EPA as a toxicologist. Vol. I, Tr. 166-69. Dr. Rotenberg underscored the severe health consequences that may occur as a result of exposure to airborne asbestos, explaining that such exposure could result in the development of either asbestosis or cancer. Vol. I, Tr. 176.<sup>(12)</sup>

Dr. Rotenberg added that the severity of the effect on lung function is dependent upon the total asbestos exposure. Vol. I, Tr. 179-80.

The fact that respondent set up a containment area in the boiler room, equipped its workers with protective clothing, used air filters, and conducted air monitoring were considered in determining the appropriate penalty. Nonetheless, given the grave health hazard presented by exposure to dry asbestos, adoption of these measures cannot serve to significantly lessen the seriousness of noncompliance with the involved asbestos NESHAP work practices. After all, the aim of these work practices is to keep the removed regulated asbestos-containing material wet and thus avoid its becoming airborne in the first place.

The final penalty criterion involves the economic impact of the penalty upon respondent's business. In general, First Capital argues that the penalty sought by EPA will have a severe, adverse impact upon its ability to continue in business. This penalty criterion involves a discussion of Confidential business information.

[CONFIDENTIAL BUSINESS INFORMATION DISCUSSION]

#### IV. Order

For the reasons mentioned above, First Capital, Insulation, Inc., is held to have violated 40 C.F.R. 61.145(c)(3) and 40 C.F.R. 61.145(c)(6)(i). A civil penalty totaling \$20,000 is assessed against respondent. Of this amount, \$10,000 is being assessed for each violation.

Respondent shall pay the civil penalty within 60 days from the date of this order. Payment may be made by mailing, or presenting, a cashier's or certified check made payable to the Treasurer of the United States of America, U.S. Environmental Protection Agency, Mellon Bank, P.O. box 360515, Pittsburgh, Pennsylvania, 15251. [\(13\)](#)

Carl C. Charneski  
Administrative Law judge

#### 1. Section 61.145(c)(3) provides:

When RACM is stripped from a facility component while it remains in place in the facility, adequately wet the RACM during stripping operation.

#### 2. Section 61.145(c) in part provides:

(6) For all RACM, including material that has 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 ....

#### 3. Initially, EPA sought a civil penalty of \$46,500 against co-respondents First Capital and Harrisburg Hospital. Harrisburg Hospital owns the facility where the alleged violations took place. Prior to the hearing, however, Harrisburg Hospital settled this matter with EPA and agreed to pay a penalty of \$6,950. Compl. Br. at 47-48. Accordingly, EPA has lowered the penalty sought against First Capital by the amount paid by Harrisburg Hospital.



4. The civil penalty portion of this decision involves a discussion of confidential business information ("CBI") relating to First Capital's operations. The public version of this decision has been edited so as to delete this CBI discussion. The deletions have been appropriately noted. The parties and the Regional Hearing Clerk, however, have been provided with complete versions of this decision which include the confidential business information portions. 40 C.F.R. Part 2, Subpart B.
5. The term "Regulated asbestos-containing material" is defined in part as "Friable asbestos material." The term "Friable asbestos material" is defined in part as "any material containing more than 1 percent asbestos as determined using the method specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy, that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure." 40 C.F.R. 61.141.
6. Inspector Daley estimated that the air temperature in the boiler room was approximately 100 degrees. The inspector made this estimate on the basis of his experience in the Merchant Marine where he worked in boiler and engine rooms. Vol. I, Tr. 26, 106. Wrightstone testified that his log notations indicated that the temperature was 260 degrees. Vol. II, Tr. 69. Of the two, Inspector Daley's temperature estimate is credited. The 260 degree reading offered by Wrightstone might have been the temperature reading of the pipes, but it is unrealistic to expect the air temperature of the room to have been so high. Moreover, even though this room was commonly referred to as the "boiler room," it was more precisely called the "mechanical room" because there was no combustion process taking place there. Vol. I, Tr. 114.
7. The personal air sampling of the workers was conducted pursuant to the Occupational Health and Safety Act of 1970. 29 U.S.C. §§ 651 *et seq.*
8. Samples were taken from both areas of the suspected RACM. Analysis of each of the samples showed the presence of more than one percent asbestos. Compl. Ex. 10.
9. Section 113(e) in part provides:

... [T]he 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 ..., 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). EPA's civil penalty guidelines, identified as Complainant's Exhibits 11 and 12, have been considered within this statutory framework. 40 C.F.R. 22.27(b).
10. Respondent contends that the Small Business Regulatory Enforcement Fairness Act of 1996, P.L. 104-121, also is relevant to the penalty assessment in this case. Resp. Br. at 27. Inasmuch as Section 113(e) of the Clean Air Act sets forth the penalty criteria to be considered, this contention is rejected.
11. The Confidential Business Information portion of this decision, *infra*, contains information relating to the overall size of respondent.
12. "Asbestosis" is a nonmalignant, progressive pulmonary impairment caused by the retention of inhaled asbestos in the lungs, resulting in the scarring of lung tissue. 38 *Fed. Reg.* 8820 (April 6, 1973)(preamble to asbestos NESHAP).
13. Unless this decision is appealed to the Environmental Appeals Board in accordance with 40 C.F.R. 22.30, or unless the Board elects to review this decision *sua sponte*, it will become a final order of the Board.

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