

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

IN THE MATTER OF:)
)
U.S. ARMY TRAINING)
CENTER AND FORT JACKSON)
)
Respondent)
)
)
)

Docket No. CAA-04-2001-1502

**RESPONDENT'S REQUEST FOR ISSUANCE OF ADMINISTRATIVE
SUBPOENAS**

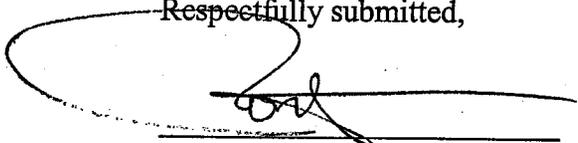
COMES NOW the Respondent, the United States Army Training Center and Fort Jackson and respectfully requests that the Presiding Officer issue administrative subpoenas to Mr. Lewis R. Bedenbaugh, Mr. Jack E. Porter III, and Mr. Richard Sharpe to require their presence and availability to testify at the hearing in this matter scheduled for February 20 and 21, 2003.

Pursuant to 40 C.F.R. § 22.19(e)(4), the Presiding Officer may require the attendance of a witness if authorized under the relevant statute. Section 307(a) of the Clean Air Act, 42 U.S.C. § 7607(a), authorizes the Administrator to issue subpoenas for the attendance and testimony of witnesses.

Respondent requests that Messrs. Bedenbaugh, Porter and Sharpe be compelled to testify at the hearing. All were identified as witnesses in this matter in Respondent's Prehearing Exchange and are expected to testify as part of Respondent's case. These individuals are employees of the South Carolina Department of Health and Environmental Control and require a subpoena in order to testify. Their testimony bears

a direct relationship to the allegations in this matter and will impart facts not otherwise obtainable by any of Respondent's other witnesses.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. F. Gay', is written over a horizontal line. The signature is stylized and somewhat cursive.

Robert F. Gay
Attorney-Advisor
USATC & Fort Jackson

January 27, 2003

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4**

IN THE MATTER OF:) Docket No. CAA-04-2001-1502
)
)
U.S. ARMY TRAINING CENTER) Administrative Penalty
AND FORT JACKSON) Under Clean Air Act,
) Section 113(d)
)
Respondent)
_____)

**COMPLAINANT'S PROPOSED FINDING OF FACT AND CONCLUSIONS
OF LAW AND BRIEF IN SUPPORT THEREOF**

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4**

IN THE MATTER OF:)	Docket No. CAA-04-2001-1502
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U.S. ARMY TRAINING CENTER)	Administrative Penalty
AND FORT JACKSON)	Under Clean Air Act,
)	Section 113(d)
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Respondent)	
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**COMPLAINANT'S PROPOSED FINDING OF FACT AND CONCLUSIONS
OF LAW AND BRIEF IN SUPPORT THEREOF**

Pursuant to 40 C.F.R. § 22.26, Complainant submits the following Findings of Fact and Conclusions of Law and Brief in Support Thereof.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a proceeding brought pursuant to Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d), for the assessment of a civil penalty. This action was initiated by the filing of an Administrative Complaint and Notice of Opportunity to Request Hearing (Complaint) against Respondent Fort Jackson and Army Training Center (Fort Jackson or Respondent) on September 28, 2001. The United States Environmental Protection Agency (EPA or Complainant) has proposed that a penalty of \$85,800 be imposed against Respondent.

In the Complaint, Complainant alleges that Respondent violated the four following provisions of the National Emission Standard for Asbestos, 40 C.F.R. Part 61, Subpart M, during a March 1997 asbestos renovation. In particular, these violations are:

1. Failure to provide written notice at least 10 days prior to beginning a renovation activity. 40 C.F.R. § 61.145(b);

entered into evidence at hearing, demonstrates the concurrence of the Attorney General on this action. See also Stipulation 45¹.

Complainant's Exhibit 6, which was entered into evidence at hearing, demonstrates the concurrence of the EPA Administrator, through her delegatee, on this action. Complainant's Exhibit 6 was signed by the Director of EPA's Federal Facilities Enforcement Office. At hearing, Respondent challenged whether the signatory on Complainant's Exhibit 6 was in fact delegated the authority to express the Administrator's concurrence under Section 113(d)(1).

On February 27, 2003, Complainant supplemented the record with copies of relevant EPA delegations, presented under a declaration, which established that the Administrator's authority to express the Section 113(d)(1) concurrence had in fact been delegated to the Director of EPA's Federal Facilities Enforcement Office. This matter was also addressed in the testimony of EPA witness Michael Walker. (T. 189-192).²

II. FINDINGS OF FACT

1. Respondent is the U.S. Army Training Center and Fort Jackson, located in Fort Jackson, South Carolina.
2. On March 19, 1997, and March 20, 1997, Respondent's personnel removed 5,600 square feet of floor tile and mastic from a dining hall at Fort Jackson.
3. The dining hall is designated at Fort Jackson as Building 5422.

¹ Stipulations were entered into the record at the commencement of the hearing in this case on February 20, 2003. References to the Stipulations are herein cited as *Stip*).

² The hearing in this matter resulted in a two volume transcript. Volume 1 covers the first day of hearing, while Volume 2 covers the second day. Each volume is separately numbered. References to volume 1 of the transcript reference T and the corresponding page numbers. References to volume 2 of the transcript reference T2 and the corresponding page numbers.

108. Ft. Jackson does not take the position that it is unable to pay the proposed penalty in this case.
109. On December 29, 2000 EPA headquarters concurred on the waiver of the statutory penalty cap and 12 month time limit contained in Section 113(d)(1) of the Clean Air Act, 42 USC § 7413 (d)(1).
110. On February 20, 2001 the United States Department of Justice concurred on the waiver of the statutory penalty cap and 12 month time limit contained in Section 113(d)(1) of the Clean Air Act, 42 USC § 7413 (d)(1), with respect to this matter.

III. CONCLUSIONS OF LAW

1. Asbestos is a hazardous air pollutant as defined in Sections 112(a)(6) and 112(b)(1) of the Clean Air Act (hereinafter, the Act), 42 U.S.C. §§ 7412(a)(6) and 7412(b)(1).
2. Respondent is a person within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e).
3. The March 19, 1997, and March 20, 1997, removal of floor tile and mastic from Building 5422 constituted a renovation as defined at 40 CFR § 61.141.
4. The tile and mastic is regulated asbestos containing material (RACM), as defined at 40 CFR § 61.141.
5. Building 5422 was a "facility" as that term is defined in 40 C.F.R. § 61.141.
6. With respect to the March 19, 1997, and March 20, 1997, renovation of Building 5422, Respondent was an "owner or operator of a demolition or renovation activity" as that term is defined in 40 C.F.R. § 61.141.
7. Respondent violated 40 CFR § 61.145(b) by failing to provide notice of Respondent's intention to conduct the March 19, 1997, and March 20, 1997, renovation at the Building 5422 prior to such renovation.
8. Respondent violated 40 CFR § 61.145(a) by failing to thoroughly inspect Building 5422 for the presence of asbestos prior to the commencement of the March 19, 1997, and March 20, 1997, renovation of Building 5422.
9. Respondent violated 40 CFR § 61.145(c)(8) by failing to have personnel trained in compliance with the asbestos NESHAP regulations at Building 5422 during the March 19, 1997, and March 20, 1997, renovation of Building 5422.

10. Respondent's violation of 40 CFR § 61.145(c)(8) began on March 19, 1997, and continued for one additional day, until March 20, 1997.
11. Respondent violated 40 CFR § 61.145(c)(6)(i) by failing to adequately wet the RACM from the March 19, 1997, and March 20, 1997, renovation at Building 5422 until it was properly collected and contained or treated in preparation for disposal.
12. Respondent's violation of 40 CFR § 61.145(c)(6)(i) began on March 19, 1997, and continued for six additional days until and including March 25, 1997.
13. Respondent is subject to the assessment of civil penalties under Section 113(d) of the Act, 42 U.S.C. § 7413(d), for the violations outlined above.
14. The penalty proposed in the Complaint is reasonable and appropriate.

IV. THE SECTION 113(e) "SIZE OF BUSINESS" FACTOR MUST BE CONSIDERED IN ASSESSING A PENALTY AGAINST A FEDERAL AGENCY RESPONDENT

Section 113(e)(1) of the Act, 42 U.S.C. 7413(e)(1), identifies factors which must be considered in assessing civil penalties for the violations in this matter. One of these factor's is "the size of the business" of the violator. Throughout this matter, Respondent has argued that this penalty factor is legally inapplicable to a federal agency respondent such as itself and therefore cannot be considered in assessing a penalty in this matter. As demonstrated below, Respondent's assertion is meritless. Just as all the other Section 113(e) statutory factors, the size of business factor must, as a matter of law, be considered in assessing penalties against a federal agency respondent. How that factor is to be assessed based upon the facts and circumstances of this case is a separate issue discussed later in this brief.

The starting point in interpreting a statute is the language itself, by considering "whether Congress has directly spoken to the precise question at hand." *Chevron U.S.A., Inc., v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). The Court must give effect to the unambiguously expressed intent of Congress. *Id.* at 843; *In re Ocean State Asbestos Removal*,

V. THE GENERAL PENALTY POLICY AND ASBESTOS PENALTY POLICY SHOULD BE USED IN CALCULATING THE PENALTY

As described above, Section 113(e)(1) of the CAA, 42 U.S.C. § 7413(e)(1), sets forth statutory factors which must be considered in assessing civil penalties under the CAA. In calculating the penalty proposed in the Complaint, EPA used its Clean Air Act Stationary Source Civil Penalty Policy (General Penalty Policy)⁶ and Asbestos Penalty Policy⁷ in considering how to apply those statutory penalty factors to the facts and circumstances in this case. These penalty policies provide a rationale framework for the assessment of the statutory factors and should be applied in this matter.

A. EPA's Penalty Policies Should be Used in Assessing the Penalty in this Matter

EPA rules governing the assessment of penalties are found at 40 C.F.R. Part 22. Pursuant to these rules:

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). This regulation requires that Presiding Officer consider any relevant penalty policy in assessing a penalty. However, EPA's penalty policies have not been subjected to rulemaking under the Administrative Procedure Act and are therefore not binding regulations. Because of that, EPA's Environmental Appeals Board (EAB) has made it clear that 40 C.F.R.

⁶ Last revised on October 25, 1991, and included as Complainant's Exhibit 8.

⁷ The Asbestos Demolition and Renovation Civil Penalty Policy, Revised May 5, 1992, included as Appendix III to the General Penalty Policy. Complainant's Exhibit 9.

§ 22.27(b) does not require that a Presiding Officer use a particular penalty policy, but instead only requires a Presiding Officer to consider such policy. *In re M.A. Bruder and Sons, Inc.*, RCRA Appeal No. 01-04, at 17 (E.A.B. July 10, 1992).

Nonetheless, the EAB has also held that the Presiding Officers should apply the relevant penalty policies whenever possible because such policies “assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner.” *In re Carroll Oil Company*, RCRA Appeal No. 01-02, at 28 (E.A.B July 31, 2002); *Bruder* at 21. In cases where the Presiding Officer chooses not to apply a relevant penalty policy at all, rather than applying the policy but in a manner different from the Complainant, the EAB has held that it will closely scrutinize the Presiding Officer’s reasons for not applying the policy to determine if such reasons are compelling. *In re Chem Lab Products, Inc.*, FIFRA Appeal No. 02-01, at 20 (E.A.B. October 31, 2002); *Bruder* at 21; *Carroll* at 28.

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B. The Penalty Policies

The General Penalty Policy provides a two-step process for determining a penalty. (Cx 8 at 3). First, a “preliminary deterrence amount” is calculated. The preliminary deterrence amount consists of two parts: a “gravity” component and an “economic benefit” component. (Cx 8 at 4).

The General Penalty Policy provides that the gravity component generally addresses the statutory factors related to the size of business, duration of the violations, and the seriousness of the violations. (Cx8 at 8). The General Penalty Policy generally evaluates the gravity of a

C. The Asbestos Penalty Policy Addresses Asbestos NESHAP Violations in a Reasonable Manner

At hearing, EPA presented the testimony of Mr. Thomas Ripp, who was qualified to testify as an expert with respect to EPA's asbestos program. (T. 112.) As part of his testimony, Mr. Ripp discussed the risks posed by asbestos renovations and the nature of Asbestos NESHAP regulations and violations.

1. Asbestos Risks

Mr. Ripp testified about the nature of the risks posed by asbestos. Asbestos is a known carcinogen and hazardous air pollutant. There is no known safe level of exposure to asbestos. (T. 113, 120). Health risks associated with asbestos include reduced lung capacity, lung cancer, mesothelioma, and asbestosis. (T. 118). A single exposure to asbestos can result in disease. (T. 119). Exposure to even a single asbestos fiber can theoretically lead to lung cancer. (T. 20).

The primary exposure pathway for asbestos is inhalation. (T. 118). Once lodged in the lungs, asbestos fibers will remain in the lungs for life. (T. 120). However, the harm from exposure cannot be immediately determined. (T. 119). Actual harm can only be determined once someone develops an illness. (T. 119). It may take up to 20 years, or longer, for the onset of illness to occur. (T. 119).

2. Asbestos NESHAP Regulations

Mr. Ripp testified that the goal of the Asbestos NESHAP program was to minimize asbestos fiber releases and exposure. (T. 113, 121). Mr. Ripp testified that the Asbestos NESHAP standards for renovations are specifically designed to address the risks posed by asbestos renovations. Mr. Ripp indicated that the regulations contain work practice standards

rather than emission controls because asbestos emissions cannot be accurately measured during renovations and because renovations do not lend themselves to point source controls. (T. 113).

Work practice standards are intended to prevent or minimize those emissions. (T. 113).

Mr. Ripp testified that asbestos renovation projects tend to be short lived and can be performed in hours. (T. 124, 125). He contrasted renovations to more typical sources such as chemical plants which remains in existence and can be identified. (T. 124). Because of the short term nature of renovations, the Asbestos NESHAP places special emphasis on the notification requirements. (T. 124). Without notification, regulators would never know that a renovation is occurring except in the rare cases of tip or complaint. (T. 124). Without notification, EPA would be unable to determine compliance. (T. 124).

3. Asbestos Penalty Policy

Mr. Ripp testified that the Asbestos Penalty Policy was specifically designed to address the unique risks posed by asbestos renovations. He testified that the General Penalty Policy was better geared to address violations at traditional point sources with control devices and emission limits. (T. 125). He contrasted such sources to asbestos renovations, which are governed by work practices and are short term in nature. (T. 125).

A review of the General Penalty Policy confirms Mr. Ripp's testimony. In assessing the harm posed by a violation, the General Penalty Policy discusses, among other factors: the degree to which a violation exceeds an applicable standard (Cx8 at 10); the attainment status of the location of the violation (Cx8 at 11); and the length of the violation, measure in months. (Cx8 at 11-12). These factors do not apply well to Asbestos NESHAP violations during renovations.

The Asbestos Penalty Policy more closely addresses issues relevant to renovations and NESHAP violations. The Notification Chart recommends penalty amounts for various degrees of violation of the notification requirement. (T.31-132). For example, a failure to submit a notification receives a higher recommended penalty than does submission of an incomplete notice. (Cx9). The Notification Chart and the Work Practices Chart discuss the duration of violations in terms of days, not months. The Work Practices Chart recommends larger penalties for renovations involving larger amounts of asbestos. Each of these considerations is closely tailored to aspects of Asbestos NESHAP violations. For those reasons, the Asbestos Penalty Policy is closely tailored to assess appropriate penalties for Asbestos NESHAP violations and should be used to assess the penalty in this matter.

D. The Penalty Policies Provide EPA with Discretion in Assessing Penalties

The penalty policies used by EPA in this matter provide ample opportunity to apply discretion, available under the statutory factors, in assessing penalties. This discretion is implemented in two ways. First, the structure of the Asbestos Penalty Policy itself reflects an initial exercise of discretion. Second, the overall penalty assessment process allows for the additional exercise of discretion.

The structure of the Asbestos Penalty Policy reflects an initial exercise of discretion by EPA as to the seriousness of the violations. For example, the Notification Chart in the Asbestos Penalty Policy recommends different penalties for different types of notification violations. Pursuant to that chart, the only limitation in discretion is that the exact same violation (in this case, failure to notify) receives the same recommended penalty in each case. Similarly, the

Work Practices Chart in the Asbestos Penalty policy recommends different penalties based on the size of the project.

EPA submits that the ranking of violations built into the Asbestos Penalty Policy charts represent a reasoned policy determination by EPA as to the relative seriousness posed by certain violations. That the recommended penalties are high is not surprising considering the high risks posed by asbestos. Reasonably, more severe notification deficiencies, or larger projects, receive larger penalties. Repeat violations receive larger penalties than do first-time violations. Inherent in this structure is an initial exercise of discretion by EPA. Complainant suggests that these charts represent a fine balancing between the desire to have consistency in its penalty assessment process and the desire to recognize site-specific facts and circumstances.

In addition, Mr. Russell testified that the two-step nature of the penalty calculation under the General Penalty Policy itself provides flexibility to consider site-specific facts and circumstances. This is done through the second step in that process: the application of the adjustment factors described in the General Penalty Policy. (T. 11-12, 16). The adjustment factors allow each of the statutory factors to be further considered with respect to the facts and circumstances of each case.

E. Conclusion

As discussed above, the General Penalty Policy and Asbestos Penalty Policy provide a reasonable framework for applying the statutory penalty factors to the facts and circumstances in a particular case. In particular, the Asbestos Penalty Policy is specifically tailored to consider the unique risks posed by asbestos and Asbestos NESHP violations. Moreover, the penalty

policies provide adequate opportunities to consider the facts and circumstances of each case under the statutory penalty factors. As Complainant has done in determining the proposed penalty, and as described in greater detail below, these penalties policies can be appropriately applied to the facts of this case to determine an appropriate penalty for the very serious violations involved herein. There is therefore no compelling reason to forego application of the penalty policies in this case.

VI. THE PROPOSED PENALTY IS APPROPRIATE CONSIDERING THE STATUTORY PENALTY FACTORS, EPA PENALTY POLICIES, AND FACTS AND CIRCUMSTANCES OF THIS CASE

As the testimony clearly demonstrated in this case, Complainant considered each of the statutory factors in determining the proposed penalty in this matter. By doing this within the framework of the Civil Penalty Policy and the Asbestos Penalty Policy, Complainant arrived at a proposed penalty which provides adequate deterrent and which is appropriate considering the facts and circumstances of this case.

A. Penalties from Asbestos Penalty Policy

1. Amount of Asbestos Involved in Renovation

It was stipulated that Respondent removed approximately 5,600 square feet of tile and mastic during the illegal renovation. (*Stip 15*). It was also stipulated that some sampling of the floor tile and mastic confirmed the presence of asbestos. (*Stips 12, 16, 17*). It was further stipulated that the floor tile and mastic was RACM. (*Stip 17.*)

51). As the volume of waste increases, the risks increase because the entire volume of waste would have to be managed. (T. 69). Mr. Russell testified that, once commingled, all the tile had to be treated as RACM. (T. 45-46, 50). Once the materials are commingled, there is no way to segregate the materials. (T. 14-15). Because of this commingling, the purported negative tile sampling results reveal nothing about the absence of asbestos or the size of the project.

In addition, according to Mr. McDowell, all of the mastic samples were positive. Based on Mr. Fairleigh's testimony, it is undisputed that the mess hall was open for business at the time of his inspection. (T. 40). Mr. Ripp indicated that mastic left in place poses an asbestos risk when subjected to foot traffic. (T. 145). For this reason alone, it is appropriate to use the full 5,600 square feet as the size of the project for purposes of using the Asbestos Penalty Policy.

Complainant Exhibit 2 indicated that one sample indicated that 25-50% of the tile was 3% RACM. (T46; Cx2). Even assuming that material was segregated, which it was not, reducing the amount of asbestos by 50% still results in a project size of 17.5 units under the Asbestos Penalty Policy, yielding the same recommended penalty. Considering the lack of sampling detail and the commingling, it would not be justified to reduce the size of the project by more than 50% based on this sampling result.

2. Summary of Complainant's Calculations from Asbestos Penalty Policy

Mr. Russell testified that he calculated the proposed penalty in this matter. Mr. Russell used the General Penalty Policy and Asbestos Penalty Policy in doing so. (T. 247). The following summary reflects the penalty calculations identified in Complainant's Exhibit 7.

a. Count I

Count I in the Complaint is Respondent's violation of 40 C.F.R. § 61.145(b). It is stipulated that Respondent violated that provision by failing to provide any advance written notice of Respondent's intent to perform the asbestos renovation at Fort Jackson. *Stips 21- 23*. The Notification Chart in the Asbestos Penalty Policy recommends a \$15,000 penalty for a first violation of this type of provision. (T2. 10). Mr. Russell increased that penalty by 10% to account for the inflation adjustment under the Debt Collection Improvement Act and therefore assessed a \$16,500 penalty component under the Asbestos Penalty Policy for this violation. (T2. 10).

b. Count II

Count II of the Complaint is Respondent's violation of 40 C.F.R. § 61.145(a). It is stipulated that Respondent violated that provision by failing to conduct a thorough inspection of the facility to identify the presence of asbestos prior to beginning the renovation. (*Stips 24-26*). Mr. Russell testified that he used the Work Practices Chart in the Asbestos Penalty Policy to determine a penalty for this violation. (T2. 12, 13, 15, 16).

Based on the 5,600 square feet of removed tile and mastic, Mr. Russell sized this renovation as involving 35 units of RACM for purposes of using the Work Practices chart. (T2. 13).

The Work Practices chart recommends a \$10,000 penalty for a first violation of a work practice requirement at a renovation involving 35 units of RACM. (T2. 13). Mr. Russell assessed that amount and then increased that amount by 10% to account for the inflation

adjustment under the Debt Collection Improvement Act. (T2. 15). He therefore assessed a \$11,000 penalty component under the Asbestos Penalty Policy for this violation. (T2. 15).

c. Count III

Count III of the Complaint is Respondent's violation of 40 C.F.R. § 61.145(c)(8). It is stipulated that Respondent violated this provision by failing to have adequately trained personnel at the facility during the two days of illegal asbestos renovation. (*Stips 27-29*).

The Work Practices chart recommends a \$10,000 penalty for a first violation of a work practice requirement at a renovation involving 35 units of RACM. (T2. 16). Mr. Russell assessed that amount. (T2, 17).

In addition, the Asbestos Penalty Policy recommends separate penalties to be assessed for multiple days of violation. For first time violators at a renovation involving between 10 and 50 "units" of asbestos, the Work Practices Chart in the Asbestos Penalty Policy recommends that a penalty of \$10,000 be assessed for the first day of violation and an additional penalty of \$1,000 be assessed for each additional day of violation after the first.

It is stipulated in this matter that Respondent's violation of 40 CFR § 61.145(c)(8) began on March 19, 1997, and continued for one additional day until March 20, 1997. (*Stip 30*). Based on this, Mr. Russell used the Work Practices Chart to assess an additional \$1,000 penalty for this one additional day of violation. (T2. 17).

Mr. Russell increased the two days of penalty by 10% to account for the inflation adjustment under the Debt Collection Improvement Act and therefore assessed a \$12,100 penalty component under the Asbestos Penalty Policy for these violations. (T2. 16, 17).

d. Count IV

Count IV of the Complaint is Respondent's violation of 40 C.F.R. § 61.145(c)(6)(i). It is stipulated that Respondent violated this provision by failing to keep the removed asbestos wet until the material was properly contained in preparation for disposal. (*Stips 31-33.*)

The Work Practices chart recommends a \$10,000 penalty for a first violation of a work practice requirement at a renovation involving 35 units of RACM. (T2. 17). Mr. Russell testified that he assessed that amount. (T2. 17).

As with the trained personnel violation, Mr. Russell testified that he assessed additional penalties based on multiple days of violation. It is stipulated in this matter that Respondent's violation of 40 CFR § 61.145(c)(6)(i) began on March 19, 1997, and continued for six additional days until March 25, 1997. (*Stip 34*). Based on this, Mr. Russell used the Work Practices Chart to assess an additional \$1,000 penalty for each of the six additional days of violation. (T2. 18).

Mr. Russell increased the \$16,000 in penalties by 10% to account for the inflation adjustment under the Debt Collection Improvement Act and therefore assessed a \$17,600 penalty component under the Asbestos Penalty Policy for these violations. (T2. 18).

e. Total Penalties from Asbestos Penalty Policy

The total part of the proposed penalty from the Asbestos Penalty Policy was \$57,200. T. 18. That amount is reflected on Complainant's Exhibit 7.

3. General Considerations - Potential for Harm

As described earlier, the General Penalty Policy provides that the gravity component of a penalty generally addresses the statutory factor related to the seriousness of the violations. (Cx8

draconian view is contrary to the remedial purposes of Section 112 of the Clean Air Act and the asbestos NESHAP.

Coleman at pages 24, 25.

These considerations are relevant to each of the four violations. By violating those requirements, as in this case, those safeguards were removed and the dangerous conditions described above were created. The result is the various possibilities for exposures that were created in this case. Mr. Ripp testified that actual harm can not be determined immediately, but can be determined when someone gets sick. (T. 119). Sickness might not evidence itself for several years, and perhaps not until 20 or more years, after exposure. (T. 119). Because immediate harm can not be determined, the Asbestos NESHAP is designed to minimize potential harm and eliminate exposure pathways. (T. 121). In effect, under the Asbestos NESHAP, the only harm that can be assessed in the short term is potential or possible harm. Considering this, the extreme risks described above, and case law precedent addressing potential for harm, a high penalty is warranted in this matter by the statutory factor "seriousness of the violations."

4. General Considerations - Importance to the Regulatory Scheme

Also relevant to the "seriousness" statutory factor is the risk to the regulatory scheme posed by the violations. (Cx8 at 9). The General Penalty Policy describes harm to the regulatory scheme as:

This factor focuses on the importance of the requirement to achieving the goals of the Clean Air Act and its implementing regulations discuss facts separate from APP charts

(Cx8 at 9).

trained personnel would have identified the noncompliance and would not have allowed the abatement to continue while the dining hall was in operation. (T. 75).

The asbestos NESHAP set up a multi-layered regulatory scheme (survey, notice, trained personnel) designed to ensure compliance and prevent emissions. By committing the violations in this case, Respondent completely frustrated that regulatory scheme and prevented that system from working. Based alone on this harm to the regulatory scheme, the high penalties recommended by the Asbestos Penalty Policy are appropriate considering the statutory factor "seriousness of the violations."

5. Consideration of Multi-day Penalties

As described above, Mr. Russell testified that he assessed multiple days of violations for Counts III (trained personnel) and IV (wetting). Mr. Russell testified that such penalties served as consideration of the statutory factor related to "duration of the violations." (T2. 19).

Note that the penalty amounts reflected in the Asbestos Penalty Policy are much less than the statutory maximum penalties. Respondent has stipulated to a total of eleven days of violation in this matter. If the statutory maximum penalty was assessed for each day of violation, the total penalty would be \$302,500. The penalty amounts recommended in the Asbestos Penalty Policy and sought by EPA in this matter are far less than that statutory maximum.

B. Size of Violator Component of Preliminary Deterrence Amount

1. "Size of Violator" under the General Penalty Policy Implements the Statutory "Size of Business" Factor

As described earlier in Section IV of this brief, Complainant believes that the "size of business" statutory penalty factor is applicable to determining an appropriate penalty against a

of the gravity penalty components only added up to \$57,200, Mr. Russell applied the discretionary 50% limitation described in the General Penalty Policy and reduced the size of violator penalty component to \$57,200. (T. 20).

2. Budget is an Appropriate Measure of Size for a Federal Agency Respondent

The General Penalty Policy measures the size of a violator in terms of assets or net worth. (Cx8 at 14). Assets generally serve as a proxy for more general considerations such as the experience, sophistication and resources of the violator. (T. 179). Information about the assets of an entity is often readily available. (T. 179). Assets therefore serve as a convenient measure of the size of a violator.

The General Penalty Policy is intended to encourage consistency in enforcement. (T. 177). Use of the sliding-scale framework in the General Penalty Policy allows EPA to tailor the penalty to the size of the violator. (T. 180). By relying on an objective factor such as assets and the sliding scale, the General Penalty Policy encourages consistency in application of the statutory factors. This helps to ensure that similarly sized respondents are treated somewhat consistently and replaces the "dartboard" approach that would necessarily result from the absence of any framework.

However, Complainant recognizes that federal agencies generally do not control their assets the same way that other types of respondents can. For example, federal agency respondents can not generally sell their own assets. (T.231). Complainant therefore does not believe it is reasonable to rely on assets or net worth in considering the size of violator factor against a federal agency respondent. For a federal agency, Complainant believes that budgetary information is a more relevant measure of an agency's overall resources. (T. 169, 170). Just as

assets can serve as a proxy for the overall resources available to a respondent, so can budget. For agencies, budget are a better measure than assets because agencies have some discretion in how they use their budgets. (T. 183).

By sizing federal agency respondents based on budgetary information rather than assets, EPA is attempting to recognize the somewhat unique nature of federal agency respondents while at the same time applying the desired consistency. EPA believes that such sizing represents a reasonable application of the sliding scale framework in the General Penalty Policy and is appropriate in light of the requirement in Section 118(a) of the Act to treat federal agencies the same as private entities.

3. Size must be Base on a Broad View of Respondent's Resources

In the General Penalty Policy, EPA takes a very broad look at the size of an entity. "In the case of a company with more than one facility, the size of the violator is determined based on the company's entire size, not just the violating entity." (Cx8 at 15). The reason for this broad look is obvious - a broad look at an entity's overall size better represents that entity's overall resources, experience and sophistication. Based on its OMA budget alone, Respondent is at least an \$83 million dollar entity. If Respondent's other budget resources were to be included, or budget resources from Respondent's higher command levels, Respondent's overall budget would be even higher.

Respondent would apparently take the opposite approach and would suggest that size be based on a very narrow view. For example, Respondent testified that its discretionary funds under the sustainment, restoration and modernization program were less than \$3 million. (T2.

Respondent is knowledgeable about the Asbestos NESHAP program as is evidenced by the 1992 NOV issued by the State. These facts are all indicators of the large size and sophistication of the Respondent. That size and sophistication require a large penalty to serve as an adequate deterrent.

4. Size of Violator Reflects the Seriousness of the Violations

As Mr. Russell testified, the size of violator factor also relates to the statutory factor addressing the seriousness of the violation. (T. 175-176, 178). Consistent with this, under the General Penalty Policy, the “size of violator” component is part of the gravity penalty. Therefore, even if this Court determines that the statutory size of business factor does not apply as a legal matter to a federal agency respondent, then it is still appropriate, based on the facts described above, to consider the “size of violator” factor under the General Penalty Policy because it relates to the “seriousness” statutory factor.

C. Summary of Gravity Calculation

As described above, the preliminary deterrence amount under the General Penalty Policy consists of an economic benefit component and a gravity component. The economic benefit component relates to the statutory factor addressing “economic benefit of noncompliance.” In this matter Complainant has not alleged that Respondent realized an economic benefit through its violation (T2. 6) and EPA did not seek to assess any penalty based on an economic benefit. Therefore, the preliminary deterrence amount in this case is limited solely to a “gravity” component (T2. 21) and the economic benefit factor does not impact the determination of the penalty in this case.

In summary, the preliminary deterrence amount equals the sum of the penalties from the Asbestos Penalty Policy and the size of violator factor from the General Penalty Policy. As reflected in Complainant's Exhibit 7, these penalties totaled \$114,400.

D. Application of Adjustment Factors

1. History of Noncompliance

Mr. Fairleigh testified that the State had issued a Notice of Violation (NOV) to Fort Jackson on July 31, 1992. (Cx 43; T. 76). This NOV alleged, *inter alia*, that Fort Jackson violated 40 CFR 61.145(a). (T. 77).

The General Penalty Policy provides that a penalty may be raised if a Respondent has a history of noncompliance. (Cx8 at 17). The General Penalty Policy further provides that notices of violations issued by State governments can be included in considering a Respondent's compliance history. (Cx8 at 18).

The relevance of prior NOV's to the consideration of full compliance history is firmly established under Part 22 case law. In upholding the relevance of prior NOV's to that factor, the EAB has stated:

A prior notification is relevant to the size of the penalty because such notification when followed by a subsequent violation is evidence of the respondent's failure to take steps to prevent violations and to comply voluntarily with the regulations. A prior violation is even more relevant when it was given in connection with a possible violation of the regulations related to a hazardous air pollutant such as asbestos...

In re: Ocean States Asbestos Removal, Inc., 7 E.A.D. 522 at 547 (EAB 1998). In that decision, the EAB explained that the issuance of prior NOV's evidenced a Respondent's degree of

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knowledge of the regulations and possible sanctions and indicates that Respondent was not adequately deterred by such knowledge. *Id* at 547-549.

Mr. Russell testified that he considered Respondent's history of noncompliance when using the General Penalty Policy to determine the proposed penalty in this matter. (T2. 26, 28). Mr. Russell testified that the 1992 NOV was relevant to the statutory factor "full compliance history and good faith efforts to comply." (T2. 25-28). Mr. Russell further testified that EPA did not increase the penalty based on the 1992 NOV. (T2. 27,28). Despite that, the 1992 NOV is relevant to Respondent's compliance history and establishes the need for a significant penalty in this matter. The 1992 NOV involved one of the same violations as alleged in this case and was committed less than five years prior to the violations giving rise to this matter. That NOV apparently had little or no deterrent effect. For that reason, a significant penalty is appropriate in this matter to provide that deterrence.

2. Willfulness or Negligence

The General Penalty Policy recommends that a penalty be increased if there is evidence of willfulness or negligence. Mr. Russell testified that he considered this adjustment factor as part of this calculation. (T2. 25). Mr. Russell testified that this adjustment factor related to the statutory penalty factor "good faith efforts to comply." (T2. 6).

The General Penalty Policy describes issues that should be considered in assessing this adjustment factor. Those issues include, among others, the level of sophistication and the extent to which the violator knew of the legal requirements. (Cx8 at 16).

Respondent certainly knew of the Asbestos NESHAP requirements, at least the survey requirement as evidenced by the 1992 NOV. In addition, Respondent also has a degree of

environmental sophistication. For example, it is stipulated in this matter that Respondent has an in-house environmental staff. (*Stip 42*).

Mr. Russell testified that Complainant did not increase the proposed penalty based on this adjustment factor. (T2. 25-26).

3. Degree of Cooperation

The General Penalty Policy provides that a penalty may be adjusted based the degree of cooperation exhibited by a violator. (Cx8 16-17). Mr. Russell testified that he considered this adjustment factor as part of this calculation. (T2. 22).

The General Penalty Policy describes three general considerations that are relevant to this adjustment factor: prompt reporting of noncompliance; prompt correction of environmental problems, and cooperation during the pre-filing investigation. (Cx8 at 17). The General Penalty Policy indicates that reductions should be limited to 30% based on this factor. (Cx8 at 17).

Mr. Russell testified that the Respondent was cooperative during the State and EPA's investigations and took prompt efforts to remedy the violations. (T2. 23-24). Based on Mr. Fairleigh's testimony that an anonymous tipster, and not the Respondent, had notified the State of the violation, Mr. Russell testified that he reduced the penalty by 25%, not the full 30% discussed under this factor. (T2. 24).

Mr. McDowell testified that he intended to notify the State once the sampling results were received. (T2. 146). It is undisputed that the State was notified by an anonymous tipster, not by someone acting on behalf of the Respondent. However well-intentioned Mr. McDowell may have been, the fact is that Respondent did not provide notification and deserves no credit on that account.

4. Environmental Damage

The General Penalty Policy recommends that penalties be increased when a violation results in severe environmental damage. Mr. Russell testified that he considered this factor, which relates to the statutory factor "seriousness of the violations" but did not increase the penalty based on this adjustment factor. (T2. 28).

5. Payment of Other Penalties

Mr. Russell testified that this adjustment factor relates to the statutory factor "payment by the violator of penalties previously assessed for the same violations. (T2. 33). Mr. Russell testified that he was not aware of any penalties already paid by Respondent for the violations at issue in this matter. (T2. 33). At no time has Respondent suggested that Respondent has paid such other penalties for these violations. Therefore, Mr. Russell testified that he did not adjust the penalty based on this factor. (T2. 33).

6. Ability to Pay

Mr. Russell testified that this penalty policy adjustment factor relates to the statutory factor addressing "the economic impact of the proposed penalty on the violator's business." (T2. 33).

Respondent stipulated that it funded its environmental compliance activities out of its "Operation and Maintenance" budget and that at all relevant times that budget exceeded \$83,000,000. (Stips. 35, 36). Based on that amount, Mr. Russell opined that the Respondent could pay the proposed penalty. (T2. 31). Mr. Russell also testified that at no time had Respondent alleged that it was unable to pay the proposed penalty. (T2. 31). On cross examination, Colonel Narhwold confirmed that Respondent was not claiming an inability to pay

this shortfall, a suggestion that the proposed penalty (\$85,800) would have a significant impact on Respondent is not tenable.

As described above, the record therefore does not support a determination that there would be adverse impact justifying a penalty reduction. Just as with the more limited issue of ability to pay, the broader issue of economic impact is one which relies on information most readily available to the Respondent rather than Complainant. The same burden shifting that occurs with ability to pay should also apply to the broader issue of economic impact.

Complainant submits that Respondent has not met that burden.

7. Other Factors as Justice may Require

Mr. Russell testified that he considered the statutory factor "other factors as justice may require." (T.34). He testified that he did not identify any considerations, other than those already discussed as part of the penalty calculation, which merited further adjustments to the proposed penalty. He therefore made no adjustment to the penalty based on this factor. (T. 34).

In at least two separate contexts, the EAB has held that penalty adjustments based on criteria such as "other factors as justice may require" should be used sparingly. Such adjustments should be "far from routine" and should be used to "reduce a penalty when the other adjustment factors prove insufficient or inappropriate to achieve justice." *In re Pepperell Associates*, 9 EAD 83, 113 (EAB 2000). In that Clean Water Act enforcement case, the EAB refused to reduce a penalty under the "any other matters as justice may require" penalty factor set forth in Section 311(b)(8) of the Clean Water Act, 42 U.S.C. § 1321(b)(8), based on environmental good deeds of the respondent.

A similar result was reached in *In re Steeltech Limited*, 8 EAD 577 (EAB 1999). In that case under the Emergency Planning and Community Right-to-Know Act (EPCRA), the respondent claimed that its penalty should be reduced based on facts related to a change in ownership of the facility. The EAB refused to reduce a penalty under the applicable part of the EPCRA Enforcement Response Policy referring to "other factors as justice may require," emphasizing "the justice factor comes into play only where application of the other adjustment factors has not resulted in a "fair and just" penalty." *Steeltech* at 595.

Respondent has suggested at least two issues which it apparently believes are relevant to the penalty assessment in this matter. Neither issue, described below, renders EPA's proposed penalty unfair or unjust under the rigorous standard contemplated by the EAB for consideration of this factor. Therefore, both issues should be rejected bases for reducing the proposed penalty.

a. Rogue Officer Argument

Respondent stipulated that it was the owner and operator of the renovation giving rise to this action. (Stip 14). Colonel Nahrwold testified that the garrison command was "totally responsible for the operations and maintenance of the infrastructure and improvements on Fort Jackson. (T. 83). The Directorate of Public Works was subordinate to the garrison command. (T. 84-85).

During the direct examination of Colonel Nahrwold, Respondent extensively discussed the role that Lt. Colonel Wall played in the violations. (T. 116-123). Lt. Colonel Wall was the Director of Public Works on the base at the time of the violations. (T.116). He was involved in discussions that led to the renovation. (T.116). On cross-examination of Mr. Russell, Respondent asked whether Mr. Russell considered whether base management intended to

b. Sovereign Immunity Claim

Respondent suggests that they couldn't pay a penalty to the state and that such inability is relevant to the assessment of a penalty in this matter. (T.54). This argument, related to Respondent's unsuccessful negotiations with the State prior to Complainant bringing this action, is legally irrelevant because it violates the EAB's proscription on considering other enforcement actions and settlements in deciding the case at bar. *Titan Wheel Corporation*, 2000 WL33126606 (EPA 12/13/00); *Chatauqua Hardware Corporation*, 3 EAD 616 (EAB 1991) *Newell Recycling Company, Inc.*, 8 EAD 598 (EAB 1999).

Moreover, Respondent's claim it is exactly the kind of boot-strapping that this court expressly rejected in *In the Matter of Department of Defense, Davis-Monthan Air Force Base*, Docket No. CAA-09-98-17, (Order on Respondent's Motion to Compel Discovery, November 17, 1999) an Asbestos NESHAP case against an Air Force base.

In *Davis-Monthan*, Respondent Air Force did not settle with the State, claiming that sovereign immunity barred the payment of a penalty to the State. When EPA then sought a penalty after referral of the case from the state, Respondent sought discovery on the issue of whether EPA's case was barred as an impermissible overfiling. This Court rejected that claim, stating:

Here, the Respondent, having raised the sovereign immunity defense to defeat the state from imposing any penalty whatsoever, can hardly turn around and claim that EPA is now precluded from seeking a civil penalty because of the state proceeding, which Respondent has successfully stymied.

Davis-Monthan at 4. In that decision, this Court refused to allow the sovereign immunity claim to defeat liability. For that same reason, Respondent in this case shouldn't be allowed to benefit

by that same claim at the penalty stage. To consider the sovereign immunity claim now would be to effectively allow the sovereign immunity claim as a defense to penalty and would subvert Complainant's right to seek such a penalty. 42 U.S.C. § 7412(l)(7).

E. Summary of Penalty Calculations

As reflected in Complainant's Exhibit 7, Complainant calculated a preliminary deterrence amount penalty of \$114,400. (T2. 21). Complainant reduced this penalty by 25% to account for cooperation exhibited by Respondent following the State's discovery of the violation. (T2. 23). The total penalty proposed by Complainant is therefore \$85,800. (T. 20, 24).

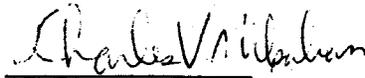
VII. CONCLUSION

Complainant has established that Respondent committed serious violations of the Asbestos NESHAP. These violations pose significant threats to human health and frustrated the multi-level safeguards established in the regulations. The violations were committed under the authority of a high ranking official at Fort Jackson operating within the scope of his duties. Respondent committed the violations despite having resources and experience which would easily have allowed the violations to be avoided.

Complainant proposed a penalty based on the statutory factors contained in Section 113(e)(1) of the Act, as applied by EPA's General Penalty Policy and Asbestos Penalty Policy. As described above, those penalty policies provide an appropriate framework for considering all of the Section 113(e)(1) statutory penalty factors, including the size of business factor. Complainant applied those factors in a thoughtful way considering the facts and circumstances of this case.

For those reasons, and as set forth more fully above, Complainant requests that the Presiding Officer assess the penalty proposed by Complainant in this matter.

Respectfully submitted,



Charles V. Mikalian
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Counsel for Complainant



Elisa Roberts
Elisa Roberts
Counsel for Complainant

CERTIFICATE OF SERVICE

I also certify that on the date below I hand-delivered the original and one copy of the COMPLAINANT'S PROPOSED FINDING OF FACT AND CONCLUSIONS OF LAW AND BRIEF IN SUPPORT THEREOF to the Regional Hearing Clerk at the following address:

Regional Hearing Clerk
U.S. EPA Region 4
Atlanta Federal Center
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

I also certify that, on the date below, I sent a copy of the COMPLAINANT'S PROPOSED FINDING OF FACT AND CONCLUSIONS OF LAW AND BRIEF IN SUPPORT THEREOF by certified mail, return receipt requested, to the following addresses:

Robert F. Gay
Attorney Advisor
USATC and Fort Jackson
9475 Kershaw Road
Fort Jackson, South Carolina 29207-5600

I also certify that, on the date below, I sent a copy of the COMPLAINANT'S PROPOSED FINDING OF FACT AND CONCLUSIONS OF LAW AND BRIEF IN SUPPORT THEREOF by certified mail, return receipt requested, to the Presiding Officer at the following address:

William B. Moran
Administrative Law Judge
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Mail Code 1900L
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460-2001

4/23/02
Date

