



U.S. Environmental Protection Agency Applicability Determination Index

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Asb. now in Sub. M (61.140 et seq.); Radon now in Sub. B.

Subparts: Part 61, B-Asb, Asbestos Demolition/Renovation (Now Sub. M)

References: 61.147
61.152(a)
61.152(b)

Abstract:

10/26/82

If the Region is referring a civil action under Section 113(b) against a demolition or renovation source, it should recommend a civil penalty settlement amount. Consistent with the penalty policy, the Region should determine a "preliminary deterrence amount" by assessing an economic benefit component and a gravity component. This amount may then be adjusted upward or downward by consideration of other factors, such as degree of willfulness and/or negligence or history of noncompliance.

Letter:

APPENDIX III

Asbestos Demolition and Renovation Civil Penalty Policy

The Clean Air Act Stationary Source Civil Penalty Policy provides guidance for determining the amount of civil penalties EPA will seek in pretrial settlement of enforcement actions under title I of the Act. Due to certain unique aspects of asbestos demolition and renovation cases, separate guidance is provided here for determining the gravity and economic benefit components of the penalty. Adjustment factors should be treated in accordance with the general stationary source penalty policy.

If the Region is referring a civil action under Section 113(b) against a demolition or renovation source, it should recommend a civil penalty settlement amount. Consistent with the general penalty policy, the Region should determine a "preliminary deterrence amount" by assessing an economic benefit component and a gravity component. This amount may then be adjusted upward or downward by consideration of other factors, such as degree of willfulness and/or negligence, history of noncompliance, ability to pay, and litigation practicalities. Since there is a wide variation in the size of demolition contractors, ability to pay may be an important adjustment factor in some instances.

The "gravity" component should account for factors such as the environmental harm resulting from the violation, the importance of the requirement to the regulatory scheme, and the size of the violator. Since asbestos is a hazardous air pollutant, the gravity factor associated with substantive violations (i.e., failure to adhere to work Practices or to prevent visible emissions from waste disposal) should be high. Also, since notification is essential to Agency enforcement, a notification violation should also warrant a high gravity component.

Gravity Component

The attached chart sets forth the gravity component of the penalty settlement figure for notification violations and for violations of substantive requirements for control of asbestos emissions. The figures in a first line of the chart apply as a general rule to failure to notify, including those situations in which substantive violations occurred and those instances in which EPA has been unable to determine if substantive violations occurred. The reduced amounts in the second line of the chart apply only if the Agency can conclude, from its own inspection, a State inspection, or other reliable information, that the source complied with substantive requirements.

Where notification is made late, the Region has discretion to seek a lesser penalty. The penalty should reflect the degree to which the Region's ability to evaluate substantive compliance has been hampered. If notification is late but still allows sufficient opportunity to monitor the entire project, little or no penalty is warranted. If notification is given so late as to preclude any evaluation of substantive compliance, the Region should determine a penalty as if no notice were given.

Regions should exercise discretion in penalizing a timely notification which is incomplete. A notification can be so insufficient as to be tantamount to no notice, in which case the Region should determine the penalty as if there were no notice. Again, the important factor is the impact the company's action has on our ability to monitor substantive compliance.

Penalties for substantive violations are based on the particular regulatory requirements violated. The figure is the sum of the penalty assigned to a violation of each set of requirements: removal, wetting, and stripping, 40 C.f.R. §61.147; collection, packaging, and transporting of asbestos-containing waste material, §61.152(b); and disposal of wastes at an acceptable site, §61.152(a). The figure also depends on the amount of asbestos involved in the operation, which relates to the potential for environmental harm associated with improper removal and disposal. There are three categories based on the amount of asbestos, expressed in "units," a unit being the threshold for applicability of the substantive requirements. If a job involves friable asbestos on pipes and other facility components, the amounts of linear feet and square feet should each be separately converted to units, and the numbers of units should be added together to arrive at a total. Where the only information on the amount of asbestos involved in a particular demolition or renovation is in cubic dimensions (volume), the amount can be converted to square dimensions by dividing the volume by the estimated thickness of the asbestos material.

Gravity components are adjusted based on whether the violation is a first, second, or subsequent offense. By "second" or "subsequent" offense, we mean that the company has violated the regulations after previously being notified by the State or EPA of asbestos NESHAP violations. This prior notification could range from simply a warning letter to the filing of a judicial enforcement action. A "second" violation could even occur at the same job as the first one if, after being notified of violations by the State or EPA and having an opportunity to correct such violations, the company continues to violate the regulations. If the case involves multiple potential defendants and any one of them is involved in a second or subsequent offense, the penalty should be derived based on the second or subsequent offense. In such instance, the Government should try to get the prior-offending party to pay the extra penalties attributable to this factor. (See discussion below on apportionment of the penalty.)

The Region should consider enhancing the gravity component in situations where the duration of the violation increases the potential harm. This would be particularly appropriate where the source allows asbestos waste material to stay on site without any effort to collect and dispose it for a significant period of time.

Benefit Component

This component is a measure of the economic benefit accruing to the contractor, the facility owner, or both, as a result of noncompliance with the asbestos regulations. Information on actual economic benefit should be used if available. The attached chart provides figures which may be used as a "rule of thumb" to determine the costs of removing and disposing asbestos in compliance with §61.147 and §61.152, where actual information is difficult to obtain or is suspect. The figures are based on rough cost estimates which the Office of Air Quality Planning and Standards has developed in considering revisions to the asbestos standard. These estimates are within a range of numbers that OAQPS has considered in determining the economic impact of the asbestos demolition and renovation requirements. Also, if any party ultimately pays to have all or part of the job done in compliance, actual expenditures can be used to offset the benefit of noncompliance.

Apportionment of the Penalty

This policy is intended to yield a minimum settlement penalty figure for the case as a whole. In some cases, more than one contractor and/or the facility owner will be named as defendants. In such instances, the Government should generally take the position of seeking a sum for the case as a whole, which the multiple defendants can allocate among themselves as they wish.

It is not necessary in applying this penalty policy to allocate the economic benefit between the parties precisely. The total benefit accruing to the parties should be used for this component. Depending on the circumstances, the economic benefit may actually split among the parties in any combination. For example, if the contractor charges for compliance with asbestos removal requirements and fails to comply, the contractor has derived a savings and the owner has not. If the contractor underbids because it does not factor in compliance with asbestos requirements, the facility owner has realized the full amount of the financial savings. (In such an instance, the contractor may have also received a benefit which is harder to quantify - obtaining the contract by virtue of the low bid.) There are circumstances in which the Government may try to influence apportionment of the penalty. For example, if one party is a second offender, the Government may try to assure that such party pay the portion of the penalty attributable to the second offense. If one party is known to have realized all or most of the economic benefit, that party may be asked to pay for that amount. Other circumstances may arise in which one party appears more culpable than others. We realize, however, that it may be impractical to dictate allocation of the penalties in negotiating a settlement with multiple defendants. The Government should therefore adopt a single "bottom line" sum for the case and should not reject a settlement which meets the bottom line because of the way the amount is apportioned.

Apportionment of the penalty in a multi-defendant case may be required if one party is willing to settle and others are not. In such circumstances, the Government should take the position that if certain portions of the penalty are attributable to such party (such as economic benefit or second offense), that party should pay those amounts and a reasonable portion of the amounts not directly assigned to any single party. However, the Government should also be flexible enough to mitigate the penalty somewhat to account for the party's relative cooperativeness. If a case is settled as to one defendant, a penalty not less than the balance of the settlement figure for the case as a whole should be sought from the remaining defendants. This remainder can be adjusted upward, in accordance with the general Civil Penalty Policy, if the circumstances warrant it. Of course, the case can also be litigated against the remaining defendants for the maximum attainable penalty.

Other Considerations

We expect that each Region may want to develop its own strategy (some have already done so) for targeting enforcement action against violators of the asbestos demolition and renovation requirements. The policy is intended to give Regions flexibility to incorporate, as part of a coherent strategy, a practice of addressing first-time notice violations where there is at least probable compliance with substantive requirements through findings of violation or administrative orders. There is also the potential for "pre-settling" judicial actions for modest penalties for such violations.

On the other hand, the policy penalizes substantive violations and repeat violations in a significant way. Penalty should generally be sought for all violations which fit these categories. If a company knowingly violates the regulations, particularly if the violations are severe or the company has a prior history of violations, the Region should consider initiating a criminal enforcement action.

Examples

Following are two examples of application of this policy.

Example 1

XYZ Associates hires America's Best Demolition Contractors to demolish a building containing 1300 linear feet of pipe covered with friable asbestos, and 16,000 square feet of siding and roofing sprayed with asbestos. Neither company notifies EPA or State officials prior to commencing demolition of the building. Tipped off by a citizen complaint, EPA inspects the site and finds that the contractor has not been wetting the asbestos removed from the building, in violation of 40 C.F.R. §61.147. In addition, the contractor has left a pile of dry asbestos waste material on site, and the inspector observes visible emissions in violation of §61.152(b). The contractor has also not deposited the waste in an acceptable disposal site, in violation of 61.152(a). At the time of the inspection 75% of the asbestos has already been removed from the building and handled improperly. After discussion with EPA officials, XYZ Associates hires another contractor to properly dispose of the asbestos wastes and to remove the remaining 25% of the asbestos in compliance with the asbestos NESHAP.

Neither XYZ Associates nor America's Best Demolition Contractors has ever been cited for asbestos violations by EPA or the State. Both parties have sufficient resources to pay a substantial penalty.

The penalty is computed as follows:

Gravity Component
No notice (first time) \$10,000
violations of §61.147, §61.152(b), and
§61.152(a) (100 + 5 = 105 units of
asbestos +45,000
\$55,000
Economic Benefit
\$4/sq. foot x 16,000 sq. feet + \$4/
linear foot x 1300 linear feet \$69,200
Offset by actual expenditure by XYZ
to remove 25% of asbestos in compli-
ance with NESHAP (25% x 569,200) -17,300
\$51,900
Preliminary deterrence amount \$106,900

Adjustment factors - Prompt correction
of environmental problem (-30% of
gravity component) \$-16,500
Minimum penalty settlement amount \$ 90,400

Example 2

Consolidated Conglomerates, Inc., hires Bert and Ernie's Trucking Company to demolish a building which contains 10,000 linear feet of friable asbestos on pipes. Neither party gives notice to EPA or to the State prior to commencement of demolition. An EPA inspector, acting on a tip, visits the site after the building has been totally demolished. He finds a large pile of dry asbestos-containing waste material on site. The inspector learns that the demolition had been completed at least three weeks before he inspected the site.

Consolidated Conglomerates is a corporation with assets of over \$100 million and annual sales in excess of 510 million. Bert and Ernie's Trucking is a limited partnership of two brothers who own two trucks and have less than \$250,000 worth of business each year. This contract was for \$50,000. Bert and Ernie's was once previously cited by the State Department of Environmental Quality for violations of asbestos regulations.

The penalty is computed as follows:

Gravity Component
No notice (2nd violation) \$25,000
Violations of §61.152(b) and \$40,000
§61.152(a) (2nd violation); no direct
evidence of violation of §61.147
(app. 38.5 units)
Aggravation of hazard due to duration \$10,000
of disposal violation - + 25% of
substantive violations (25% x \$40,000) _____
\$75,000

Benefit Component
\$4/linear foot x 10,000 linear feet \$40,000
Preliminary deterrence amount
\$115,000
No adjustment factors
Minimum settlement penalty amount \$115,000

Apportionment of the Penalty

The penalty in this case has been increased by \$35,000 because it involves a second violation by the contractor. Ordinarily, the Government should try to get Bert and Ernie's to pay at least that amount of the penalty. However, Consolidated Conglomerates financial size compared to the contractor's will probably dictate that Consolidated pay most of the penalty.

Asbestos Demolition/Renovation Penalty Policy

Gravity Component
Notification 1st violation 2nd violation Subsequent
No notice \$10-12,000 \$20-25,000 \$25,000
No notice but probable \$0-5,000 \$10-15,000 \$25,000 substantive compliance
Late notice - discretion - if tantamount to no notice, use above table
Incomplete notice - discretion - if tantamount to no notice, use above table
Substantive violations
Total amount of asbestos involved in the operation
1st violation 2nd violation Subsequent
> 10 units \$5,000 \$15,000
\$25,000
> 10 units but >50 units \$10,000 \$20,000
\$30,000
> 50 units \$15,000 \$25,000
\$35,000
unit = 260 linear feet or 160 square feet - if both are involved, convert each amount to units and add together

Apply matrix separately to violation of §61.147, §61.152(b), and §61.152(a) - add together
Enhance if duration of offense aggravates hazard - e.g., failure to dispose of asbestos - containing wastes.

Benefit Component

For asbestos on pipes:
\$3 per linear foot of asbestos for wetting of friable asbestos and packaging of wastes - \$61.147, §61.152(b)
\$1 per linear foot of asbestos for transporting and disposal of wastes - §61.152(b), §61.152(a)
\$4 per linear foot for both
For asbestos on other facility components:
\$3.50 per square foot for wetting of friable asbestos and packaging of wastes
\$.50 per square foot for transporting and disposal of wastes
\$4.00 per square foot for both