UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

| | | |
|---|---|---|
| IN THE MATTER OF | ) | |
| | ) | Docket No. EPCRA-VIII-93-06 |
| TITAN STEEL CORPORATION | ) | |
| | ) | |
| Respondent | ) | |

ORDER ON DEFAULT

On September 19, 1995, Complainant, United States Environmental Protection Agency, filed its Second Motion for Default Order pursuant to 40 C.F.R. § 22.17. This Order on Default grants Complainant's motion and makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. On or about June 2, 1993, Complainant filed the Complaint in this matter, alleging five violations of Section 313 of the Emergency Planning and Community Right-to-Know Act ("EPCRA") and proposing a penalty of $28,750.

2. On or about June 22, 1993, Respondent filed an Answer, including a request for a hearing.

3. In its Answer, Respondent failed to deny or explain any material factual allegation contained in the Complaint.

4. By order dated July 21, 1993, the Presiding Judge directed both parties to submit their respective prehearing exchanges no later than September 23, 1993.

5. On or about September 28, 1993, Complainant filed a Motion for Extension of Time to File Prehearing Exchange to

November 26, 1993.

6. Complainant filed its prehearing exchange on November 26, 1993.

7. Respondent, to date, has failed to file its prehearing exchange.

8. On May 15, 1995, the Presiding Judge issued an Order to Show Cause directing Respondent to show cause on or before June 30, 1995, as to why the Complainant's motion for default should not be granted.

9. Respondent, to date, has failed to file any response to the Order to Show Cause.

II. CONCLUSIONS OF LAW

1. Under 40 C.F.R. § 22.15(d), Respondent's failure to deny or explain any material factual allegation contained in the Complaint constitutes an admission of these allegations.

2. Respondent has failed to comply with the order regarding filing of prehearing exchanges, has failed to show good cause as to why its prehearing exchange has not been filed in response to the Order to Show Cause, and is therefore in default pursuant to 40 C.F.R. § 22.17(a).

3. Pursuant to 40 C.F.R. § 22.17, said default constitutes an admission by Respondent of all the facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations. The admission of these facts, together with a review of the Complaint and applicable law, support further findings of fact and conclusions of law.

III. ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. EPA has jurisdiction of this matter under Section 325(c) of EPCRA, 42 U.S.C. § 11045(c).

2. Respondent is Titan Steel Corporation, located at 4315 South 300 West, Murray, Utah 84107.

3. Pursuant to Sections 313 and 328 of EPCRA, 42 U.S.C. §§ 11023 and 11048, EPA promulgated the "Toxic Chemical Release Reporting: Community Right-to-Know" rule, 40 C.F.R. Part 372. Under Section 313 of EPCRA and 40 C.F.R. § 372.22, owners or operators of facilities subject to the requirements of Section 313 are required to submit annually a Toxic Chemical Release Inventory Reporting Form (hereinafter "Form R") for each toxic chemical listed under Section 313(c) of EPCRA or 40 C.F.R. § 372.65 that was manufactured, processed, or otherwise used during the preceding calendar year in quantities exceeding the established toxic chemical thresholds.

4. Under Section 313(a) of EPCRA, the completed Form R, as published under Section 313(g) of EPCRA, is required to be submitted to EPA on or before July 1 of the year after the manufacture, processing, or other use of the chemical.

5. Respondent is a "person" as that term is defined by Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).

6. Respondent is an owner or operator of a "facility" in Murray, Utah as that term is defined by Section 329(4) of EPCRA, 42 U.S.C. § 11049(4) and 40 C.F.R. § 372.3.

7. On or about January 27, 1992, an authorized EPA

employee inspected Respondent's facility in Murray, Utah. The purpose of the inspection was to determine Respondent's compliance with the EPCRA Section 313 reporting requirements.

8. Under Section 313(b) of EPCRA, owners or operators of facilities that have 10 or more full time employees, are in Standard Industrial Classification Codes 20 through 39, and manufactured, processed, or otherwise used a toxic chemical listed under Section 313(c) of EPCRA or 40 C.F.R. § 372.65 in quantities exceeding the appropriate threshold as set forth in Section 313(f) of EPCRA and 40 C.F.R. § 372.25, are required to submit a Form R for these substances for the preceding reporting year.

9. Respondent's facility has 10 or more "full-time employees" as that term is defined by 40 C.F.R. § 372.3.

10. Respondent's facility is in Standard Industrial Classification Code 3441.

11. Chromium, CAS # 7440-47-3, is a toxic chemical listed under 40 C.F.R. § 372.65, for which reporting is required pursuant to Section 313(b) of EPCRA, if it is manufactured, processed or otherwise used in quantities exceeding the appropriate threshold as set forth in 40 C.F.R. § 372.25.

12. Nickel, CAS # 7440-02-0, is a toxic chemical listed under 40 C.F.R. § 372.65, for which reporting is required pursuant to Section 313(b) of EPCRA, if it is manufactured, processed or otherwise used in quantities exceeding the appropriate threshold as set forth in 40 C.F.R. § 372.25.

13. Xylene, CAS # 1330-20-7, is a toxic chemical listed under 40 C.F.R. § 372.65, for which reporting is required pursuant to Section 313(b) of EPCRA, if it is manufactured, processed or otherwise used in quantities exceeding the appropriate threshold as set forth in 40 C.F.R. § 372.25.

14. Pursuant to 40 C.F.R. § 372.25, the appropriate reporting threshold for chromium which was "processed" in 1989 is 25,000 pounds.

15. During the calendar year 1989, in excess of 25,000 pounds of chromium were "processed," as that term is defined in 40 C.F.R. § 372.3, at Respondent's facility.

16. Respondent failed to submit a Form R to EPA on or before July 1, 1990 for chromium it "processed" during the calendar year 1989.

17. Respondent's failure to submit a Form R for the chromium it "processed" in the year 1989 by July 1, 1990 is a violation of Section 313 of EPCRA.

18. Pursuant to 40 C.F.R. § 372.25, the appropriate reporting threshold for nickel which was "processed" in 1989 is 25,000 pounds.

19. During the calendar year 1989, in excess of 25,000 pounds of nickel were "processed," as that term is defined in 40 C.F.R. § 372.3, at Respondent's facility.

20. Respondent failed to submit a Form R to EPA on or before July 1, 1990 for nickel it "processed" during the calendar year 1989.

21. Respondent's failure to submit a Form R for the nickel it "processed" in the year 1989 by July 1, 1990 is a violation of Section 313 of EPCRA.

22. Pursuant to 40 C.F.R. § 372.25, the appropriate reporting threshold for xylene which was "otherwise used" in 1988, 1989 and 1990 is 10,000 pounds per year.

23. During the calendar year 1988, in excess of 10,000 pounds of xylene were "otherwise used," as that term is defined in 40 C.F.R. § 372.3, at Respondent's facility.

24. Respondent failed to submit a Form R to EPA on or before July 1, 1989 for xylene it "otherwise used" during the calendar year 1988.

25. Respondent's failure to submit a Form R for the xylene it "otherwise used" in the year 1988 by July 1, 1989 is a violation of Section 313 of EPCRA.

26. During the calendar year 1989, in excess of 10,000 pounds of xylene were "otherwise used," as that term is defined in 40 C.F.R. § 372.3, at Respondent's facility.

27. Respondent failed to submit a Form R to EPA on or before July 1, 1990 for xylene it "otherwise used" during the calendar year 1989.

28. Respondent's failure to submit a Form R for the xylene it "otherwise used" in the year 1989 by July 1, 1990 is a violation of Section 313 of EPCRA.

29. During the calendar year 1990, in excess of 10,000 pounds of xylene were "otherwise used," as that term is defined

in 40 C.F.R. § 372.3, at Respondent's facility.

30. Respondent failed to submit a Form R to EPA on or before July 1, 1991 for xylene it "otherwise used" during the calendar year 1990.

31. Respondent's failure to submit a Form R for the xylene it "otherwise used" in the year 1990 by July 1, 1991 is a violation of Section 313 of EPCRA.

IV. CONCLUSION

Respondent's Answer to the Complaint does not raise any matter which could support a decision that Complainant has failed to establish a prima facie case or could justify the dismissal of the Complaint. An examination of the prehearing exchange documents submitted by Complainant supports the allegations in the Complaint that Respondent violated Section 313 of EPCRA as alleged. It is therefore concluded that Respondent has violated Section 313 of EPCRA, 42 U.S.C. § 11023.

V. PENALTY

Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1), authorizes the assessment of a civil penalty of up to $25,000 for each violation of Section 313 of EPCRA, 42 U.S.C. § 11023. Complainant's policy with respect to the assessment of civil penalties is guided by the "Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act" dated August 10, 1992 ("Penalty Policy"). Based upon the facts alleged in the Complaint, the criteria set forth in Section 325(c)(1) of EPCRA, and the Penalty Policy, Respondent is hereby

assessed the following civil penalty for the violations alleged in the Complaint:

| COUNT | VIOLATION | PENALTY |
|---|---|---|
| I | Section 313 of EPCRA Failure to submit Form R for chromium - 1989 | $ 5,750 |
| II | Section 313 of EPCRA Failure to submit Form R for nickel - 1989 | $ 5,750 |
| III | Section 313 of EPCRA Failure to submit Form R for xylene - 1988 | $ 5,750 |
| IV | Section 313 of EPCRA Failure to submit Form R for xylene - 1989 | $ 5,750 |
| V | Section 313 of EPCRA Failure to submit Form R for xylene - 1990 | $ 5,750 |
| TOTAL | | $ 28,750 |

The penalty has been calculated in accordance with the Penalty Policy. As stated on pages 7 and 8 of that Policy, penalties are determined in two stages: (1) determination of a "gravity-based penalty," and (2) adjustments to the gravity-based penalty.

To determine the gravity-based penalty, two factors, the "circumstances" of the violation and the "extent" of the violation, are to be considered. As set forth on pages 8 through 10 of the Penalty Policy, the "extent" of the violation reflects (a) the amount of the chemical manufactured, processed, or otherwise used by the company, and (b) the size of the company (total corporate entity sales and number of employees). On page

9 of the Penalty Policy, "extent" levels (A, B, and C) are established for these factors.

With regard to this particular case, Complainant has determined that Respondent processed or otherwise used less than ten times the reporting threshold amount, which would place the violations in Extent Level B or C, depending on the size of the company. Under the Penalty Policy, a company committing such violations that employs at least 50 employees with more than $10 million in total corporate entity sales would fall under Extent Level B; all other companies would fall under Extent Level C. A Dun and Bradstreet report submitted by Complainant with its prehearing exchange indicated that Respondent employed more than 50 employees, but did not provide an estimate of Respondent's total corporate entity sales. Complainant apparently estimated that Respondent had less than $10 million in total sales, resulting in Extent Level C, the lowest extent level provided for under the Penalty Policy.

On pages 11 and 12, the Penalty Policy describes the procedure to ascertain the "circumstance" level. The appropriate level is determined by the nature of the violation. As explained on page 4 of the Penalty Policy, where violations involving a failure to submit a Form R continue for one year or more after the due date, such violations are considered to be "Failure to Report in a Timely Manner - Category I" violations. As set forth on page 12 of the Penalty Policy, the appropriate circumstance level for such Category I violations is Level 1.

In this particular case, Respondent's failure to submit the appropriate Form Rs continued for one year or more after the due date. Therefore, the appropriate circumstance level for this violations is Level 1.

Accordingly, the "gravity-based penalty" for each count is assessed at Extent Level C, Circumstance Level 1. Applying the penalty matrix found on page 11 of the Penalty Policy, the appropriate "gravity-based penalty" for each of the five violations alleged in the Complaint is $5,000; the total unadjusted penalty is $25,000.

The Penalty Policy also provides for "adjustment factors", in addition to the "gravity-based penalty", to be considered in determining the final penalty. One of these factors is "attitude", discussed in part on page 18 of the Penalty Policy as follows:

> This adjustment has two components: (1) cooperation and (2) compliance. An adjustment of up to 15% can be made for each component:
>
> (1) Under the first component, the Agency may reduce the gravity-based penalty based on the cooperation extended to EPA throughout the compliance evaluation/enforcement process or the lack thereof. Factors such as degree of cooperation and preparedness during the inspection, allowing access to records, responsiveness and expeditious provision of supporting documentation requested by EPA during or after the inspection, and cooperation and preparedness during the settlement process.

Under this provision of the Penalty Policy, Complainant is clearly allowed to reduce the penalty to reflect the cooperation of a Respondent at several stages of an enforcement investigation and proceeding. However, citing (1) the phrase referring to

cooperation "or the lack thereof" and (2) language from an earlier EPCRA penalty policy, Complainant urges that this language also authorizes an increase in penalty for a lack of cooperation and that such an increase is appropriate here in light of this Respondent's demonstrated lack of cooperation.[1]

Although the language in the Penalty Policy on this issue is ambiguous, such an increase is appropriate here. This proposed penalty increase was described in the Complaint and in Complainant's Prehearing Exchange. Complainant further explained this penalty adjustment in the proposed default order attached to its first Motion for Default Order, filed on August 11, 1994, and again in the proposed default order filed with its Second Motion for Default Order on September 19, 1995. Nevertheless, Respondent has not contested this proposed increase at any stage of this proceeding. Therefore, without deciding the issue of how this ambiguity in the Penalty Policy should be resolved, in the absence of opposition, Complainant's recommended penalty increase is adopted for this proceeding.

Accordingly, the unadjusted penalty of $5,000 proposed for

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[1]According to Complainant, the record here shows that: (1) Respondent was ill-prepared to provide necessary information during the initial inspection. (2) Subsequently, over a period of several months, Respondent consistently failed to provide supporting documentation repeatedly requested by Complainant. (3) Complainant was finally compelled to return to Murray, Utah, to conduct a subsequent inspection, expecting that Respondent would otherwise continue to ignore its requests for information. Under these circumstances, Complainant argues that Respondent showed a consistent lack of cooperation as defined under the Policy, justifying an upward adjustment of 15% to the gravity-based penalty.

each count is increased by 15% to $5,750, resulting in a total penalty for Respondent's five violations of $28,750.

ORDER

Under the authority of EPCRA and the Consolidated Rules of Practice, 40 C.F.R. Part 22, Complainant's Second Motion for Default Order is hereby granted. It having been determined that Respondent violated EPCRA as alleged in the Complaint, a penalty of $28,750 is assessed against Respondent, Titan Steel Corporation, pursuant to Section 325 of EPCRA, 42 U.S.C. § 11045.[2] The penalty shall be paid within sixty (60) days of the date of this Order by the submission of a cashier's or certified check in the amount of twenty-eight thousand and seven hundred fifty dollars ($28,750), payable to Treasurer, United States of America, to the following address:

Regional Hearing Clerk
U.S. EPA, Region VIII
999 18th Street, Suite 500
Denver, Colorado 80202-2405

**SO ORDERED.**

Daniel M. Head
Administrative Law Judge

Dated: October 12, 1995
Washington, D.C.

[2]This Order constitutes an initial decision, which, unless appealed in accordance with Section 22.30 of the Consolidated Rules of Practice (Rules), 40 C.F.R. § 22.30, or unless the Environmental Appeals Board (EAB) elects sua sponte to review the same as therein provided, will become the final order of the EAB in accordance with Section 22.27(c) of the Rules.

**IN THE MATTER OF TITAN STEEL CORPORATION,** Respondent
**Docket No. EPCRA VIII-93-06**

**CERTIFICATE OF SERVICE**

I certify that the foregoing Order on Default, dated Oct. 12, 1996, was sent in the following manner to the addressees listed below:

Original by Pouch Mail to:

Eduardo Perez
Office of Regional Counsel
U.S. Environmental Protection
Agency, Region VIII
999 18th Street - Suite 500
Denver, CO 80202-2405

Copy by Certified Mail, Return Receipt Requested to:

Counsel for Complainant:

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Environmental Protection Agency
Office of Administrative
Law Judges
401 M Street, SW
Washington, DC 20460

Dated: Oct. 12, 1996
Washington, DC