UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	)	
	)	
SuperClean Brands, Inc.	)	
St. Paul, Minnesota	)	**Docket No. EPCRA-05-2009-0016**
	)	
Respondent.	)	
	)	

COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO PENALTY

Complainant, the Director of the Land and Chemicals Division, United States Environmental Protection Agency (U.S. EPA or Agency), Region 5, by and through her attorney, Terence Stanuch, hereby moves before the Presiding Officer, pursuant to 40 C.F.R. § 22.20 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the Consolidated Rules), 40 C.F.R. Part 22, that an accelerated decision be entered in this matter as an initial decision issued pursuant to 40 C.F.R. § 22.27, finding that $57,870 is an appropriate civil penalty to recommend that Respondent be assessed for the violations alleged in the Complaint.

The Complaint alleged five violations of Section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11023, and the Toxic Chemical Release Reporting Community Right-to-Know Rule at 40 C.F.R. Part 372. Complainant simultaneously filed a Motion for Accelerated Decision as to Liability with this Motion.

Introduction

Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), states, in part:

> (1) Any person (other than a governmental entity) who violates any requirement of section 11022 or 11023 [Form R requirements] of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation.

> (3) Each day a violation described in paragraph (1) or (2) continues shall, for purposes of this subsection, constitute a separate violation.
>
> (4) The Administrator may assess any civil penalty for which a person is liable under this subsection by administrative order or may bring an action to assess and collect the penalty in the United States district court for the district in which the person from whom the penalty is sought resides or in which such person's principal place of business is located.

To provide guidance and ensure that penalties assessed for violations of EPCRA are calculated in a fair and consistent manner, the U.S. EPA developed the "Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990)"(amended)(April 12, 2001), ("the ERP"). (Complainant's Initial Prehearing Exchange, Exhibit No. 18). The ERP states that:

> [t]he purpose of the Enforcement Response Policy is to ensure that enforcement actions for violations of EPCRA § 313 and the PPA *(Pollution Prevention Act, explanation added)* are arrived at in a fair, uniform and consistent manner; that the enforcement response is appropriate for the violation committed; and that persons will be deterred from committing EPCRA § 313 violations and the PPA (*sic*). ERP at 1.

The ERP also states that "[e]ach day a violation continues may constitute a separate violation. Id.

Pursuant to the 2004 Civil Monetary Penalty Inflation Adjustment Rule, the U.S. EPA issued the June 5, 2006 "Memorandum - Penalty Policy Supplements Pursuant to the 2004 Civil Monetary Penalty Inflation Adjustment Rule." Complainant's Initial Prehearing Exchange, Exhibit No. 19. This memorandum adjusted all penalties for inflation, for several environmental statutes including EPCRA, for all violations occurring on or after March 15, 2004.

Respondent's Admissions

Count I

Respondent admits that it did not submit to the U.S. EPA Administrator a Form R for methanol for the 2003 calendar year on or before July 1, 2004. Answer at paragraph 26.

However, as discussed in Complainant's Rebuttal Prehearing Exchange, page 1, Respondent has offered four different dates as the submittal date for this Form R: (1) Respondent first asserted that this Form R was submitted on October 3, 2005 (Complainant's Initial Prehearing Exchange, Exhibit Nos. 3 and 4); then (2) Respondent asserted that this Form R was submitted sometime in October 2004, (Complainant's Initial Prehearing Exchange, Exhibit Nos. 5 and 6); then (3) Respondent asserted that this Form R was submitted on March 5, 2009 (Complainant's Initial Prehearing Exchange, Exhibit Nos. 7 and 8); and finally, Respondent asserts that this Form R was submitted on October 1, 2004 (Respondent's Initial Prehearing Exchange, page 3). Complainant will address this confusion later in this Motion.

Count II

Respondent admits that its Form R for methanol for the 2004 calendar year was submitted to the U.S. EPA Administrator on September 30, 2005, 90 days after the July 1, 2005 due date for this Form R. Answer at paragraph 35.

Count III

Respondent admits that its Form R for methanol for the 2005 calendar year was submitted to the U.S. EPA Administrator on October 17, 2006, 107 days after the July 1, 2006 due date for this Form R. Answer at paragraph 43.

Count IV

Respondent admits that its Form R for ethylene glycol for the 2004 calendar year was submitted to the U.S. EPA Administrator on June 10, 2008, more than one year after the July 1, 2005 due date for this Form R. Answer at paragraph 51.

Count V

Respondent admits that its Form R for ethylene glycol for the 2005 calendar year was also submitted to the U.S. EPA Administrator on June 10, 2008, more than one year after the July 1, 2006 due date for this Form R. Answer at paragraph 59.

Legal Argument

Section 22.20(a) of the Consolidated Rules, 40 C.F.R. § 22.20(a), states, in part:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

Section 22.27(b) of the Consolidated Rules, 40 C.F.R. § 22.20(b), states, in part:

> If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based upon the evidence in the record and in accordance with any penalty criteria set forth in the Act.[1] The Presiding Officer shall consider any civil penalty guidelines issued under the Act.

Also, the U.S. EPA Administrator, in a final decision of the Environmental Appeals Board, has held that "a person is not entitled to an evidentiary hearing unless that person puts a material fact at issue." Green Thumb Nursery, Inc., 1997 EPA App. LEXIS 4, *25 (EAB, Mar. 6, 1997). "[The] principle that one must raise actual, relevant, and material disputes of fact in order to obtain an evidentiary hearing is at the heart of all procedures for summary disposition, whether as to summary judgment in a judicial context, or as to administrative proceedings." Id. at *26.

Calculation of the Proposed Penalty

Starting on page 6 its Initial Prehearing Exchange, Complainant provided a detailed narrative to explain how the penalty proposed in the Complaint was calculated. Complainant

1. Section 325(c) of EPCRA, 42 U.S.C. § 11045(c) does not set forth any specific penalty criteria which must be considered before assessing a civil penalty.

recognizes that "a penalty policy, such as the EPCRA ERP, is not unquestionably applied as if the policy were a rule with 'binding effect.'" Steeltech, Ltd., 1998 EPA ALJ LEXIS 35, *21 (May 27, 1998); Catalina Yachts, Inc., 1999 EPA App. LEXIS 7, *22 (March 24, 1999). However, as stated above, the procedural rules governing this proceeding require that the Presiding Officer consider any civil penalty guidelines issued under the Act. 40 C.F.R. § 22.27(b). Therefore, Complainant utilized the ERP to calculate the penalty proposed in the Complaint and Respondent has not asserted any argument in either its Answer or Initial Prehearing Exchange that Complainant's use of the ERP was either inapplicable or inappropriate; nor has Respondent put forth any genuine issue of material fact that would affect the calculation of the proposed penalty.

The Gravity-Based Penalty

Complainant avers that the calculation of the gravity-based penalty in this matter, including the application of specific "extent" and "circumstance" levels, was determined in strict conformance with the ERP. However, Respondent "believes that the proposed penalty should be reduced or eliminated" (Respondent's Initial Prehearing Exchange at 6), and makes two arguments to explain why it believes the gravity-based penalty was calculated incorrectly.

Respondent's First Argument - Gravity Calculation. Respondent argues that it basically complies with EPCRA and that the potential harm from these violations is "extremely low." Respondent's Initial Prehearing Exchange at 6. Respondent states that Complainant "could have utilized one of the other, lower quantity hazardous materials in calculating the proposed penalties" and argues that Matrix Level C should have been utilized based on the facts in this case."[2] Id. However, the facts in this case clearly indicate that the selection of Matrix Level B for the three

2. Matrix Level C has already been applied to the two ethylene glycol violations. Matrix Level B applies only to the three methanol violations.

methanol violations was not only consistent with the ERP, but required by the ERP. The ERP is very specific as to how matrix levels are determined and does not allow any discretion to select a different matrix level for any reason. ERP at 8. To do so would be an arbitrary and capricious application of the ERP.

Respondent's Second Argument - Circumstances. Respondent also argues that Complainant's decision to assess a Category I penalty for the 2003 methanol violation is "excessive" and "harsh," given Respondent's "consistent record of filing the Forms R for methanol" and after allegedly making "numerous" attempts to file this particular Form R. Respondent's Initial Prehearing Exchange at 6. Respondent argues that a Category II penalty should have been used. Id. at 7.

Complainant avers that selection of Category I for the 2003 methanol violation was appropriate, based on the facts of this matter, and in strict conformance with the ERP. As discussed on page 9 of Complainant's Initial Prehearing Exchange, Category I penalties are applied to Form R submittals that are more than one year late; and Category II penalties are applied to Form R submittals that are less than one year late. ERP at 12. Similar to the process for determining matrix levels, the ERP is very specific as to which Category to apply and does not allow for any discretion to select a different Category for any reason. Id. To do so would be another arbitrary and capricious application of the ERP.

However, Respondent's real argument revolves around its uncertainty as to when it actually submitted the 2003 Form R for methanol to the TRI Data Processing Center. As discussed in Complainant's Rebuttal Prehearing Exchange at page 2, Respondent has offered several dates upon which it supposedly submitted the 2003 Form R for methanol: first it was

October 3, 2005;[3] then it was sometime in 2004; then it was March 5, 2009, the postmark date this Form R was finally received by the TRI Data Processing Center (Id.), and finally, October 1, 2004 (Respondent's Initial Prehearing Exchange at 3). Respondent wants Complainant to accept Gene Jensen's[4] affidavit (Complainant's Initial Prehearing Exchange, Exhibit No. 6), as proof that the 2003 Form R for methanol was submitted to the Federal Government sometime is 2004. However, Mr. Jensen's affidavit is vague in that it does not specifically state a date upon which he supposedly submitted this Form R and does not offer any indicia of reliability. Mr. Jensen's affidavit simply cannot be accepted because it does not rise to the level probative evidence. "Summary disposition may not be avoided by merely alleging that a factual dispute may exist, or that future proceedings may turn something up." Green Thumb Nursery, at n.24 (citations omitted). "The mere possibility that a factual dispute *may* exist, without more, is not sufficient to overcome a convincing presentation by the moving party." Id.

Even the October 3, 2005 Certified Mail Receipt is questionable because it doesn't contain any markings or indication that it was for the 2003 Form R for methanol. The only real proof of submittal for this Form R is the Chemical Report Summary from the TRI Data Processing Center. Complainant's Initial Prehearing Exchange, Exhibit No. 8. The TRI Data Processing Center did not receive Respondent's 2003 Form R for methanol until March 10, 2009, and Respondent has not been able to provide any documentation or other information to prove that this Form R was

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3. The Court will note that October 9, 2005 is the date listed as the "Form R received date" for the 2003 Form R for methanol on page 9 and in Exhibit No. 14 of Complainant's Initial Prehearing Exchange. The October 9, 2005 date is a typographical error and should have said October 3, 2005. However, this six day difference is irrelevant to this matter because either date is still more than one year after the July 1, 2004 due date for this Form R. All penalties for Forms R submitted more than one year after the due date are calculated at a flat rate.

4. Gene Jensen was/is Respondent's operations manager at Respondent's Facility who was/is responsible for submitting the required EPCRA Forms R.

submitted before March 5, 2009. Regardless, even if the Agency accepts the October 3, 2005 Certified Mail Receipt as being an acceptable date of submittal for this Form R, Category I is still the appropriate category for this alleged violation because this Form R was submitted more than one year after it was due.

Adjustments to the Gravity-Based Penalty

Finally, the ERP recognizes that upward or downward adjustments to the gravity-based penalty may be necessary and lists seven factors that may be taken into consideration.

As stated above, Respondent "believes that the proposed penalty should be reduced or eliminated" (Respondent's Initial Prehearing Exchange at 6), and makes the argument that its attitude and cooperative posture throughout the process entitle it to a reduction of the proposed penalty. Id. at 7.

The ERP recognizes several "adjustment factors" to be considered in determining whether any upward or downward adjustment should be made to the gravity-based penalty. These adjustment factors include the following criteria: voluntary disclosure, history of prior violations, delisted chemicals, attitude, and other factors as justice may require. The ERP also discusses "settlements with conditions," such as the applicability of Supplemental Environmental Projects, and whether a violator has an ability to pay the proposed penalty. Complainant's Initial Prehearing Exchange, page 12. As discussed in Complainant's Initial Prehearing Exchange (Id.), the adjustment factors of voluntary disclosure, delisted chemicals, settlements with conditions, and ability to pay are not applicable to this matter and, therefore, are not discussed herein.

History of Prior Violations (page 16 of the ERP), *see* Complainant's Initial Prehearing Exchange, page 12.

Based upon the fact that the U.S. EPA filed an administrative complaint against Respondent on April 13, 2007 alleging violations of section 312(a) of EPCRA, 42 U.S.C. § 11022(a) (Complainant's Initial Prehearing Exchange, Exhibit No. 20), and the fact that Respondent entered into a Consent Agreement and Final Order (Id., Exhibit No. 21), on December 12, 2007 to resolve that matter, Respondent has a history of prior violation regarding EPCRA. Consequently, and in accordance with the ERP, Complainant had the discretion to increase the gravity-based penalty in this matter from $57,870 to $64,318. Complainant's Initial Prehearing Exchange, page 12.

However, Complainant decided not to adjust upward the gravity-based penalty in this matter for a history of prior violation because, based upon Respondent's explanation in its March 13, 2008 letter (Complainant's Initial Prehearing Exchange, Exhibit No. 1), the violations alleged in both the April 13, 2007 Complaint and the instant Complaint arose during the same time period. Complainant thought that increasing the gravity-based penalty for violations that occurred during the same time period, albeit in two separate administrative proceedings, was inconsistent with the intents and purposes of this adjustment factor. Based on a general notion of fairness, Complainant did not make any upward adjustment to the gravity-based penalty.

Attitude (page 18 of the ERP).

Pursuant to the "attitude" adjustment factor, downward adjustments to the gravity-based penalty may be appropriate:

> (1) based on the cooperation extended to the U.S. EPA throughout the compliance evaluation/enforcement process, and cooperation and preparedness during the settlement process; or
>
> (2) in consideration of the facility's good faith efforts to comply with EPCRA and the speed and completeness with which it comes into compliance.

Complainant does not agree that Respondent's actions during the course of this proceeding warrant any reduction in the proposed penalty for at least the following reasons:

First, Respondent's claim that it "learned that Forms R for ethylene glycol for calendar years 2004 and 2005 were not filed" "[d]uring the investigation of the Agency's Notice" (Respondent's March 13, 2009 letter to U.S. EPA, Complainant's Initial Prehearing Exchange, Exhibit No. 1), is misleading. During the closing conference of the October 27, 2005 U.S. EPA inspection of Respondent's Facility, the U.S. EPA inspector informed Gene Jensen, Respondent's representative, that:

> "there was a possibility that [Respondent] should be reporting for ethylene glycol. [The inspector] recommended that Mr. Jensen review the records, and if in his opinion [Respondent] should have filed for the preceding years, [Respondent] should file a report.
>
> Mr. Jensen was shown how to find reporting information on the EPA web site." Complainant's Initial Prehearing Exchange, Exhibit No. 15, page 6.

Therefore, Respondent was already on notice in October 2005 that it might have to submit Forms R for its ethylene glycol use but apparently didn't follow up on this advice.

Second, Respondent's initial submission of documents that were requested pursuant to the October 27, 2005 inspection contained numerous deficiencies which were documented in a letter sent to Respondent on December 16, 2005. Complainant's Initial Prehearing Exchange, Exhibit No. 15, Attachment K). Respondent did not respond to this letter so the Agency sent Respondent a follow-up letter on January 13, 2006. Complainant's Initial Prehearing Exchange, Exhibit No. 15, Attachment L). Respondent submitted additional information but still failed to answer numerous questions presented in these letters. Complainant's Initial Prehearing Exchange, Exhibit No. 15, page 7. Attachments M and H of Complainant's Initial Prehearing Exchange, Exhibit

No. 16, provide more detailed information as to the problems U.S. EPA had in dealing with Respondent regarding this matter.

Third, Respondent's submission of documents that were requested pursuant to the October 18, 2006 inspection contained several large gaps in the delivery schedule which were documented sent to Respondent on December 6, 2006. Complainant's Initial Prehearing Exchange, Exhibit No. 16, Attachment P. Respondent submitted additional invoices in response to this letter but there were still gaps in the delivery schedule, as summarized in Section VIII of the October 18, 2006 inspection report. Id.

Fourth, as discussed on page 3 in Complainant's Rebuttal Prehearing Exchange, Complainant informed Respondent on at least one occasion, during a May 28, 2008 conference call, that the TRI database still did not list its 2003 Form R for methanol. It was not until March 5, 2009, that Respondent finally had proof that its 2003 Form R for methanol had been submitted to the TRI Data Processing Center. Complainant's Initial Prehearing Exchange, Exhibit No. 9.

In stark contrast to Respondent's lack of cooperation, the respondent in a previous EPCRA Form R reporting case, Bollman Hat Company, 1999 EPA ALJ LEXIS 18 (March 17, 1998), acted in an almost exemplary manner. The Bollman Hat court provided a lengthy narrative describing Bollman's "open and cooperative" attitude, which included the timely, complete and accurate submission of all reports that were requested, and a willingness to point out U.S. EPA's error in underestimating the number of days late that Bollman had filed its 1994 reports. Id. at *34. Consequently, the Bollman Hat court held that a full 30% reduction of the gravity-based penalty was warranted because the Bollman "has exhibited in its actions the cooperative and compliant 'attitude' intended to be fostered and rewarded in the ERP . . . ." Id.

"Cooperation" is evaluated in light of the violator's behavior during the compliance evaluation and enforcement process, and includes "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." Pacific Refining Company, EPCRA Appeal No. 94-1 (December 6, 1994); ERP at 18. The "compliance" component of this factor is evaluated in light of a facility's good faith efforts to comply with EPCRA, and the speed and completeness with which it comes into compliance. Id.

As discussed above, Respondent's actions have not been anything like those of the Bollman Hat Company. Complainant does not believe there should be any downward adjustment to the gravity-based penalty because Respondent really has not been that cooperative during the course of this proceeding, nor has it made good faith efforts to readily comply with EPCRA.

Other Factors as Justice May Require (page 18 of the ERP), *see* Complainant's Initial Prehearing Exchange, page 14.

In addition to the other adjustment factors discussed in the ERP, the U.S. EPA also consider other issues that might arise, on a case-by-case basis and which, at the U.S. EPA's discretion, should be considered in assessing penalties. The ERP states that those factors which are relevant to EPCRA § 313 violations include, but are not limited to: new ownership for history of prior violations, "significant-minor" borderline violations, and a lack of control over the violation. In recognition of this section in the ERP, Respondent asserted that "any penalty that may be imposed . . . should be further reduced based on the following: 1) [Respondent's] good faith efforts to comply; 2) [Respondent's status as a small business; and 3) other factors as justice may require." Respondent's Initial Prehearing Exchange at 7.

In response, and as discussed in all of Complainant's pleadings in this matter, Complainant doesn't agree that Respondent has made "good faith efforts to comply" with EPCRA; Respondent may be a small business but the ERP already considers a company's corporate sales and number of employees before determining which extent level is appropriate; and Respondent has not identified, and Complainant is not aware of, any "other factors as justice may require." In addition, Complainant already decided not to increase the gravity-based penalty even though Respondent has a history of prior violation. Based on the above, Complainant did not adjust the gravity-based penalty calculated in this matter either upward or downward after considering all of these adjustment factors. *See* Steeltech, Ltd., at *45 (May 27, 1998)(failure to appropriately train an employee and transfer corporate duties, or a violation due to employee turnover, does not constitute an understandable excuse warranting a reduction in the penalty on the basis of "other factors as justice may require.)

Conclusion

Respondent maintains that "the *minimum* base fine under § 313 is appropriate" in this case. Respondent's Initial Prehearing Exchange at 7. In response, Complainant asserts that the penalty of $57,870 proposed in the Complaint "is" the minimum base fine under § 313 that is appropriate. Also, Respondent has not put forth any genuine issue of material fact that would change the calculation of the penalty proposed in this matter. "To find a party liable despite its lack of culpability, but then to reduce, significantly, the applicable penalty based on this lack of culpability, would certainly undermine the goals of [EPCRA]." Steeltech, Ltd. v. EPA, 273 F.3d 652, 656 (6th Cir. 2001). "EPA set forth a policy in the ERP of strict liability as to violations of EPCRA § 313 with the intent of strongly discouraging ignorance of EPCRA and its requirements." Steeltech, Ltd., at *38, Steeltech, Ltd. v. EPA, at 656.

Complainant has properly applied the ERP and has already given Respondent fair consideration in evaluating all appropriate adjustment factors. For the reasons set forth above, Complainant requests that the Presiding Officer issue an initial decision in this matter, on an accelerated basis as provided for in 40 C.F.R. § 22.20(a), finding that there are no genuine issues of material fact that exist as to the determination of an appropriate penalty for Respondent's violations of EPCRA as alleged in Counts I through V of the Complaint and recommending, pursuant to 40 C.F.R. § 22.27(b), that Respondent be assessed a civil penalty of $57,870.

Respectfully Submitted,

Terence Stanuch

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In the Matter of: SuperClean Brands, Inc., Respondent
Docket No. EPCRA-05-2009-016

CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of Complainant's Motion to Amend its Initial Prehearing Exchange, Complainant's Motion for Accelerated Decision as to Liability, and Complainant's Motion for Accelerated Decision as to Penalty, all regarding: In the Matter of: SuperClean Brands, Inc., Docket No. EPCRA-05-2009-016, were filed with the Regional Hearing Clerk, U.S. EPA, Region 5, on August 28, 2009, and that copies were sent this day in the following manner to the addressees listed below:

Copy by government pouch mail to:

The Honorable Susan L. Biro
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave. NW
Washington, DC 20460

Copy by regular U.S. mail to:

Attorney for Respondent:

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Dated this 28 day of August 2009.

Mary Ortiz
Administrative Program Assistant
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 5
Chicago, Illinois