3/13/91

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
PEASE AND CURREN, INC.,	)	Docket No. EPCRA-I-90-1008
	)	
Respondent	)	

EPCRA: Section 325: Pursuant to Section 325 of EPCRA, 42 U.S.C. § 11045, a civil penalty in the amount of $9,000.00 is assessed for the violation of Section 313, 42 U.S.C. § 11023 previously found herein.

Appearances:

For Complainant:
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For Respondent:
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Before: Henry B. Frazier, III
Chief Administrative Law Judge

INITIAL DECISION

I. Background - Interlocutory Order for Partial Accelerated Decision as to Liability:

On June 7, 1990, an Interlocutory Order for Partial Accelerated Decision as to Liability was issued in this case. That Order, issued sua sponte, found that Pease and Curren, Inc., (Respondent or Pease and Curren), had violated Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) [a.k.a. Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA)], 42 U.S.C. § 11023 and the regulations which set out in greater detail the Section 313 reporting requirement, 40 C.F.R. Part 372, by failing to submit timely, complete and correct Toxic Chemical Release Inventory Reporting Forms (Forms R).

II. Background - Processing of the Case

On July 16 and 17, 1990, a hearing, which had been requested by Pease and Curren, was held in Providence, Rhode Island, for the purpose of deciding the sole remaining issue of the amount, if any, of civil penalties, which appropriately should be assessed for the violations previously found.

The U.S. Environmental Protection Agency (EPA, Complainant or the Agency) proposed a Class II administrative penalty of $15,000 for the three violations of Section 313 found. Respondent contends that the lowest possible penalty or no penalty at all should be assessed.

Respondent and the Complainant submitted posthearing memoranda, proposed findings of fact, proposed conclusions of law and proposed orders on September 27, 1990 and September 28, 1990,

respectively. On October 16, 1990 and October 18, 1990, the Respondent and Complainant, respectively, submitted reply memoranda.

III. Findings of Fact

In addition to the findings of fact previously made in my Interlocutory Order for Partial Accelerated Decision, and incorporated by reference to the extent not otherwise inconsistent with the findings of fact herein, on the basis of the entire record, including the testimony elicited at the hearing, the exhibits received in evidence and the submissions of the parties, and giving such weight as may be appropriate to all relevant and material evidence which is not otherwise unreliable, I make the findings of fact which follow. Each matter of controversy has been determined upon a preponderance of the evidence. All contentions and proposed findings and conclusions submitted by the parties have been considered, and whether or not specifically discussed herein, those which are inconsistent with this decision are rejected.

1. Pease & Curren, Incorporated of Warwick, Rhode Island is a corporation engaged in the recovery of precious metals from other products and materials. (Tr. 193.)

2. During calendar year 1987, Pease and Curren manufactured, processed or otherwise used 55,125 pounds of hydrochloric acid; 47,555 pounds of nitric acid; and 20,754 pounds of sulfuric acid at its facility located at 75 Pennsylvania Avenue, Warwick, Rhode Island 02888. (Compl. Exh. 1, Attachments 5 and 6).

3. For calendar year 1987, Pease and Curren had sales of less than ten million dollars ($10,000,000). (Tr. 195.)

4. For calendar year 1987, Pease and Curren had less than 50 full time employees at its facility located at 75 Pennsylvania Avenue, Warwick, Rhode Island 02888. (Tr. 196-96.)

5. Mr. Francis Curren, who is Vice President of Pease and Curren, assumed personal responsibility for the environmental aspects of the operations of the company ten years ago and has retained that responsibility for the past decade. (Tr. 193, 196, 198, 216.)

6. Respondent has made several environmental improvements in its operations over the past decade including the installation of air pollution controls on incinerators, the development of a medical surveillance program for employees, the establishment of engineering controls to eliminate a lead problem and contracting with Applied Environmental Technologies to establish programs for labeling, hazardous waste handling and hazardous communication, and the training of employees. (Tr. 198-205, 217-18.)

7. In 1987 or 1988 Mr. Curren read about "this SARA thing" in a couple of magazines or trade journals. (Tr. 206.)

8. Dr. Rajesh Kumar Mishra, who is in charge of the laboratory and the refinery and who directs research and development work at Pease and Curren, first read of SARA Title III in an article in a trade journal sometime during the period from late 1987 to mid-1988. (Tr. 249, 267.)

9. Mr. Curren discussed the Form R reporting requirements with Dr. Mishra and with Bill Sefton the maintenance engineer who is a supervisor at the facility. They initially concluded that Pease and Curren "processed" chemicals covered by the requirement but that the company did not meet the 75,000 pound threshold requirement for reporting. They did not understand exactly what types of operations fell into the "otherwise use" category. (Tr. 214, 221-225, 245, 249.)

10. Mr. Curren questioned the environmental consultants of Applied Environmental Technologies who were under contract to Pease and Curren about EPCRA in a general meeting called to discuss several environmental matters. He requested that they "look into it and let us know" whether it applied to Pease and Curren. One of the consultants, whose name Mr. Curren does not recall, later advised him orally that Pease and Curren "did not fit into" the SARA requirements. Mr. Curren also discussed the matter with the chemical supplier for Pease and Curren who felt that the reporting requirements of Section 313 did not apply to Pease and Curren. (Tr. 206, 225-29.)

11. EPA has engaged in a number of "out-reach" activities to inform members of industry of their responsibilities to report under Section 313 of EPCRA. Since 1988 EPA has operated an industry assistance hotline telephone which is a toll free 800 number to provide information to any caller concerning the requirements of Section 313 of EPCRA. In May and early June of 1988, mass mailings were sent to approximately 15,000 manufacturing

industries in New England which may have been subject to the Section 313 reporting requirements. These mailings contained information regarding reportable chemicals, their threshold quantities for reporting and who had to report and announced a series of workshops to be conducted by EPA throughout New England on Title III of SARA, including Section 313 requirements. Such a mailing, including an invitation to these workshops, was sent to Pease and Curren. In addition, EPA representatives have participated in Section 313 conferences and seminars which were sponsored by other groups. (Tr. 13-15, 30-34, 49, 235; Compl. Exhs. 3, 6, 7.)

12. Mr. Curren called the EPA hotline "seven or eight" times, probably in 1988, to inquire as to whether Pease and Curren was required to comply with the Form R reporting requirements. However, the line was busy each time so Mr. Curren suggested to the consultants that they call the hotline. He does not know whether they complied with his request and he never inquired as to whether they did. (Tr. 229-30.)

13. Mr. Curren received and read the letter and fact sheet from EPA concerning Section 313 of SARA Title III which was mailed to Pease and Curren in May of 1988 and which announced the workshop conducted in Warwick, Rhode Island. Pease and Curren did not send anyone to the workshop because Mr. Curren had concluded that SARA Title III did not apply to the operations at Pease and Curren. (Tr. 20, 234-35; Compl. Exh. 3.)

14. In late February or early March 1989 a letter and informational materials about the 1989 workshop was sent to Pease and Curren. (Tr. 35-38; Compl. Exh. 4.)

15. In mid-March of 1989 EPA initiated an inspection of Pease and Curren as the result of a telephone call in which EPA received a tip from a government agency source alleging that Respondent's facility would fall into the category of businesses required to file a Form R report under EPCRA for the year 1987. (Tr. 82; Compl. Exh. 1.)

16. The inspection was not based upon any past violation of environmental laws. (Tr. 82-85.)

17. On March 24, 1989, Donald Kraus of U.S. EPA Region I and Martha Mulcahey of the Rhode Island Department of Environmental Management, conducted an inspection of Pease and Curren, Inc., 75 Pennsylvania Avenue, Warwick, Rhode Island 02888, to determine compliance with the toxic chemical reporting requirements of SARA Section 313. (Tr. 140-44, Compl. Exh. 1.)

18. Mr. Curren did not inform the EPA inspector that he had made a decision sometime prior to May 1988 that SARA Title III did not apply to Pease and Curren. (Tr. 242, 246-47.)

19. Following the EPA inspection, Mr. Kraus requested information as to the amounts of certain chemicals which had been used by Respondent. Pease and Curren procured a computer and established systems to gather and compile the amounts of each reportable chemical that was purchased, used and shipped out each

year beginning in 1986 and the manner in which the quantities were used. (Tr. 211-12, 233.)

20. The records which Pease and Curren had kept up to that time were purchase orders, manifests for the shipment of hazardous waste and MSDS's. In order to compile the information required under Section 313, employees at Pease and Curren had to go through all the purchase orders to determine how much of each chemical had been purchased during each year in question. An estimate of the amounts of the chemicals which had been used in 1986 had to be developed so that an estimate as to the amounts on hand at the beginning of 1987 could be made. (Tr. 210, 231-33, 271-74.)

21. On April 21, 1989, Mr. Curren wrote Mr. Kraus to provide the following information as to the actual usage of certain chemicals for 1987:

Hydrochloric Acid	55,125 lbs.
Nitric Acid	47,555 lbs.
Sulfuric Acid	20,754 lbs.

(Compl. Ex. 1, Attachment 5.)

22. On August 10, 1989, Mr. Curren submitted to EPA Forms R for the years 1987 and 1988 for the chemicals: hydrochloric acid, nitric acid, and sulfuric acid. (Tr. 236-40; Compl. Exh. 1, Attachment 6.)

23. On September 14, 1989 Dr. Mishra submitted to EPA on behalf of Pease and Curren a correction of the consumption and year end inventory figures of nitric acid, sulfuric acid and hydrochloric acid for 1987 and 1988. The need for the correction

resulted from some confusion on the part of Pease and Curren concerning the manner in which the reporting quantity was to be computed. (Tr. 166, Compl. Exh. 1, Attachment 7.)

24. Form R information that is submitted 13 months late would not be included in data bases already published and disseminated to the public, thus depriving the public some sources of accurate and comprehensive information that EPCRA was designed to provide. (Tr. 55, 61-62.)

25. Form R information that is submitted 13 months late may not become accessible by the states and local users of such information in the computerized data bases of the EPA Toxic Release Inventory System and the National Library of Medicine until two years after the data would have otherwise become available had it been submitted on time. (Tr. 55-57; 61-62.)

26. At an EPA sponsored seminar in Providence, Rhode Island on May 8, 1990, Dr. Dwight G. Peavey, an Environmental Scientist with EPA, was questioned by Dr. Rajesh Kumar Mishra concerning Section 313 reporting requirements. (Tr. 77, 86-87, 260.)

27. Dr. Peavey does not recall what questions were asked by Dr. Mishra but does recall that the questions were clouded and that he suggested that the two discuss the matter at "half time" of the conference. Dr. Peavey does not believe that he gave a definitive answer to Dr. Mishra's questions. (Tr. 77.)

28. Dr. Mishra recalls that during the question and answer period at the seminar he "explained, in very plain words, that here I have nitric acid, I take silver and dissolve in nitric acid.

After that I add hydrochloric acid and precipitate silver as silver chloride. And then I refine silver. How is the nitric acid in this case will be grouped? Which group it will come in? And we had a discussion--we had a good discussion for about, I'll say, three, four, five minutes and there were about 500 people in the room. And you know, I made sure that he understands what I'm talking about. He did, you know, we talked about it back and forth with questions and answers." (Tr. 261.)

29. Dr. Mishra recalls that Dr. Peavey responded: "'According to this yours is a process chemical.'" or "'It is process.'" Dr. Mishra also recalls that Dr. Peavey responded: "'Well, we can discuss it after the thing is over.'" (Tr. 261, 275-76.)

IV. Applicable Statutory Provisions Governing Penalty Assessment

Section 325(c)(1) of EPCRA governs the assessment of civil and administrative penalties for violations of the Section 313 reporting requirements. It permits the Administrator to assess a civil penalty of not more than $25,000 per violation. Section 325(c)(3) provides that each day a violation continues constitutes a separate violation for purposes of Section 325(c).

Section 325(c) of EPCRA does not expressly provide criteria to be considered in assessing a penalty for a violation of the reporting requirements of Section 313. However, Section 325(b) sets forth the criteria which must be considered in assessing penalties for violations of the emergency notification requirements under Section 304.

Section 325(b) establishes two types of administrative penalties which may be assessed for a violation of the emergency notification requirements of Section 304 of EPCRA: Class I administrative penalties and Class II administrative penalties.[1]

Section 325(b)(2) of EPCRA, 42 U.S.C. § 11045(b)(2), which provides for Class II administrative penalties, requires that civil penalties be assessed in the same manner and subject to the same provisions, as civil penalties are assessed under Section 2615 of Title 15. Section 2615 of Title 15 governs the assessment of penalties under the Toxic Substances Control Act (TSCA). Section 2615(a)(2)(B) of Title 15 provides that in "determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or

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[1]Section 325, 42 U.S.C. § 11045, provides, in pertinent part:

(b) Civil, administrative and criminal penalties for emergency notification

(1) Class I administrative penalty

(A) A civil penalty of not more than $25,000 per violation may be assessed by the Administrator in the case of a violation of the requirements of section 11004 of this title.

* * * * * * *

(C) In determining the amount of any penalty assessed pursuant to this subsection, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

(2) Class II administrative penalty

A civil penalty of not more than $25,000 per day for each day during which the violation continues may be assessed by the Administrator in the case of a violation of the requirements of section 11004 of this title . . . . Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected under section 2615 of Title 15.

violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require." (Section 16(a)(2)(B) of TSCA.)

In contrast, Section 325(b)(1)(C) prescribes the following criteria for determining the amount of a Class I penalty: "the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." Thus, the only differences between the criteria which must be considered in assessing Class I and Class II civil penalties under Section 325(b) of EPCRA are that (1) the effect on the ability of the violator to continue to do business be taken into account for a Class II penalty but not for a Class I penalty, and (2) the economic benefit or savings (if any) resulting from the violation be taken into account for a Class I penalty but not for a Class II penalty.

Since EPCRA itself is silent as to the criteria which should be applied in assessing civil penalties under Section 325(c), the question is whether reference should be made to either or both sets of criteria which are utilized under Section 325(b). The legislative history of EPCRA fails to provide any guidance. It would appear that by setting only a maximum penalty of $25,000 for each violation of Section 313 Congress did intend that the penalties which are assessed under Section 325(c) be subject to

some degree of discretion. Since Section 304, like Section 313, establishes reporting and notification requirements, it appears reasonable to conclude that the criteria utilized in assessing penalties under Section 325(b) for violations of Section 304, although not binding, could serve as general guidelines for assessing penalties under Section 325(c) for violations of Section 313.

The penalties in this case are being assessed by an order made on the record after opportunity for hearing in accordance with Section 554 of the Administrative Procedure Act (APA). Because of the cross-reference to Section 2615 of TSCA found in Section 325(b)(2), Class II penalties for violations of Section 304 of EPCRA are also assessed by an order made on the record after opportunity for a hearing in accordance with Section 554 of the APA. (This is in contrast to Class I penalties which are assessed by EPA through less formal administrative procedures.) Therefore, it would appear reasonable to rely upon the criteria spelled out in Section 2615(a)(2)(B) of TSCA. It should be noted, however, that in the particular circumstances of this case it makes no difference as to whether the Class II penalty criteria in Section 2615(a)(2)(B) of TSCA or the Class I penalty criteria in Section 325(b)(1)(C) are applied because neither of the distinguishing criteria which are found only in one set of criteria (discussed on p. 11, supra) are at issue in assessing the penalty in this case.

V. Application of Penalty Guidelines

The Consolidated Rules of Practice provide, in pertinent part, at 40 C.F.R. § 22.27(b):

> (b) Amount of Civil Penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

The Judicial Officer has held that "the requirement to give the guideline consideration is 'entirely in accordance with the settled rule that agency policy statements interpreting a statute are entitled to be given such weight as by their nature seems appropriate. [Citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)].'"[2]

While I must consider the civil penalty guidelines in determining the amount of the recommended civil penalty and must set forth specific reasons for assessing a penalty different in amount from that recommended by the Complainant, I am not bound to assess the same penalty as that proposed by the Complainant.[3] I may assess a different penalty if, upon consideration I conclude, for example, the guidelines have been improperly interpreted and

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[2]Bell and Howell Company, (TSCA-V-C-033, 034, 035) (Final Decision, December 2, 1983), at 10, n. 6, quoting the Presiding Officer's Initial Decision.

[3]In re: Electric Service Company, TSCA Docket No. V-C-024, Final Decision No. 82-2, at 20, n. 23.

applied by the Complainant; or circumstances in the case warrant recognition, or, where they may have been recognized by the Complainant, warrant a weight, not accorded them by EPA;[4] or the penalty calculated and recommended by the Complainant under the guidelines is somehow not consistent with the criteria set forth in the Act.

EPA has issued an Enforcement Response Policy (ERP) for Section 313 of EPCRA dated December 2, 1988. The ERP provides for the determination of a gravity-based penalty amount, utilizing the factors of circumstance level and a penalty adjustment level. These factors are incorporated into a matrix which allows determination of the appropriate base penalty amount. The total

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[4]Thus, for example, the Judicial Officer has held that: "There is nothing in the guidelines which suggests that a presiding officer is required to assess a penalty in an amount which is identical to one of the amounts shown in the matrix . . . . The guidelines were never intended to establish an inflexible policy which would force the presiding officer to elect between one amount or the other . . . . Instead, it is better to view the amounts shown in the matrix as points along a continuum, representing convenient benchmarks for purposes of proposing and, in some instances, assessing penalties. Accordingly, <u>if warranted by the circumstances</u>, other points along the continuum may be selected in assessing a penalty. Although the guidelines do not purport to give specific guidance on how this should be done, <u>it seems evident that, at a minimum, the additional evidence adduced at a hearing can be used as a basis for justifying deviations</u> (up or down) from the amounts shown in the matrix. In other words, by viewing the amounts shown in the matrix as benchmarks along a continuum, a range of penalties . . . becomes available to account for, among other things, some of the less tangible factors which the presiding officer is in a unique position to evaluate. Moreover, the existence of this range constitutes tacit acknowledgement of the fact that, no matter how desirable, mathematical precision in setting penalties is impossible." <u>Bell and Howell Co.</u>, (TSCA-V-C-033, 034, 035) (Final Decision, December 2, 1983), at 18-19 (emphasis added).

penalty is determined by calculating the penalty for each violation on a per chemical, per facility basis.

Once the gravity-based penalty amount has been determined, upward or downward adjustments to the penalty amount are made in consideration of the factors which relate to the violator: voluntary disclosure, culpability, history of prior violations, ability to continue in business, and such other matters as justice may require.

EPA has proposed a penalty of $5,000 for each of the three violations or a total penalty of $15,000.

EPA classified Respondent's three violations as nonreporting violations because Pease and Curren submitted its Forms R to EPA and the State of Rhode Island after EPA conducted its inspection at Pease and Curren on March 24, 1989. Therefore, the circumstance level for each of the three violations (three toxic chemicals) was set at "Level 1."

After determining the circumstance level, the penalty adjustment level was determined by EPA. Since the ERP provides that the penalty adjustment level is based on the quantity of Section 313 chemical which is manufactured, processed, or used by the facility, and the size of the total corporate entity in violation, and since the Respondent company had sales of less than ten million dollars or less than 50 employees and used the Section 313 chemicals associated with the violation at less than 10 times the reporting threshold of 10,000 pounds, EPA set the penalty adjustment level at "Level C." Therefore the circumstance level

and penalty adjustment level for each chemical was set by EPA, with the resulting penalty, as follows:

a. Hydrochloric acid - Level 1.C. - $5,000

b. Nitric acid - Level 1.C. - $5,000; and

c. Sulfuric acid - Level 1.C. - $5,000

TOTAL PENALTY: $15,000.

After calculating the gravity-based penalty of $15,000 EPA considered the additional adjustment factors under the ERP and determined that no adjustments were appropriate.

VI. Respondent's Contentions

Respondent argues that EPA's calculation should be rejected. Respondent contends that its failure to file was not the result of operating in ignorance of the law, nor a conscious disregard of the requirements of the law. The confusing nature of the definitions for "manufacture," "process" or "otherwise use" coupled with the attempt to reconcile them with Respondent's operations led to a good faith determination by Respondent that it "processed" as opposed to "otherwise used" chemicals and, hence, was not subject to the filing requirements for 1987. As soon as it learned from EPA that the "otherwise use" category was applicable, Respondent points out that it took all required action and admitted its failure, albeit unintentional, to file.

The only criterion for the imposition of the most stringent circumstance level in this case was the contact by EPA in the form of the inspection prior to the filing of the reports. Respondent

argues, based on the holding in Riverside Furniture,[5] there is no rational basis for imposition of a penalty solely for that reason. Hence, Respondent concludes that in light of its own good faith determination that it was not subject to the reporting requirements of the law, to impose the penalty for a nonreport as opposed to a late report solely because EPA contacted it and conducted an inspection based on a telephone tip by an unidentified caller, is wholly arbitrary.

VII. Complainant's Contentions

Complainant contends that no adjustment should be made in the Circumstance Level of the penalty calculation because the circumstances of Riverside Furniture are distinguishable from the facts of the instant case and because the decision in Riverside Furniture lacks an explicit rationale for the amount of its penalty assessment and, hence, does not provide a basis for likewise rejecting EPA's application of the ERP penalty matrix in this case.

As for Respondent's alleged confusion over the applicability of Section 313 to its operations, Complainant argues that it is clear from either the preambles to the Proposed and Final Rules, the text of the Rule itself, or the instructions that accompanied the Form R in March 1988, that, in order for a chemical to be considered to be "manufactured" or "processed" with respect to the reporting requirements of EPCRA Section 313, that chemical must become a part of some product distributed in commerce. Complainant

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[5]In the Matter of Riverside Furniture Corporation, Docket No. EPCRA-88-H-VI-406S (September 28, 1989).

asserts that Respondent offered no evidence to show that Pease and Curren believed that the chemicals involved herein actually became a part of the products which they ultimately distributed in commerce.

Instead, Complainant maintains, Respondent's reliance on its confusion over the definitions of "process" and "otherwise use" as a defense is merely a justification for its institutional neglect of its obligation to comply with EPCRA which neglect was demonstrated by Respondent's testimony at hearing which revealed an extremely casual attitude toward the company's compliance with EPCRA. Indeed, Respondent failed to show that it made a concerted effort to determine whether the Section 313 reporting requirements were applicable to its facility at a point in time when a timely and accurate report could be made. Further, Complainant points out that it is well-settled that Respondent is charged with knowledge of United States Statutes at Large and of regulations published in the Federal Register. Therefore, no adjustment should be made in the proposed penalty with respect to Respondent's degree of culpability in connection with its alleged lack of knowledge concerning the reporting requirement.

VIII. Determination of Penalty Amount

The seminal decision concerning the determination of penalties for violations of Section 313 of EPCRA was the decision issued by Judge Jones in Riverside Furniture which decision has become a final order of the Administrator pursuant to 40 C.F.R. § 22.27(c).

In that decision it was noted that "the filing of such reports [Forms R] was intended, in this as in other programs, to be timely, complete and accurate. The success of EPCRA can be attained only through voluntary, strict and comprehensive compliance with the Act and regulations which recognize that achievement of such compliance would be difficult and that a lack of compliance would weaken, if not defeat, the purposes expressed."[6]

It was found that "the EPCRA program must require voluntary and timely compliance with the Act and regulations to succeed in attaining the objective envisioned by the Act: having available information for the government and the public reflecting the location, character and quantities of toxic chemicals released by industry into and onto air, water and land. The Act and regulations provide for a date certain for the initial filing of Form[s] R . . . ."[7]

The decision also recognized the outreach efforts which EPA undertook to inform the regulated community of the Section 313 requirements. (See Findings of Fact 11 herein, supra pp. 4-5.) In Riverside Furniture it was pointed out that "EPA outreach efforts were undertaken with the recognition that to achieve compliance with Section 313 of EPCRA on a broad scale would be difficult and that a lack of compliance would defeat the purposes of said Section 313 of the Act . . . . Its broad outreach program on the national, regional and state levels were designed to make the regulated

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[6]Riverside Furniture at 10.

[7]FN Id. at 11. [Footnote omitted.]

community aware of the requirements of said Section 313 . . . ."[8] As for Riverside's professed lack of actual knowledge as a basis for penalty mitigation, it was found that "the success of such outreach efforts [by EPA] must be predicated not on whether Riverside, acting through its employees, had actual knowledge of what requirements of the Act were pertinent to its continued operation but, rather, on whether Riverside should have known of such requirements as a result of such efforts. On this premise, Riverside is charged with actual knowledge."[9] As the decision noted, the failure of a corporation to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law.[10]

"[H]owever," the decision noted, "in recognition of difficulties in making the regulated community aware of the provisions of subject regulation, the guidelines for the assessment of civil penalties provided, in the interest of assuring that such penalties are arrived at in a fair, uniform and consistent manner, that certain 'late filings' would be tolerated."[11]

In applying the guidelines in Riverside Furniture it was noted that "[u]nder the guidelines, once the contact with Riverside was made by EPA, any report filed thereafter is considered to be a

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[8]Id. at 6.

[9]Id. at 7 [Footnote omitted.]

[10]Id. at FN 2, citing Mungin v. Florida East Coast Ry. Co., 318 F. Supp. 720, 737 (DMD Fla., 1970).

[11]Riverside Furniture at 11.

failure to report."[12] The decision held "that such disposition is arbitrary and opposed to the expressed interest in arriving at civil penalties in a fair, uniform and consistent manner."[13]

Pease and Curren does not content that it lacked actual knowledge of Section 313 of EPCRA. Indeed, Pease and Curren has admitted such knowledge. Instead, Respondent contends that the definitions of "manufacture," "process" and "otherwise use" were confusing when applied to operations such as those at Pease and Curren. More specifically, Respondent contends that the definitions of "process" and "otherwise use" are inconsistent with the use of the term "process" as it is used in industry and therefore Respondent's misinterpretation and misapplication of the term "process" was understandable and excusable. The statutory definitions of "manufacture" and "process"[14] and the corresponding regulatory definitions of "manufacture," "process" and "otherwise

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[12]Id. at 12.

[13]Id.

[14]Section 313(b)(1)(C), 42 U.S.C. § 11023(b)(1)(C), provides:

> For purposes of this section--
> (i) The term "manufacture" means to produce, prepare, import, or compound a toxic chemical.
> (ii) The term "process" means the preparation of a toxic chemical, after its manufacture, for distribution in commerce--
> (I) in the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such chemical, or
> (II) as part of an article containing the toxic chemical.

use"[15] are somewhat complex in their application. However, that is no basis for mitigation of the penalty herein. Respondent, like everyone else, is charged with knowledge of the United States Code and rules and regulations duly promulgated thereunder.[16] To be

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[15]40 C.F.R. § 372.3 provides the following definitions for purposes of Part 372:

> "Manufacture" means to produce, prepare, import, or compound a toxic chemical. Manufacture also applies to a toxic chemical that is produced coincidentally during the manufacture, processing, use, or disposal of another chemical or mixture of chemicals, including a toxic chemical that is separated from that other chemical or mixture of chemicals as a byproduct, and a toxic chemical that remains in that other chemical or mixture of chemicals as an impurity.
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> * * * * * * *
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> "Otherwise use" or "use" means any use of a toxic chemical that is not covered by the terms "manufacture" or "process" and includes use of a toxic chemical contained in a mixture or trade name product. Relabeling or redistributing a container of a toxic chemical where no repackaging of the toxic chemical occurs does not constitute use or processing of the toxic chemical.
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> "Process" means the preparation of a toxic chemical, after its manufacture, for distribution in commerce:
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> (1) In the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such substance, or
>
> (2) As part of an article containing the toxic chemical. Process also applies to the processing of a toxic chemical contained in a mixture or trade name product.

[16]44 U.S.C. § 1507. The Supreme Court has said: "Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-385 (1947)."

charged with such knowledge means more than knowledge of the existence of provisions of law and regulation; it denotes a knowledge of their meaning and application.

EPA published extensive explanations of the terms. The preamble published with the Proposed Rule in the Federal Register on June 4, 1987 explained in some detail the meaning and application of the terms "manufacture," "process" and "otherwise use."[17] There EPA said that the

> [S]tatute does not define the term "otherwise used" and no guidance with respect to this term is provided in the legislative history. EPA proposes to define "otherwise used" as any use of a toxic chemical at a covered facility that is not an action covered by the terms "manufacture" or "process," and includes use of a toxic chemical contained in a mixture or trade name product. For example, a chemical would be otherwise used if it is used as a solvent to aid a chemical process but does not intentionally become part of the product distributed in commerce. Another example would be a chemical used as an aid in manufacturing such as a lubricant or metalworking fluid. Such uses do not fall within the definitions of manufacture or process.
>
> EPA believes that it is necessary to define the term "otherwise used" to make a distinction between processing and other uses, primarily as they relate to the threshold values discussed in Unit V. In particular, a facility that processes a chemical has a higher threshold assigned to it by the statute than a facility that uses (i.e., otherwise uses) that chemical. For example, a facility that incorporates toluene into a mixture for distribution in commerce is processing that chemical. Provided the facility meets the SIC code and employment triggers above, the facility must report if it processes more than 75,000 pounds of toluene in 1987. A facility

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[17]52 Fed. Reg. 21155.

> that "otherwise uses" toluene, for example to clean equipment, is not processing toluene. Therefore the threshold is use of more than 10,000 pounds per year of toluene. EPA requests comment on the proposed definition of "otherwise used" and its application in the proposed rule.

In the same preamble EPA amplified the statutory meaning of "process" as follows:

> As defined by the statute, the term "process" means the preparation of a toxic chemical after its manufacture for distribution in commerce—(a) in the same form or physical state as, or in a different form or physical state from, that in which it is received by the person so preparing such substance, or (b) as part of an article containing the toxic chemical.
>
> In general, processing includes making mixtures, repackaging, or use of a chemical as a feedstock, raw material, or starting material for making another chemical. Processing also includes incorporating a chemical into an article.
>
> EPA also interprets the term "process" to apply to the processing of a toxic chemical that is a component of a mixture or other trade name product. This would include processing of a toxic chemical that is an impurity in such product. That is, if a person is processing a chemical or mixture that contains an impurity, then the person is processing that impurity.

When the Final Rule was published in the Federal Register on February 16, 1988, EPA further clarified the terms "process" and "otherwise use" as follows:

> a. Processing is an incorporative activity. The process definition focuses on the incorporation of a chemical into a product that is distributed in commerce. This incorporation can involve reactions that convert the chemical, actions that change the form or physical state of the chemical, the blending or mixing of the chemical with other chemicals, the inclusion of the chemical in an

> article, or the repackaging of the chemical. Whatever the activity, a listed toxic chemical is processed if [after its manufacture] it is ultimately made part of some material or product distributed in commerce. Examples of the processing of chemicals include chemicals used as raw materials or intermediates in the manufacture of other chemicals, the formulation of mixtures or other products where the incorporation of the chemical imparts some desired property to the product (e.g., a pigment, surfactant, or solvent), the preparation of a chemical for distribution in commerce in a desirable form, state, and/or quantity (i.e. repackaging), and incorporating the chemical into an article for industrial, trade, or consumer use.
>
> b. Otherwise use is a nonincorporative activity. EPA is interpreting otherwise using a covered toxic chemical to be activities that support, promote, or contribute to the facility's activities, where the chemical does not intentionally become part of a product distributed in commerce. Examples would be a chemical processing aid such as a catalyst, solvent, or reaction terminator. These chemicals may be integral parts of a reaction but do not become part of a product. Other examples would be manufacturing aids such as lubricants, refrigerants, or metalworking fluids, or chemicals used for other purposes at the facility such as cleaners, degreasers, or fuels.[18]

The preamble to the Final Rule also announced the development of a listing of certain exempt uses of toxic chemicals in response to several comments that the proposed definition of "otherwise use" was too broad. At the same time EPA rejected the views of commenters who variously "disagreed with EPA's interpretation that a non-incorporative use of a solvent in chemical processing should be classified as otherwise using it" and with EPA's view that a catalyst should be "classified as a processing aid (i.e. otherwise

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[18]53 Fed. Reg. 4506.

used)." EPA rejected "these comments on the grounds that it is necessary and appropriate to distinguish processing from otherwise using based on the thrust of the process definition (i.e. whether the toxic chemical in question becomes part of some product distributed in commerce)."[19] Clearly Respondent must be charged with knowledge of the statute and the rules promulgated thereunder. Such knowledge must include an understanding of the key distinction between "process" and "otherwise use."

Furthermore, Pease and Curren received the EPA mailings which outlined the requirements of Section 313. Mr. Curren received and read the letter and fact sheet sent to Pease and Curren in May 1988 which informed him that the reporting requirements applied to manufacturers in SIC Codes 20 through 39 who employ ten or more people and who have "manufactured or processed 75,000 pounds of any listed chemicals or used 10,000 pounds of any listed chemicals during 1987."[20] As part of its outreach efforts in 1987 EPA also sent to the same approximately 15,000 manufacturing industries in New England a copy of a brochure entitled "Title III Section 313 Release Reporting Requirements."[21] The brochure alerted recipients that the "first annual report, for the 1987 calendar year, is due by July 1, 1988" and that the "proposed Toxic Chemical Release Inventory rule under Section 313 was published in the Federal Register on June 4, 1987" and that the "target date for the final

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[19]Id.

[20]Compl. Exh 3.

[21]Compl. Exh 6; Tr. 49; Finding of Fact 11, supra, pp. 4-5.

Register on June 4, 1987" and that the "target date for the final rule is December 31, 1987." As for the meaning of the terms "manufacture," "process" and "otherwise use" the brochure said:

> What is meant by the terms "manufacture," "process," or "otherwise use"?
>
> - Manufacture—means to produce, prepare, import or compound one of the chemicals on the list. For example, if you make a dye for clothing by taking raw materials and reacting them, you are manufacturing the dye. You would also be covered if you were a textile manufacturer who imported a dye on the list for purposes of applying it to fabric produced at your plant.
>
> - Process—in general, includes making mixtures, repackaging, or using a chemical as a feedstock, raw material, or starting material for making another chemical. Processing also includes incorporating a chemical into an article (e.g., using dyes to color fabric [the fabric is the article that the dye is being incorporated into]).
>
>   Examples of processing include:
>
>   - The use of a solvent as a chain transfer agent in the making of solution polymers (e.g., certain resins used in paints and coatings);
>
>   - Using a chemical as an intermediate in the manufacture of a pesticide (e.g., using chemical A to make chemical B).
>
> - Otherwise Use—applies to any use of a toxic chemical at a covered facility that is not covered by the terms "manufacture" or "process" and includes use of a toxic chemical contained in a mixture or trade name product.

- Using chlorine as a biocide in plant cooling water;
- Using trichloroethylene to degrease tools;
- Using chlorine in waste water treatment.

The brochure described who must report, how to report, the SIC Groups subject to Section 313, the chemicals subject to Section 313 reporting, what must be reported, what recipients should begin to do to meet the requirements and EPA regional and headquarters contacts together with telephone numbers.

In sum, the enactment of the statute, the publication of the Rule in the Federal Register and in the Code of Federal Regulations, the explanations of the definitions of the terms at issue in the preamble to the Proposed Rule and to the Final Rule and the extensive outreach efforts of EPA lead to only one conclusion--Pease and Curren should have known of the Section 313 requirements and of their applicability to its operations. It is abundantly clear from these published documents that the key factor in distinguishing "process" from "otherwise use" is whether the toxic chemical in question becomes a part of some product distributed in commerce. As has been noted, the failure of a corporation to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law.

Mr. Curren, who has been the self-appointed environmental official of Pease and Curren for the past decade, was less than diligent in his pursuit of an authoritative answer to the question of whether Pease and Curren was obligated to meet the Section 313

reporting requirements. Indeed, his testimony and demeanor at the hearing revealed an attitude toward the responsibilities under Section 313 which can only be described as, at times, less than diligent. (See Findings of Fact 5, 7, 9, 10, 12, 13 and 18 supra, pp. 3, 4, 5, 6.)

Mr. Curren referred to the reporting requirements under Section 313 of Title III of SARA variously as "this SARA thing"[22] or as "SARA Tier III."[23] Even though Mr. Curren testified that he looked into the question of whether Pease and Curren was obligated to comply with Section 313 of Title III of SARA only a few months prior to the inspection, when informed that the inspection was for the purpose of ascertaining compliance with SARA, Mr. Curren made no connection between the inspection and Section 313 until sometime during the actual inspection.[24]

Indeed, the EPA inspector testified that after explaining the Section 313 requirements to Mr. Curren at the time he began the inspection, Mr. Curren said that "he was not aware of it and hadn't heard about it."[25] This testimony was uncontroverted. For some unexplained reason, Mr. Curren never informed the EPA inspector that he had previously determined that Section 313 did not apply to the operations at Pease and Curren even after Mr. Curren understood

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[22]Tr. 208.

[23]Tr. 212, 228-29.

[24]Id.

[25]Tr. 149.

the purpose of the inspection[26] and even though he testified that he had discussed the Section 313 requirements with company officials, with the environmental consultants hired to advise and assist him in carrying out his responsibilities as the environmental official for the company and with Pease and Curren's chemical supplier just a few months prior to the inspection. For Mr. Curren to have told the EPA inspector that he was unaware of the Section 313 requirements and to have failed to inform the inspector that he had previously concluded that they did not apply to Pease and Curren and then testify at the hearing that he had read about the Section 313 requirements and discussed them with several people and concluded that they did not apply to Pease and Curren only a few months before the inspection sounds somewhat implausible and does display, if nothing else, some degree of nonchalance toward the Section 313 requirements.[27]

Respondent contends that the exchange between Dr. Peavey and Dr. Mishra at the workshop in Providence, Rhode Island, in May 1990, demonstrated the difficulty in the everyday application of the Section 313 requirements to industry in general and Respondent's business in particular. The testimony differed as to what was said during the exchange. Dr. Peavey recalls that Dr. Mishra's questions were clouded, that he did not provide a definitive answer and instead suggested that the two discuss the matter during some break or at the conclusion of the seminar.

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[26]Tr. 242, 246-47.

[27]Tr. 149.

Dr. Mishra testified that he posed the problem "in very plain words" and that he made sure that Dr. Peavey understood what he was "talking about" and that Dr. Peavey responded that the toxic chemicals involved were processed. Whether the two parties understood one another during the exchange as well as Dr. Mishra recalled is problematical, especially when both testified that Dr. Peavey had suggested that they discuss the matter further during a break in the proceedings. If the question and answer were as clear as Dr. Mishra believes, there would have been no reason for Dr. Peavey to suggest a further discussion of the matter. Regardless, this discussion took place in May 1990, nearly two years after the July 1, 1988, filing deadline and provides no basis for mitigation of the penalty for the violation which occurred in 1988.

In determining the amount of the penalty to be assessed under the ERP for Section 313, I adopt the holding in Riverside Furniture that treating a late report submitted by a facility "after being contacted by EPA or an EPA representative in preparation for a pending inspection . . . or . . . after EPA begins an inspection"[28] as a failure to report "is arbitrary and opposed to the expressed interest in arriving at civil penalties in a fair, uniform and consistent manner."[29] Like Judge Jones in Riverside Furniture, "I find that the guidelines are impractical in application and produce

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[28]ERP at p. 8.

[29]FN 10, supra.

a resultant civil penalty incommensurate with the facts presented by the record."

Moreover, as previously noted, (p. 13, supra) as Presiding Officer I am required to determine the civil penalty "in accordance with any criteria set forth in the Act." Both Section 325(b)(1)(C) of EPCRA and Section 16(a)(2)(B) of TSCA require that I consider the "nature, circumstances, extent, and gravity of the violation" when assessing a civil penalty. While the Section 313 ERP establishes a "gravity-based" amount by considering a "circumstance level" and a "penalty adjustment level," the "circumstance level" takes into account "the seriousness of the violation" while the "penalty adjustment level is based on the quantity of the section 313 chemical . . . and the size of the total corporate entity in violation." To treat a late report as a failure to report in the facts of this case would distort the full nature, circumstances, extent, and gravity of the violation and would prevent me from properly applying these statutory criteria. I am compelled by EPCRA to give full weight to the totality of the nature, circumstances, extent, and gravity of the violations herein.

In Riverside Furniture Judge Jones determined that Circumstance Level 3 was appropriate. He cited the fact that the Forms R were received by EPA 115 days late and, hence, "the unfavorable impact on the EPCRA program was discernably less than had Riverside taken 180 days or more to file said reports." He also "considered that the charge here made is a failure to report in 1988 (at the initiation of subject enforcement effort), and

actually prior to promulgation of the Enforcement Response Policy on December 2, 1988." In contrast, Pease and Curren filed the Forms R more than 180 days later and not until August 10, 1989. As recognized in Findings of Fact 24 and 25, the submission of Form R information 13 months late has a serious impact upon the availability of such information. Therefore, giving full weight to the totality of the nature, circumstances, extent, and gravity of the violations herein, I determine the circumstance level to be that of "Late Reporting after 180 days" or Level 2.

There is no question that Respondent had sales of less than ten million dollars and less than 50 employees and used the Section 313 chemicals associated with the violation at less than 10 times the reporting threshold of 10,000 pounds.[30] Therefore, the penalty adjustment level should be set at C. Under the penalty matrix the base penalty amount for each violation must be set at $3,000 or a total base penalty amount of $9,000. In agreement with Complainant, I find that no adjustments are appropriate under the adjustment factors. Respondent has cited some expenditures which it made prior to the violations to assure compliance with health and environmental protection requirements. Here the violator has not offered "to make expenditures for environmentally beneficial purposes above and beyond those required by law."[31]

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[30]Findings of Fact 3, 4, and 5, supra, pp. 2-3.

[31]ERP at p. 16.

ORDER[32]

Pursuant to Section 325 of EPCRA, 42 U.S.C. § 11045, a civil penalty in the amount of $9,000.00 is assessed against Respondent, Pease and Curren, Inc., for the violations of Section 313 of EPCRA.

IT IS ORDERED that Respondent, Pease and Curren, Inc., pay a civil penalty to the United States in the sum of $9,000.00. Payment shall be made by cashier's or certified check payable to "Treasurer, United States of America." The check shall be sent to:

U.S. Environmental Protection Agency
P.O. Box 360197M
Pittsburgh, PA 15251

Respondent shall note on the check the docket number specified on the first page of this initial decision. At the time of payment, Respondent shall send a notice of such payment and a copy of the check to:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region I
John F. Kennedy Federal Building
Room 2003
Boston, MA 02203

Attn: Marianna B. Dickinson

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: March 13, 1991
Washington, DC

[32]Pursuant to 40 C.F.R. § 22.27(c), this initial decision shall become the final order of the Administrator within forty-five (45) days after the service upon the parties unless an appeal to the Administrator is taken by a party or the Administrator elects to review the initial decision upon his own motion. 40 C.F.R. § 22.30 sets forth the procedures for appeal from this initial decision.