UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
BOLLMAN HAT COMPANY,	)	DKT. No. EPCRA-III-182
	)	
Respondent	)	

INITIAL DECISION

DATED: March 17, 1998

EPCRA: Pursuant to Section 325 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. §11045, Respondent Bollman Hat Company is assessed a total penalty of $8,166.00 for failing to file Toxic Chemical Release forms as to sulfuric acid for calendar years 1992 and 1993, methyl isobutyl ketone for calendar years 1992, 1993 and 1994, and toluene for calendar years 1993 and 1994, in violation of Section 313 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. §11023.

PRESIDING OFFICER: CHIEF ADMINISTRATIVE LAW JUDGE SUSAN L. BIRO

APPEARANCES:

For Complainant:
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For Respondent:
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I. PROCEDURAL HISTORY

On July 1, 1996, Thomas J. Maslany, the Director of the Air, Radiation, and Toxics Division of Region III of the Environmental Protection Agency (hereinafter "Complainant" or "EPA"), filed a Complaint against Bollman Hat Company (hereinafter "Respondent" or "Bollman").[(1)] The Complaint charged Respondent in seven counts with violating Section 313 of the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"), 42 U.S.C. §11023, by failing to file Toxic Chemical Release Forms (Form Rs) for sulfuric acid for calendar years 1992 and 1993, methyl isobutyl ketone for calendar years 1992, 1993 and 1994, and toluene for calendar years 1993 and 1994, chemicals which were "otherwise used" by Respondent in those years in excess of the 10,000 pound reporting threshold. The Complaint proposed a total civil penalty of $39,716 which Complainant represented had been determined in accordance with EPA's August 10, 1992 Enforcement Response Policy for Section 313 of EPCRA ("ERP"), a copy of which was attached to the Complaint. *See*, Complaint section entitled "Proposed Penalty."

On July 22, 1996, Respondent filed an Answer to the Complaint, wherein it acknowledged the seven violations, but challenged the amount of the proposed penalty and requested a hearing thereon. In its Answer, Respondent claimed that in calculating the penalty Complainant had erred by failing to give Respondent the benefit of certain penalty reductions explicitly permitted by the ERP, namely delisting of a chemical, attitude, and other factors as justice may require. Respondent based its entitlement to those reductions on the following facts: (a) the non-aerosol type of sulfuric acid which Respondent used had been proposed for delisting in July 1991 (before the violations occurred) and was finally approved for delisting by EPA in June of 1995 (before the Complaint was filed), as a result of which such acid was no longer required to be reported on a Form R; (b) Respondent had treated and neutralized 100% of the acid it used so there were no releases into the environment, as a result of which the non-filing did not effect the overall Toxic Release Inventory database; © Respondent had identified and reported its failings to Complainant before being contacted by EPA; (d) Respondent had no prior history of violations; (e) Respondent had acted in good faith and been cooperative at all steps of the proceeding; (f) the violations were the result of misconduct by a single employee who subsequently had been discharged for cause; and (g) Respondent had successfully undertaken corrective measures to ensure that no further violations occurred. Respondent proposed a penalty of $10,718 which it also alleged had been calculated consistent with the ERP. *See,* Answer.

On December 5, 1996, in accordance with Section 22.04 of the Consolidated Rules of Practice Governing The Administrative Assessment Of Civil Penalties and the Revocation or Suspension of Permits ("Rules") (40 C.F.R. §22.04), the undersigned issued a Prehearing Order. In an effort to clarify and simplify the issues for trial, the Prehearing Order had specifically requested that, in its Prehearing Exchange -

> The Complainant shall set out how the proposed penalty was determined, and shall state *in detail* how the specific provisions of any EPA penalty or enforcement policies and/or guidelines were used in calculating the penalty.

See, Prehearing Order dated December 5, 1996 (emphasis added).

In response, Complainant stated in its Prehearing Exchange that "[t]he proposed penalty accords with [the ERP]," a copy of which it attached as an exhibit to the Exchange. Specifically, Complainant represented in its Prehearing Exchange that the proposed penalty had been calculated by first determining the gravity-based penalty in accordance with the ERP, and then, as to the 1992 and 1993 violations only, reducing that penalty by 75% because Respondent had confessed and corrected those violations. Complainant explained that no such reduction had been given in regard to the penalties for the 1994 counts because EPA had contacted Respondent before Respondent had disclosed those violations. Complainant did not disclose in its Prehearing Exchange why it used a *75%* reduction rate for voluntary self-disclosure on the 1992 and 1993 violations, when the ERP only allows for a maximum of a *50%* reduction for self-disclosure, nor did it explain why no reduction was given for delisting and/or attitude, etc., although such reductions are expressly permitted

by the ERP and are supported by the uncontested facts of this case. *See,* Complainant's Prehearing Exchange dated December 30, 1996, pp. 2-4.

On or about July 30, 1997, the parties submitted a Joint Set of Stipulated Facts, Exhibits and Testimony. Respondent explicitly stipulated to liability as to each of the seven EPCRA violations charged in the Complaint as well as all of the requisite facts underlying the violations. EPA stipulated to certain facts regarding the penalty under the ERP including the fact that non-aerosol sulfuric acid had been delisted, that there were no releases of the acid, that Respondent was a "first offender" and that Respondent was prepared for and cooperated in the EPA inspection. The parties also stipulated to the admission into evidence of all exhibits attached to both Prehearing Exchanges.

After due notice, a hearing was held in this matter before the undersigned Administrative Law Judge on November 18, 1997 in Philadelphia, Pennsylvania. Two witnesses - EPA Inspector Donald W. Stanton and Craig Yussen, EPA Region III's EPCRA Section 313 Compliance Coordinator - testified at the Hearing on behalf of Complainant. Two witnesses - David Wails, Bollman's Plant Manager, and Marty Hikes, head of Bollman's Plant Services - testified at the hearing on behalf of Respondent. A total of twenty-seven exhibits were admitted into evidence without objection.[(2)] During the hearing, held almost a year and a half after the Complaint was filed, EPA disclosed for the very first time that the proposed penalty had *not* been determined by exclusively applying the ERP (Exhibit 23). Tr. 105-06. Rather, Complainant confessed at the hearing that it had relied upon another EPA policy entitled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" ("Self-Policing Policy") to determine what, if any, adjustments should be made to the gravity-based penalty set by the ERP.[(3)] Tr. 96-97, 137-47. As a result, after considering the ERP and in light of the defenses raised in this case to the penalty, Complainant indicated that it would be appropriate to make further reductions in the proposed penalty for delisting and cooperation. Tr. 101-03, 110-11, 135-36.

The Transcript of the hearing was received by the undersigned on December 3, 1997.[(4)] Each party was given the opportunity to submit post-hearing briefs.[(5)] The record closed on February 13, 1998, the extended filing deadline for reply briefs.

II. DISCUSSION

A. THE CRITERIA APPLICABLE TO EPCRA § 313 PENALTY ASSESSMENTS

Section 22.27(b) of the Rules provides in pertinent part that:

> . . . 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. (Emphasis added).

40 C.F.R. §22.27(b).

1. Statutory Civil Penalty Criteria

The Act at issue here, EPCRA, provides that any person violating its Section 313 (42 U.S.C. §11023), the filing requirements at issue in this case, "shall be liable to the United States for a civil penalty *in an amount not to exceed $25,000* for each such violation." *See,* 42 U.S.C. 11045(c)(1) (emphasis added). However, EPCRA fails to enumerate any guiding criteria for determining how much of the maximum $25,000 per violation civil penalty should be imposed in a particular case.[(6)]

2. Regulatory Civil Penalty Guidelines

On August 10, 1992, EPA issued its EPCRA Section 313 ERP [Enforcement Response Policy]. Ex. 23 and Tr. 71. The ERP's stated purpose is to "ensure that enforcement

actions for violations of EPCRA §313 . . . 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 . . . ." Ex. 23, p. 1.[(7)]

The EPCRA ERP utilizes a matrix and/or a per-day formula to determine a "gravity-based" penalty accounting for the circumstance level and extent level of the violation. Once this gravity-based penalty is determined, the ERP provides that upward or downward adjustments in that penalty may be made in consideration of other factors such as voluntary disclosure, history of prior violations, delisted chemicals, attitude, and ability to pay. Ex. 23, pp. 14-20.

All seven EPCRA violations at issue here involve Respondent's failure to submit yearly Toxic Chemical Release forms (commonly known as a "Form Rs") when such forms came due on July 1 of the following calendar year. The ERP defines a violation under these "circumstances" as a "failure to report in a timely manner violation" and divides such violations into two categories. Category I covers instances where the Form R reports are submitted *one year or more after the July 1 due date*; Category II covers instances where the reports are submitted after the July 1 due date *but before July 1 of the following year*. Ex. 23, p. 4. Category I violations are considered as "circumstance level 1" violations. Category II violations are "circumstance level 4" violations.

The ERP determines a violation's "extent" level by looking at the size of the violator's business and the quantity of the chemical used that is the subject of the violation. Violations committed by businesses with over 10 million dollars in corporate sales and 50 employees, which used in the applicable calendar year more than 10 times the reporting threshold of the chemical, are designated as "extent level A." Violations by the same size businesses which used less than 10 times the reporting threshold in the applicable calendar year are designated "extent level B."

After the circumstance and extent levels are determined in accordance with the ERP, those levels are mapped on the ERP's grid or matrix to determine the "gravity-based penalty" amount applicable to the violation. The matrix indicates that circumstance level 1/extent level A violations warrant a gravity-based penalty of $25,000; circumstance level 1/extent level B violations warrant a $17,000 gravity-based penalty. Where the violator filed less than one year after the filing deadline, the ERP provides a per-day formula which establishes the percentage of the gravity-based penalty applicable to the violation.

The second stage for determining the appropriate penalty under the ERP involves the "adjustments" to the gravity-based penalty. The ERP allows for the gravity-based penalty to be adjusted upward or downward for a number of factors including the following:

(a) voluntary disclosure - a downward adjustment of up to 50%.

(b) delisted chemicals - a downward adjustment of a fixed 25%;

(c) attitude - a downward adjustment of up to 30%

(d) other factors as justice may require - a downward adjustment of up to 25%.

The ERP indicates that adjustments for voluntary disclosure and delisting may be made by EPA prior to issuing a civil complaint, but an adjustment for "attitude" is made only after a complaint is issued. Ex. 23, p.8. Further, the ERP indicates that an adjustment may not be made for both attitude and voluntary disclosure, because those adjustments are considered "mutually exclusive." Ex. 23, p.16.

On April 3, 1995, EPA explicitly superseded, *in part,* the use of the ERP in determining EPCRA civil penalties by the publication of an Interim Policy entitled "Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy

Statement." *See*, 60 Fed. Reg. 16,875 (April 3, 1995). That Policy was finalized eight months later with the publication of the Self-Policing Policy on December 22, 1995.[(8)] *See,* 60 Fed. Reg. 66,706. The stated purpose of the Final Self-Policing Policy was to encourage regulated entities to conduct voluntary compliance evaluations and to disclose and correct violations by providing significant financial incentives for doing so. Therefore, the Self-Policing Policy indicated that EPA would elect to waive the gravity-based penalties that might otherwise be imposed through the application of the ERP for companies that voluntarily identify, disclose and correct violations in accordance with nine enumerated criteria. Further, the Policy provided that EPA would reduce the ERP gravity-based penalties by 75% for companies that meet all, except the first, of the nine criteria. *See,* 60 Fed. Reg. 66,711.

The nine criteria for obtaining a complete or partial penalty waiver set out in the Final Self-Policing Policy are:

1. Systematic Discovery
2. Voluntary Discovery
3. Prompt Disclosure
4. Discovery and Disclosure Independent of Government or Third Party Plaintiff
5. Correction and Remediation
6. Prevent Recurrence
7. No Repeat Violations
8. Other Violations Excluded
9. Cooperation.

See, 60 Fed. Reg. 66,711-12.

B. **THE APPLICATION OF THE PENALTY CRITERIA TO THIS CASE**

COUNT 1

At the hearing, Mr. Craig Yussen testified that, as EPA Region III's "EPCRA Section 313 Compliance Coordinator," it was his duty to calculate the penalties to be proposed in complaints filed by EPA for violations of EPCRA Section 313. Tr. 74. Mr. Yussen testified that in such capacity he had determined that $6,250 was the appropriate penalty to be proposed for Respondent's violation set forth in Count 1 of the Complaint.

In explaining how he reached this conclusion, Mr. Yussen stated that he began his penalty calculations by first looking to and applying the ERP. Following the ERP, Mr. Yussen categorized the violation set forth in Count 1 of the Complaint - Respondent's failure to file its 1992 Form R, until February 21, 1995, reporting the 437,420 pounds of non-aerosol sulfuric acid it otherwise used in that calendar year - as a "circumstance 1/extent level A" violation. Tr. 78-84 and Ex. 21. Applying the matrix set forth in the ERP resulted in a gravity-based penalty of $25,000 for such a violation.[(9)] Tr. 84-85. However, at that point, rather then applying the adjustment factors set forth in the ERP itself, Mr. Yussen testified that he turned, instead, to the Self-Policing Policy for guidance as to the appropriate adjustments to be made because Respondent had voluntarily disclosed the violation by filing its report late, before being contacted by the EPA. Tr. 94, 145. After reviewing the Self-Policing Policy in light of the facts of this case, Mr. Yussen testified that he concluded that Respondent had met eight of the nine criteria listed in it and, therefore, following the Policy, adjusted the gravity-based penalty of $25,000 downward by 75% resulting in a total proposed penalty of $6,250 for Count I. Tr. 96-97, 207-08.[(10)]

Mr. Yussen testified that the one criterion out of the nine enumerated in the Self-Policing Policy which he had concluded that Respondent had *not* met at the time he initially determined the penalty was that Respondent "took measures to prevent future violations." Tr. at 196, 207-08.[(11)] Mr. Yussen explained that he based this conclusion upon the inspection report which showed that "[i]n this instance, they self-disclosed for '92 and '93, then turned around and violated for 1994." Tr.

196.[(12)]

Both of Respondent's witnesses testified in regard to the circumstances under which Bollman discovered the violations and the measures it had undertaken to correct those violations and prevent future violations.[(13)]

Respondent's first witness was David Wails, its Plant Engineer, who has been employed by Bollman Hat for eight years. Tr. 242. Mr. Wails testified that prior to March 1993, Sheldon Brubaker, Bollman's Manager of Research and Development, was responsible for EPCRA Form R compliance. Mr. Wails stated that Mr. Brubaker was terminated in March of 1993, for poor job performance unrelated to the failure to file the Form Rs. In fact, at the time that Mr. Brubaker was terminated, Bollman was unaware of the existing EPCRA violations. Tr. 261. In November 1993, Bollman hired Marty Hikes. In July 1995, Mr. Wails stated that he discovered the reporting package for the 1994 EPCRA Form Rs on his desk which he speculated may have been placed on his desk by another employee who was responsible for other environmental matters, but not EPCRA filings. Tr. 263. Mr. Wails stated that he passed the forms on to Mr. Hikes, who in an attempt to complete them discovered that Form Rs had not been filed for 1992 or 1993 either. Tr. 252.[(14)]

Marty Hikes, Bollman's manager of plant services and maintenance, testified as Respondent's second witness. Tr. 266-67. Mr. Hikes testified that he began working for Bollman five years ago. In about July 1995, Mr. Hikes stated that Mr. Wails came to him with an EPCRA reporting package containing blank forms for calendar year 1994. Tr. 267-68.[(15)] Mr. Hikes stated he reviewed the package and realized that the company was already late in filing for calendar year 1994. He so advised his supervisor, Mr. Wails, who instructed him to promptly complete and file the forms. Mr. Hikes testified that because he was not familiar with EPCRA filings, however, he needed to spend time reviewing the instruction booklet. He then attempted to collect the data required to complete the forms and found it difficult because Respondent had no system in place to centrally collect and collate the required data. Therefore, Mr. Hikes stated he decided to see what had been reported in prior years. Tr. 274. It was at that point, Mr. Hikes indicated, that he discovered that the Form Rs for 1992 and 1993 had also not yet been filed. *Id.* Mr. Hikes stated he decided to try to prepare the 1993 form first, because those records were the most easily accessible. Tr. 274. He testified that he worked on the forms every day. Tr. 275. He also worked on putting into place a system for automatically collecting the data needed to complete the reports. Tr. 277. Mr. Hikes testified that after the new data collection system was in place he filed the 1994 forms. Further, he indicated that, as a result of the new system, there have been no violations in the years since 1994.

I find Respondent's testimony to be credible regarding the discovery of the violations, its efforts to remedy the violations and the measures implemented to prevent a reoccurrence credible. It is clear from such testimony that Respondent discovered all of the violations, for each of the three years at issue - 1992, 1993 as well as 1994 -essentially simultaneously. Respondent went about remedying the violations in the order it deemed most efficient, while simultaneously putting into place measures which have effectively prevented the occurrence of future violations. It is clear that Mr. Yussen did not have a full and correct understanding of the circumstances under which the seven violations were discovered at the time he reached his conclusion regarding Respondent meeting most, but not all, of the criteria of the Self-Policing Policy. Therefore, I find that the 1994 violation did not result from a failure to put into place preventative measures after discovering the earlier violations. Rather, I find this violation occurred before Respondent recognized that it needed to file Form Rs and before it had any system for filing them. Thereafter, in late 1994-95, after all seven of the violations had already occurred, Respondent put into place corrective measures which have successfully avoided further violations.[(16)]

On that basis, I find that Respondent did undertake sufficient measures to prevent a reoccurrence of the violation after it became aware of the problem.[(17)] I conclude that Respondent met all of the criteria under the Self-Policing Policy. Therefore,

in accordance with that Policy, the gravity-based penalty for Count 1 will be reduced by the full 100% allowed.

EPA has argued in its post-hearing brief that it erred in initially determining that Respondent had met all but one of the nine Self-Policing requirements. Specifically, EPA states that:

> In this instance, Complainant, in its discretion, admittedly without knowing all of the relevant background details of Respondent's voluntary disclosure at the time, and in its zeal to recognize and encourage voluntary disclosure, extended a technically unsupported penalty adjustment to Respondent in the Complaint. (Complainant's Post-Hearing Brief at 7).

EPA now claims that its chief witness, Region III's "EPCRA Section 313 Compliance Coordinator," the person responsible for properly determining proposed penalties, misapplied the policy and that Respondent actually failed to meet at least *two* of the criteria of the Self-Policing Policy. Nevertheless, EPA does not ask the Court not to apply the Policy or grant the reduction derived from such error, stating that as "acknowledged at the Hearing, Complainant extended the reduction in the Complaint and is prepared to abide by it." Complainant's Post-Hearing Brief at 8 n.5. Rather, Complainant brings up Respondent's apparent shortcomings in respect to the self-policing criteria requirements in order to further support its rather weak claim of "no harm, no foul." *Id.* Irrespective of EPA's position in its post-hearing brief, it gave Respondent a presumption of having met eight of the nine criteria of the Self-Policing Policy up to and throughout the hearing. Therefore, I will hold EPA to that presumption, particularly considering that EPA's nondisclosure of its use of the Self-Policing Policy precluded Respondent from any meaningful response at the hearing. Additionally, inasmuch as I have found that Respondent met the "prevention of future violations" requirement that Mr. Yussen testified Respondent failed to meet at the hearing (Tr. 196, 207-08), Respondent merits the full 100% reduction for Count 1.

COUNT 2

As alleged in Count 2 of the Complaint, Respondent failed to file a 1992 Form R until February 21, 1995, when it reported that it otherwise used 15,540 pounds of Methyl Isobutyl Ketone during calendar year 1992. Mr. Yussen determined that such a violation constituted a circumstance 1/extent level B violation under the ERP. Tr. 103-104 and Ex. 21. Applying the ERP matrix resulted in a gravity-based penalty of $17,000 for such a violation. As with Count 1, because Respondent had disclosed this violation, Mr. Yussen applied EPA's Self-Policing Policy, rather than the ERP, to determine what adjustments should be made to the penalty. Based upon his conclusion that Respondent met eight out of nine of the criteria in that Policy, he then reduced the gravity-based penalty by 75% in recognition of Respondent's voluntary self-disclosure of the violation, resulting in a total proposed penalty for this count of $4,250. Tr. 104-105, 108 and Ex. 21.

For the reasons set forth above regarding Count 1, I conclude that the penalty for Count 2 should also be reduced by the full 100% allowed under the Self-Policing Policy.

COUNT 3

The violation alleged in Count 3 is Respondent's failure to file a 1993 Form R reporting the 387,500 pounds of non-aerosol sulfuric acid it used in that year until 235 days after the July 1, 1994 due date. EPA concluded that this violation constituted a circumstance 1/extent level A violation under the ERP. Applying the ERP resulted in a gravity-based penalty of $19,616 for Count 3.[(18)] Again, because Respondent disclosed this violation, EPA then applied the Self-Policing Policy rather then the ERP to determine the applicable adjustments, and thus reduced the penalty by 75% in recognition of Respondent's voluntary disclosure resulting in a proposed penalty of $4,904 for Count 3. Ex. 21

For the reasons set forth above regarding Count 1, I conclude that the penalty for Count 3 should also be reduced by the full 100% allowed under the Self-Policing Policy.

COUNT 4

The violation set forth in Count 4 of the complaint involves Respondent's failure to file a 1993 Form R reporting the 22,572 pounds of MIBK it used in that calendar year until 235 days after the July 1 due date. EPA assessed this violation as a circumstance 1/extent level B violation under the ERP. The ERP sets a gravity-based penalty of $13,052 for such a violation using a per-day formula. Since Respondent had also disclosed this violation, in reliance upon the Self-Policing Policy, EPA reduced the penalty by 75% resulting in a proposed penalty of $3,263. Ex. 21.

For the reasons set forth above regarding Count 1, I conclude that the penalty for Count 4 should also be reduced by the full 100% allowed under the Self-Policing Policy.

COUNT 5

As alleged in Count 5, Respondent failed to file a 1993 Form R reporting the 11,086 pounds of Toluene it used in that calendar year until 235 days after the July 1 due date. Applying the ERP, EPA asserted that this violation constituted a circumstance 1/extent level B violation, and calculated a gravity-based penalty of $13,052. Respondent's disclosure of this violation was the basis for EPA's reduction of the penalty by 75% under the Self-Policing Policy, resulting in a proposed penalty of $3,263 for Count 5. Ex. 21.

For the reasons set forth above regarding Count 1, I conclude that the penalty for Count 5 should also be reduced by the full 100% allowed under the Self-Policing Policy.

COUNT 6

Respondent failed to file a 1994 Form R reporting the 17,590 pounds of MIBK it used in that calendar year until 97 days after the July 1 due date, as alleged in Count 6. EPA assigned circumstance 1 and extent level B for this violation. Based upon the ERP, Complainant proposed a penalty of $8,893 for this violation.[(19)] Tr. 115. In calculating the proposed penalty for this violation, Complainant made no adjustments whatsoever to the gravity-based penalty under either the Self-Policing Policy or the ERP.

Mr. Yussen testified that he did not adjust the penalty downward for Self-Policing Policy's 75% reduction for voluntary self-disclosure, which he had applied to the 1992 and 1993 violations, because Respondent had been contacted by the EPA before it disclosed its violation for this year. Tr. 117-118 and Ex. 21. Specifically, Inspector Stanton had made initial contact with Respondent by telephone on October 4, 1994 and discussed therein Respondent's failure to file the 1994 Form Rs. Respondent filed its 1994 Form R for MIBK eight days after this initial contact occurred, on October 12, 1995.

Respondent argued in response that long before it was contacted by Inspector Stanton, it became aware of the 1994 violation and was already in the process of gathering the data necessary to complete the form. Therefore, it argued that it was entitled to have the penalty for this violation adjusted downward to the same extent as the 1992 and 1993 violations.

The record supports Respondent's assertion that the Inspector's telephone call with Mr. Hikes on October 4, 1994 was not the trigger which caused the 1994 Forms to be filed. The testimony of Respondent's witnesses supports a finding that Respondent was aware of the 1994 Forms not having been timely filed prior to that contact and had already undertaken steps to prepare for filing the 1994 Forms, as Respondent had prepared and filed the 1992 and 1993 Forms without any specific prompting by the EPA. In fact, Exhibit 18, a cover letter drafted to accompany the filing of the

1994 forms, shows that Respondent was ready to file the reports as early as October 6, 1995. It appears that the subsequent six day delay in filing was the result of the need to obtain Bollman's Executive Vice-President's signature on the forms, which did not occur until October 12, 1995.

However, even if the telephone call from the EPA did not trigger the filing, it is clear that prior to that telephone call Respondent never made any effort to put EPA on notice that it had uncovered the violations for 1994 and would be filing shortly. Moreover, Mr. Hikes testified that he chose to delay filing the 1994 Forms until Bollman had in place its system for routinely gathering the data needed to complete the Form Rs, instead of completing the forms by gathering the data by hand as he had for the prior years. Therefore, I find Complainant's assertion well-founded, that Respondent is not entitled to the benefit of the reduction for voluntary disclosure set forth in the Self-Policing Policy.

Nevertheless, the conclusion that Respondent is not entitled to the adjustments provided under the Self-Policing Policy does not lead to a conclusion that it is entitled to no adjustments at all. The Self-Policing Policy indicates that the ERP continues to apply (*see*, footnote 8 above) and even Mr. Yussen testified that this was his understanding. Tr. 199-200. Thus, although the Self-Policing Policy is inapplicable to this Count, Respondent is still entitled to the benefits of all adjustments relevant under the ERP. The ERP provides for a downward adjustment of up to 30% for "attitude;" and a downward adjustment of up to 25% for "other factors as justice may require." As discussed below, I find that Respondent is entitled to both of these adjustments in full.

Reduction for Attitude

As to the adjustment in the gravity-based penalty for "attitude," the ERP indicates that:

> 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.
>
> (2) Under the second component, the Agency may reduce the gravity-based penalty in consideration of the facility's good faith efforts to comply with EPCRA, and the speed and completeness with which it comes into compliance.

Ex. 23, p. 18 (emphasis in original).

Without a doubt, Respondent in this case has exhibited in its actions the cooperative and compliant "attitude" intended to be fostered and rewarded in the ERP and warranting the full 30% reduction of the gravity-based penalty for the violation set forth in Count 6.

As to the first component of attitude, "cooperation," Complainant has stipulated that "Respondent was prepared for the EPA inspection held on November 6, 1995, fully cooperated during the inspection, and produced accurate records during the inspection to support the reporting submitted by the company under Section 313 of EPCRA." *See*, Ex. 25, Stip. 25. This stipulation, made in advance of the Hearing, was well supported by the testimony of the EPA's first witness, Inspector Donald W. Stanton.

Inspector Stanton testified that his initial telephone contact with Bollman occurred via a telephone conversation with Mr. Hikes which was initiated, apparently without any prior notice, by the Inspector. Tr. 31 and Ex. 20. Mr. Stanton stated that in this initial contact, Mr. Hikes was "cooperative and forthcoming in his information," and that the information provided in that initial contact proved accurate. Tr. 37. Specifically, Inspector Stanton testified that Mr. Hikes voluntarily acknowledged that the company was regulated under EPCRA and had not yet filed its form Rs for 1994, but had filed for prior years. Tr. 32, 38. Mr. Stanton could not recall if Mr. Hikes told him Bollman was already in the process of completing the 1994 Forms. Tr. 62. Mr. Hikes also accurately provided information regarding filing made in prior years, and the size of the company in terms of sales and employees. (Tr. 33). Mr. Hikes described to the inspector how the violations came about. Tr. 55-56.

Inspector Stanton testified that he followed up his telephone contact with Bollman with an on-site inspection to the facility on November 6, 1995. Tr. 31. Marty Hikes and David Wails participated in the inspection. Messrs. Hikes and Wails gave the inspector a tour of the facility and the documentation he had requested in a letter previously mailed to the company. Tr. 45-46. Inspector Stanton acknowledged that Bollman provided a complete set of all the relevant EPCRA documents to him on the day of the inspection and that to do so probably involved Respondent spending considerable preparation time. Tr. 39-40, 44.

Mr. Stanton characterized the cooperation he received from Respondent during both of his contacts as "average to above-average." Tr. 35, 37, 39. He stated that he had indicated this on a tracking sheet he prepares with his report, characterizing Respondent as "open and cooperative." Tr. 49-52. For Respondent's cooperation in the inspection and production of accurate records, Inspector Stanton believed that an adjustment should be made to the gravity-based penalty to an extent "bigger than a bread box." Tr. 54-55.

The record in this case also well documents Respondent's cooperation and preparedness during the settlement process. The record, in fact, reveals that Respondent participated in a number of settlement conferences and provided documents requested by Complainant in connection therewith. *See*, Complainant's Report on the Progress of Settlement dated November 14, 1996, Complainant's Settlement Status Report dated April 3, 1997 and Tr. 107.

Moreover, Respondent's initial penalty proposal stated in its Answer appears extremely reasonable in that even at the time it filed its Answer in this case Respondent indicated it would be willing to pay a penalty slightly more than that determined to be appropriate herein. *See*, Answer, p. 12; Tr. 17.[(20)]

In addition to its cooperation in settlement discussions, Respondent acted in an exemplary manner in terms of the litigation process. Respondent acknowledged its liability for the violations from the very initial stage of this proceeding. *See*, Answer, p. 12; Tr. 13.[(21)] Respondent did not engage in any attempts to delay this proceeding - it filed no motions for extension whatsoever until after the hearing, a single joint motion prompted by Complainant's desire to file a post-hearing brief in this case. Respondent stipulated to numerous material facts, lessening Complainant's burden of production and shortening the length of the trial. Further, at the trial, Respondent introduced only a minimal number of witnesses and documents. It was clear from the quality of its presentation at the hearing that Respondent's attorney and witnesses were well prepared for trial.

Therefore, Respondent has well satisfied the "cooperation" component of the attitude adjustment set forth in the ERP.

As to "compliance," the second component of attitude, relating to Respondent's "good faith efforts to comply with EPCRA, and the speed and completeness with which it comes into compliance," it must be noted that Bollman engaged in exactly the self-policing activity the Self-Policing Policy was designed to encourage, *even before* the Self-Policing Policy with its financial incentives was published. Moreover, even with this Policy in place, Mr. Yussen stated that this was the *only*

case, out of 75 cases which he has evaluated for Region III, in which voluntary disclosure applied at all.[22] Further, as indicated above, I find Respondent's testimony regarding the fact that it was already preparing for filing its 1994 forms to be credible. Such effort was not prompted by the inspection. Respondent filed its 1994 Forms less than 10 days after being initially contacted by Complainant, a response time which certainly can be considered to be "speedy." Further, those Forms apparently were complete and free from any of the errors which the 1992 and 1993 forms exhibited.[23]

The record shows that Respondent chose not to place the EPA on notice of its awareness of its 1994 violation and chose to have in place a data collection system before it filed its 1994 Forms, rather than preparing such forms by gathering data from individual sources as it had done for 1992 and 1993, as a result of which, it filed those forms eight months after the others. This choice, however, likely reflects no more than a poor business judgment as to the manner of compliance, for which Respondent is paying a penalty. It does reflect some meaningful effort on the part of Respondent to come into compliance in a timely manner.

Thus, I find that Respondent has demonstrated a good faith effort to comply which warrants the application of the additional 15 percent reduction for the second component of attitude.

Therefore, based upon the foregoing, Respondent is entitled to the full 30% reduction for expressing a cooperative attitude in this proceeding as defined by the ERP.

Reduction For "Other Factors as Justice May Require"

Under the heading for this adjustment factor the ERP states that:

> In addition to the factors outlined above, the Agency will consider other issues that might arise, on a case-by-case basis, and at Regional discretion, which should be considered in assessing penalties. 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 lack of control over the violation. . . . In these situations, an additional reduction of up to 25% off the gravity-based penalty may be allowed. Use of this reduction is expected to be rare and the circumstances justifying its use must be thoroughly documented in the case file.

Ex. 23, p. 18 (emphasis in original).

As to this criteria the Environmental Appeals Board has stated:

> The justice factor operates as a safety mechanism when necessary to prevent an injustice.

Spang & Co., EPCRA Appeal Nos. 94-3 and 94-4, 1995 EPCRA LEXIS 6 (EAB, October 20, 1995).

Additionally, other administrative law judges have interpreted these factors to merit broad application when appropriate. For example, one judge has stated:

> The phrase "such other factors as justice may require" stated in the Act and ERPs should not be given a narrow construction. Much of the interpretation should be left to the sound discretion of the ALJ.

See, Cox Creek Refining, EPA Docket No. EPCRA-III-032, 1993 EPCRA LEXIS 73 (ALJ, June 23, 1993).

Although Mr. Yussen testified that he had never seen a penalty reduced for "such other factors" (Tr. 126), the Courts have relied upon the "justice factor" provision to reduce fees in a number of other cases. *See, Group Eight Technology, Inc.,* EPA Docket No. TSCA-V-C-66-90, 1997 TSCA LEXIS 48 (ALJ, November 17, 1997) (procedural posture of case constituted "other factor"); *Seneca Asbestos Removal & Control Inc.*, EPA Docket No. CAA-010A-1993, 1997 CAA LEXIS 2 (ALJ, January 2, 1997) (penalty exceeding economic benefit of contract under which penalty occurred and penalties paid by other violators considered under "other factors"); *General Motors Corp*., EPA Docket No. CWA-A-O-001-93, 1996 CWA LEXIS 6, (ALJ, October 31, 1996) (reduction because of respondent's unique position among competitors to be found as violator as a result of good faith efforts to obtain permit considered as "other factor" warranting reduction); *Spang & Co*., EPCRA Appeal Nos. 94-3 and 94-4, 1995 EPCRA LEXIS 6 (EAB, October 20, 1995).

"Justice" is defined as the "proper administration of laws" and the "disposition of legal matters or disputes to render every man his *due*" *Black's Law Dictionary* 776 (5th ed. 1979). Denial of one's right to *due* process is certainly an injustice. "The essential elements of due process of law are notice and the opportunity to be heard and to defend in orderly proceeding adapted to nature of case." *Id.* at 449. In cases involving the administrative assessments of civil penalties, the EPA has deemed it part of due process that a respondent, charged in an administrative complaint with a violation, be told of the reasoning behind the proposed penalty. *See*, Rule 22.14 (40 C.F.R. §22.14). In this case, Complainant did not fully disclose to Respondent the reasoning behind the proposed penalty. Complainant provided only a half truth. It represented that the penalty was based on the ERP alone, when in fact Complainant adjusted the proposed penalty based upon the Self-Policing Policy.

Not only did Complainant fail to disclose the reasoning behind the penalty proposed in its Complaint but it failed to do so in response to a specific inquiry from the undersigned in regard thereto contained in the Prehearing Order. That Order specifically asked Complainant to include in its Initial Prehearing Exchange an explanation as to "how the proposed penalty was determined, and . . . state in detail how the specific provisions of any EPA penalty or enforcement policies and/or guidelines were used in calculating the penalty." Complainant's response merely cited the ERP. EPA failed to disclose its use of the Self-Policing Policy in its narrative response to the undersigned's inquiry and did not provide a copy of it among its Prehearing Exchange documents. It did this despite Rule 22.05 which provides that "the signature [of a party or its counsel on a pleading] constitutes a representation by the signer that he has read the pleading, letter or other document, [and] that to the best of his knowledge, information and belief, the statements made therein are true."

The EPA withheld from Respondent, as well as from the undersigned, its use of the Self-Policing Policy in calculating the penalty until the hearing, and even then it was merely referenced verbally but not presented or marked for identification. Tr. 194-95, 105-106.[(24)] As a result, both Respondent and the undersigned came to the hearing confused as to the rationale behind the penalty calculation.

Furthermore, had the Agency disclosed its use of the Self-Policing Policy in calculating the penalty, this case likely would have settled without the need for hearing. The withholding of a full explanation as to how it calculated the proposed penalty is a hindrance to the settlement policy as set forth in Section 22.18 of the Rules ("[t]he Agency encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations").[(25)] If Respondent had been aware of the Policy, it could have argued that it met either all seven of the criteria of the Interim Policy or all nine of the criteria of the Final Policy for waiver of the penalty for the first five counts, and for reduction of last two counts based upon the ERP which the Policy states still applies in conjunction with it. Respondent in this case acted reasonably at all steps and had it been operating from the same page as

Complainant an amicable resolution could have been reached.

Such an injustice to Respondent may be remedied under the provision of "other factors as justice may require." Therefore, I find that the Respondent is entitled to the 25% reduction allowed by the ERP for Count 6.

The penalty is recalculated as follows: $9,074.00 (gravity-based penalty)(26) less 55% (30% attitude adjustment and 25% "other factors" adjustment), for a total penalty of $4,083.00. (27) Therefore, I conclude the appropriate penalty for this violation is $4,083.00.

COUNT 7

EPA assessed the violation of Respondent's failure to file a 1994 Form R reporting the 62,971 pounds of Toluene until 96 days after the July 1 due date as a circumstance 1/extent level B violation under the ERP. Based upon the ERP, Complainant proposed a penalty of $8,893 for this violation.(28) Tr. 116. In calculating the proposed penalty for this violation, Complainant made no adjustments whatsoever to the gravity-based penalty under either the Self-Policing Policy or the ERP. Ex. 21.

For the reasons set forth above regarding Count 6, I conclude that the penalty for this violation also should be reduced to $4,083.00.

CONCLUSION

I find that Respondent, Bollman Hat Company failed to file Toxic Chemical Release forms as to sulfuric acid for calendar years 1992 and 1993, methyl isobutyl ketone for calendar years 1992, 1993 and 1994, and toluene for 1994, in violation of Section 313 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. §11023. As a result, I find the imposition of a civil penalty in the amount of $8,166.00 is appropriate in light of all the factors in this case.

ORDER

1. Respondent is assessed a civil penalty of 8,166.00.

2. Payment of the full amount of this civil penalty shall be made within 60 days of the service date of this Order by submitting a certified or cashier's check in the amount of $8,166.00, payable to the Treasurer, United States of America, and mailed to:

EPA - Region III
P.O. Box 360515
Pittsburgh, PA 15251

3. A transmittal letter identifying the subject case and the EPA docket number, as well as Respondent's name and address, must accompany the check.

4. If Respondent fails to pay the penalties within the prescribed statutory period after entry of the Order, interest on the penalty may be assessed.

5. Pursuant to 40 C.F.R. §22.27(c), this Initial Decision shall become the Final Order of the Agency, unless an appeal is taken within twenty (20) days of the date of service of this decision, pursuant to 40 C.F.R. §22.30, or the Environmental Appeals Board elects, *sua sponte*, to review this decision.

Susan L. Biro
Chief Administrative Law Judge

Date: March 17, 1998
Washington, D.C.

1. [1] The Director's authority to institute the action was delegated to him by the Regional Administrator of EPA Region III, who, in turn, had been delegated such

authority by The Administrator of the Environmental Protection Agency. *See*, EPA Delegation No. 22-3 (September 13, 1987).

2. [2] The first twenty-four exhibits (nos. 1-24) were offered into evidence by Complainant, the next two exhibits (nos. 25 and 26) were offered by Respondent, and the final exhibit (no. 27) consisted of the parties' Joint Set of Stipulations. Tr. 24-25. A demonstrative exhibit used by the Complainant was marked for the purpose of identification as Exhibit 28, but was not admitted into evidence.

3. [3] The Complainant did not produce at the hearing for inspection by the Respondent or the undersigned a copy of the Self-Policing Policy. This document was only produced by the Complainant as an attachment to its Post-Hearing Brief.

4. [4] Citation to the Transcript will be in the following form: "Tr. __."

5. [5] In response to a Joint Motion, the parties were given an extension of time to file their post-hearing briefs in this case. As a result, the parties had essentially two months from the date the Transcript became available to file their initial post-hearing briefs and an additional two weeks thereafter to file reply briefs.

6. [6] Section 325(c)(1) of EPCRA, 42 U.S.C. §11045(c)(1), provides that, with respect to violations of the emergency notification requirements of EPCRA Section 304 (42 U.S.C. §11004), in determining the amount of the civil penalty 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." Some Judges have relied upon these same criteria to guide their administrative penalty assessments for violations of Section 313. *See e.g., TRA Industries Inc.,* EPA Docket No. EPCRA-1093-11-05-325 (ALJ, Oct. 11, 1996); *GEC Precision Corp.,* EPA Docket No. EPCRA-7-94-T-3 (ALJ, Aug. 28, 1996).

7. [7] The page citations to the ERP are to the page numbers used in the document itself and not to the number of pages of the exhibit counting chronologically.

8. [8] As to its application, the Self-Policing Policy provides in pertinent part that:

> [t]his policy applies to the assessment of penalties for any violations under all of the federal environmental statutes that EPA administers, and supersedes any inconsistent provisions in media-specific penalty or enforcement policies and EPA's 1986 Environmental Auditing Policy Statement. ... To the extent that existing EPA enforcement policies are not inconsistent, they will continue to apply in conjunction with this policy.

60 Fed Reg. at 66,712. This policy was often referred to at the hearing as EPA's "Self-Audit Policy." Tr. 95. The Interim Policy became effective 15 days after publication and the Final Policy became effective 30 days after publication. *See*, 60 Fed. Reg. 16,875 (April 3, 1995) and 66,712 (Dec. 22, 1995). The Respondent did not raise the issue of whether the Interim Policy or Final Policy applied in this case nor did the Complainant justify its reliance on the Final Policy only without mention of the Interim Policy, which was in existence at the time the self-disclosures were made. However, as the text herein indicates, the issue is immaterial since Respondent was found to meet the single criterion under either policy which Complainant claimed Respondent did not meet.

9. [9] For all counts EPA concluded that the Respondent had over $10 million dollars in corporate entity sales and over 50 employees during all relevant periods hereto.

Ex 21. The Respondent did not challenge this conclusion and it is supported by the record. *See*, Ex. 22. The reporting threshold for all toxic chemicals for each of the calendar years at issue in this case was 10,000 pounds.

10. [10] In initially calculating the penalty, Mr. Yussen testified that he did not adjust the penalty downward any further for the other adjustment factors identified in the ERP such as delisting, attitude or "other factors as justice may require" because the Self-Policing Policy does not contain any provision for such additional adjustments. However, at the hearing, Mr. Yussen suggested that further downward adjustments based on those factors might be applicable. Tr. 101-103.

11. [11] It was not clear from the testimony at the hearing exactly which of the nine enumerated criteria in the Self-Policing Policy Mr. Yussen was referring to in regard to Respondent not having taken appropriate measures to prevent future violations. The closest criterion of the nine enumerated in the Final Policy which would relate to this issue is number "6" entitled "Prevent Recurrence," which merely provides that "the regulated entity *agrees in writing* to take steps to prevent a recurrence of the violation, which may include improvements to its environmental auditing or due diligence efforts." 60 Fed. Reg. 66,711 (emphasis added). However, the Interim Policy had a stricter standard requiring the regulated entity not just to agree to take steps, but to actually implement appropriate measures and it may be this criterion to which Mr. Yussen was referring since the Interim Policy was in effect at the time the Respondent self-disclosed and corrected its 1992 and 1993 violations. 60 Fed. Reg. 16,877.

Moreover, the Final Policy indicates that the 75% reduction is only available where all but the first criterion "Systemic Discovery," is met. 60 Fed. Reg. 66,711. The Interim Policy allowed for such a reduction where "most, but not all" of the criteria were met. 60 Fed. Reg. 16,875. Again, it may be that Mr. Yussen was giving the Respondent the benefit of the, this time, more lenient, Interim Policy in this regard.

12. [12] The parties have stipulated that Bollman filed its 1992 and 1993 Form Rs on February 21, 1995 and its 1994 Form Rs on October 12, 1995. Exhibit 25, Stip. 14 and 17.

13. [13] Unaware of the existence of the Self-Policing Policy until the middle of the hearing and not having a copy before it even then, Respondent had no opportunity to argue its application in this case. Therefore, before and during the hearing, Respondent challenged the proposed penalty adjustments solely based upon the fact that the adjustments were inconsistent with the ERP. Specifically, Respondent argued that the gravity-based penalty for Count 1 should be adjusted downward even further because, on July 26, 1991, before the Form R even became due, EPA had proposed that the non-aerosol type of sulfuric acid Respondent used be "delisted," that is removed from the list of chemicals which were required to be reported on a Form R, and that the rule delisting the chemical became final on June 30, 1995, before the Complaint was filed. Further, Respondent treated and neutralized 100% of all the sulfuric acid, so no releases occurred. As a result, Respondent asserted, its failure to submit the form R for the acid did not result in any errors or omissions in the Toxic Report Inventory database figures on releases reported to the public. In addition, Respondent alleged that it was entitled to an additional reduction for its positive attitude and cooperation during the process and litigation and for the lack of control over the violation which was caused by the actions of one errant employee and its prompt corrective action. Based upon these factors, Respondent took the position that the penalty for this violation should be $0 (zero).

14. [14] Mr. Wails acknowledged that between March 1993 and July 1995 the company essentially had no one responsible for complying with the EPCRA reporting requirements. Tr. 252.

15. [15] At one point, Mr. Hikes described the time he was assigned to complete the EPCRA forms as "but eight months" after he joined Bollman. Tr. 268. However it is

difficult to reconcile that characterization with his statement at the hearing that he has been with the company "5 years and two days" would make the date of discovery about July of 1993, rather than July 1995. This would be consistent with the fact that he was hired as a replacement for Mr. Brubaker who was terminated in March of 1993 and Mr. Wails testimony that Mr. Hikes was hired in the fall of 1993 or "October or November of 1993." Tr. 243, 248. Both Mr. Hikes and Mr. Wails credibly testified that Bollman discovered the EPCRA violations in connection with the effort to complete forms for 1994 which were already late, which suggests that in fact, Mr. Hikes was assigned the task of completing the forms about two and a half years after he joined the company, rather than eight months after.

16. [16] This, however, does not excuse Respondent's negligence in failing to have in place for two and a half years, between March 1993 and July 1995, any procedure for assuring it was in compliance with the EPCRA reporting requirements.

17. [17] It should be noted that under the Final Self-Policing Policy, to fulfill its Remediation obligation, the Respondent would only have had to "agree[] in writing to take steps to prevent a recurrence of the violation." 60 Fed. Reg. 66,711. Since the Respondent, without any notice of this Policy and its financial rewards, implemented steps to prevent recurrence of the violation, it is clear that Respondent would have been able to agree in writing to do so sometime in the future, had the EPA suggested such an agreement. Further, at the time the Respondent discovered the violations and filed its reports for the three years at issue, only the Interim Policy was in effect.

18. [18] The Complainant applied a per-day formula to calculate the penalty.

19. [19] In calculating the number of days the Respondent filed its Form R late, Mr. Yussen miscalculated by a total of six days due to the erroneous belief that Respondent filed its 1994 Form R on October 6, 1995. In fact, the Forms were not filed until October 12, 1995. Ex. 21 and Ex. 25, Stip. 20. As a result, as indicated in the text below, the correct unadjusted gravity-based penalty under the ERP is $9,074.00.

20. [20] In fact, in its Answer the Respondent pointed out the Complainant's error underestimating the number of days late the Respondent had filed its 1994 reports, and thus the resulting gravity-based penalty set by the ERP, and on its own raised the initial penalty sum used in its counter-calculations. *See*, Answer, p. 12.

21. [21] In its Answer, Respondent asserted the appropriate penalty in this case would be $10,718.

22. [22] Inspector Stanton noted that his inspection for Form R violations did not uncover any other violations at Respondent's facility, such as Tier One and Tier Two reports required under Section 312 of EPCRA. Tr. 40-43. Specifically, Mr. Stanton confirms that Respondent had properly reported to the local fire department. Tr. 42.

23. [23] On April 19, 1995, EPA issued a Notice of Technical Error regarding Respondent's 1992 and 1993 Form Rs. Ex. 9. Apparently, Respondent had used the term "NA" [not applicable] rather than inserting a "0" where the Form inquired as to something the Respondent had no data to provide. The Respondent promptly corrected this error and resubmitted the forms on May 19, 1995. Ex. 10, 11 and 14.

24. [24]The Self-Policing Policy could not be deemed by the EPA to be "confidential," because it had been published in the Federal Register. Tr. 105-107.

25. [25] It is interesting that one element of the Respondent expressing a positive attitude as described in the ERP is "responsiveness and expeditious provision of supporting documentation requested by the EPA during or after the inspection, and cooperation and preparedness during the settlement process." Ex. 23, p.18. These

are characteristics lacking in EPA in this proceeding.

26. [26] The ERP provides the following formula for calculating per day penalties:

$$\text{Level 4 Penalty} + \frac{(\text{\# of days late} - 1) \times (\text{Level 1} - \text{Level 4 Penalty})}{365}$$

Applied in this case, that formula works as follows:

$$\$6{,}000 + \frac{(103-1) \times (\$17{,}000-\$6{,}000)}{365} = \$9{,}074$$

27. [27] A question was raised at the hearing as to whether the adjustment percentages are progressively subtracted from the gravity-based penalty (*e.g.*, subtract 30% of $9074, then subtract 25% from the remainder), or added together (30% plus 25%) and then subtracted from the gravity-based penalty. Mr. Yussen testified that he uses the former "progressive" method: "we don't add percentages . . we take 25 percent off and 30 percent off what's left . . . [i]t's not as if it's a 55 percent reduction." Tr. 215-216. However, the ERP suggests the latter "additive" method: "terms which provide for a 25% reduction *of the initial penalty calculated . . .* an additional reduction of up to 25% *off the gravity-based penalty* may be allowed." ERP at 17-18 (italics added).

The Environmental Appeals Board explicitly used the "additive" method in *Pacific Refining Company,* 5 E.A.D. 607, 622, 1994 EPCRA LEXIS 54 * 27 (EAB, Dec. 6, 1994) (reducing EPCRA § 313 penalties by a total of 55%, consisting of 15% for cooperation, 15% for compliance, and 25% for "other factors"). That method is also prescribed in EPA's other penalty policies. *See,* RCRA Civil Penalty Policy at 41 (Oct. 1990); U.S. EPA Penalty Guidance for Violations of UST Regulations, Appendix C (Nov. 15, 1990); PCB Penalty Policy, Appendix C p.24 (April 9, 1990); TSCA Civil Penalty Policy, 45 Fed. Reg. 59770, 59776 (Sept. 10, 1980); General FIFRA Enforcement Response Policy, at D-2 (July 2, 1990); Clean Air Act Stationary Source Civil Penalty Policy, Appendix 5 (Oct. 25, 1990); EPA General Enforcement Policy # GM-22 at 20 (Feb. 16, 1984)("the *unadjusted* gravity component may be reduced up to 50%")(italics added). Therefore, the additive method has been applied and utilized in calculating the penalty in this proceeding.

28. [28] In calculating the number of days the Respondent filed its Form R late, Mr. Yussen miscalculated by a total of six days due to the erroneous belief that Respondent filed its 1994 Form R on October 6, 1995. In fact, the forms were not filed until October 12, 1995. Ex. 21 and Ex. 25, Stip. 20. As a result, as indicated in the text above, the correct unadjusted gravity-based penalty under the ERP is $9,074.00.