UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
CLARKSBURG CASKET CO.,	)	DKT. No. EPCRA-III-165
	)	
Respondent	)	

ORDER DENYING MOTION FOR ACCELERATED DECISION ON PENALTY

Complainant has filed a Motion for Accelerated Decision as to Penalty. Respondent has opposed such Motion. For the reasons discussed below, it is determined that Complainant's Motion will be DENIED.

I. BACKGROUND

This action arises under the Emergency Planning and Community Right to Know Act of 1986 ("EPCRA"), 42 U.S.C. §§ 11001-11050. On June 6, 1997, Complainant's Motion for Accelerated Decision as to liability was granted, and Respondent was found liable for failure to timely file Form Rs for the chemicals xylene and toluene for the years 1991-1993. Therefore, the remaining issue in this case is the appropriate penalty to be assessed against Respondent.

In its Motion for Accelerated Decision as to Penalty, Complainant asserts that no material issues of fact are in dispute and that it is entitled to judgment as a matter of law. Based upon its application of the statutory penalty criteria and the EPA's Enforcement Response Policy(1) ("ERP"), Complainant maintains that Respondent should be assessed a penalty of $17,000 for each of its six violations for a total penalty of $102,000. Respondent opposes entry of summary decision on the issue of penalty arguing it is not warranted because material issues of fact relevant to the penalty determination remain in dispute. Respondent also urges that, based on application of the statutory penalty factors to the facts of this case, Complainant is not entitled to the penalty it requests.

II. STANDARD OF REVIEW

Consolidated Rule of Procedure 22.20(a) provides for entry of accelerated decision where "no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R § 22.20(a). The Environmental Appeals Board has held that the standard for accelerated decision is "comparable to a summary judgment under Federal Rule of Civil Procedure 56, which by analogy provides guidance." In re: ICC Indus., TSCA Appeal No. 91-4, 1991 TSCA Lexis 61, at *16 (Dec. 2, 1991). See also, In re: CWM Chemical Services, TSCA Appeal No. 93-1, 1995 TSCA Lexis 10 (May 15, 1995). Interpreting the standard of Rule 56, the Supreme Court has stated that the proper inquiry is "whether the evidence presents a sufficient disagreement to require submission to a [fact finder] or whether it is so one sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, 477 U.S. 242, 251 (1986).

III. ISSUES

As set forth below, Respondent has established that issues of material fact relevant to the determination of the appropriate penalty in this matter are in dispute and, therefore, Complainant's Motion must be denied.

Gravity-based Penalty

EPCRA § 325(c), 42 U.S.C. § 11045(c), provides no specific criteria to guide the assessment of civil penalties for violations of EPCRA § 313, 42 U.S.C. § 11023. Therefore, in calculating its proposed penalty under EPCRA § 313 violations, Complainant relies upon EPA's ERP and the statutory criteria enumerated in TSCA § 16(a)(2)(B), 15 U.S.C. 2615(a)(2)(B),(2) which are incorporated by reference into EPCRA § 325(b)(2), 42 U.S.C. § 11045(b)(2),(3) and EPCRA § 325(b)(1)(C), 42 U.S.C. § 11045(b)(1)(C).(4) Section 325(b)(1)(C), which guides assessment of Class I civil penalties under EPCRA's emergency notification provisions, provides a very similar list of factors. The factors considered under TSCA § 16 and EPCRA § 325(b)(1)(C) differ in only two respects: the former considers the effect of a penalty on the violator's ability to continue in business, while the latter considers the economic benefit derived by the violator. See, In the Matter of Apex Microtechnology, Inc., EPCRA-09-92-00-07 (Initial Decision May 7, 1993) (discussing elements of EPCRA § 325(b)(1)(C) and TSCA § 16 and using TSCA § 16 factors). Complainant argues that the nature of Respondent's violations is serious, and that "failure to file Form Rs 'completely thwarts the intent of the statute.'" (Complainant's Motion at 5, quoting In the Matter of TRA Industries, EPCRA 1093-11-05-325 (Initial Decision, Oct. 11, 1996)). In addition, Respondent's violations had gone unremedied for five, four and three years respectively at the time Complainant filed its Motion for penalty assessment.

In response, Respondent appears to argue in part that its EPCRA violations are minor because the violations are reporting violations and not safety violations.(5) This argument is without merit. To argue that the nature of a violation is minor because it involves reporting and not safety ignores the purpose of EPCRA's right-to-know program. Section 313 plays a critical part in this program which "aims to compile accurate, reliable information on the presence and release of toxic chemicals and to make that information available at a reasonably localized level." Citizens for a Better Environment v. The Steel Company, 90 F.3d 1237, 1238 (7th Cir. 1996).

After considering the nature of Respondent's violations, Complainant articulates the grounds for its gravity-based penalty calculation. Following the ERP, Complainant considers Respondent's violations as involving "circumstance level 1" for failure to timely file its Form Rs. Complainant places Respondent in "extent level B" based on its employment of more than fifty workers at the Clarksburg facility, sales of greater than ten million dollars and use of less than ten times the threshold reporting level of toluene and xylene in each of the three years at issue. Applying its circumstance and extent determinations to the ERP matrix, the Complainant arrives at a figure of $17,000 for each of the six violations for a total penalty of $102,000.

Respondent does not contest any of the factual conclusions reached by Complainant in its circumstance and extent classifications.(6) The arguments made by Respondent in response to Complainant's gravity-based penalty determination are better directed to the factors considered in adjusting the base penalty and will be discussed below.

Adjustment Factors

Respondent and Complainant agree that Respondent is able to pay the proposed penalty, that Respondent has no history of prior violations, that Respondent gained no economic benefit from its violations and that the chemicals toluene and xylene are EPCRA § 313 regulated chemicals. Remaining for consideration is the Respondent's culpability,(7) whether Respondent voluntarily disclosed its violations, Respondent's attitude and "other matters as justice may require."

With regard to Respondent's culpability, Complainant maintains Respondent failed in its obligation to keep records of its usage of § 313 chemicals and to have them available for inspection by Complainant. Moreover, Complainant asserts that this failure should not be treated as a mere aberration because Respondent continued in its failure until ordered by the undersigned to produce the required records.

In response Respondent asserts that its violations were not knowing or willful but rather that they were an oversight. Respondent acknowledges that this is not a defense but maintains that it should be considered in the penalty determination "as reflective of [Respondent's] intent to comply and dispel any inference of a knowing or willful violation." (Respondent's Reply in Opposition at 7). In addition, Respondent offers two arguments that apparently are addressed to its lack of culpability: that it was not familiar with the requirements of EPCRA, and that Inspector Stanton did not tell to Respondent that it was obligated to file Form Rs after his inspection.(8)

Ignorance of EPCRA's requirements has consistently been held not to constitute grounds upon which to reduce a proposed penalty. See, In the Matter of Cox Creek Refining Co., EPCRA-III-032, 1993 EPCRA Lexis 73 at *8-9 (Initial Decision, June 23, 1993) and In the Matter of GEC Precision Corp., EPCRA-VII-94-T-381-E (Initial Decision, August 28, 1996). Consequently, Respondent's arguments that it was unfamiliar with EPCRA and that Inspector Stanton failed to tell it that it was required to file Form Rs after his inspection do not raise a material issue of fact sufficient to resist Complainant's motion.(9)

The Complainant maintains that the facts do not show that any mitigation of the gravity-based penalty is warranted on the basis of "voluntary disclosure" because none of Respondent's actions satisfy the ERP's definition of "voluntary disclosure." According to the ERP, "[t]he agency will not consider a facility to be eligible for any voluntary disclosure reductions if the company has been notified of a scheduled inspection or the inspection has begun, or the facility has been otherwise contacted by U.S. EPA for the purpose of determining compliance with EPCRA § 313." See, ERP at 14. According to Complainant, it did not know Respondent's usage volumes of toluene and xylene until Respondent supplied invoices and Material Safety Data Sheets pursuant to an order issued in December of 1996 in this proceeding.

Respondent does not address any of its arguments directly to this factor. Respondent's averment that it voluntarily provided all information and documents requested by Complainant does not raise an issue of material fact. As described above, "voluntary disclosure" does not apply to actions undertaken after the facility is on notice of EPA's plans to conduct an inspection. The actions referred to by Respondent all took place either during or after the announced inspection.

Complainant argues further that the facts do not warrant any penalty mitigation based on Respondent's "attitude." The attitude element of penalty assessment under the ERP consists of two components, "cooperation" and "compliance." See, ERP at 18. Cooperation encompasses factors such as degree of cooperation and preparedness during the inspection, allowing access to records, and responsiveness and expeditious provision of supporting documentation requested during or after the inspection. Compliance encompasses Respondent's good faith efforts to come into compliance with EPCRA and the speed and completeness with which Respondent, in fact, comes into compliance.

Complainant asserts that it gave Respondent at least three opportunities before the initiation of this enforcement action to provide Complainant with its own account of the information relevant to its § 313 reporting obligations. In addition, Complainant points out, Respondent had yet to file the Form Rs that are the subject of the complaint at the time Complainant filed its Motion for Accelerated Decision on Penalty.

Respondent offers several arguments in support of its contention that it cooperated throughout Complainant's inspection and investigation and made good faith efforts to come into compliance. First, Respondent maintains that it cooperated in Inspector Stanton's inspection of its facility. In support of its position, Respondent quotes from the report filed by Inspector Stanton after his inspection of Respondent's facility in which he states that "[f]or the inspection, they had compiled summaries of usages of Section 313 chemicals . . . ." (Complainant's Prehearing Exchange, Exhibit 1).

Second, Respondent asserts that it has never failed to produce records or documents requested by Complainant. Third, Respondent asserts that it believed that it was in compliance with EPCRA because it provided all information requested by Inspector Stanton, and that he never instructed Respondent that it needed to file Form Rs in addition to supplying him with the information he requested. In support of its second and third arguments, Respondent points to its letter dated June 28, 1996. (Respondent's Reply in Opposition Exhibit B). Respondent avers that in this letter, which it provided at Inspector Stanton's request, it disclosed its usage volumes of toluene and xylene for the years at issue and that the

inspector gave no indication that anything further was required of Respondent. Fourth, Respondent maintains that the Complainant's changing estimates of its chemical usage volumes contributed to its difficulty in complying with EPCRA. Finally, Respondent alleges that Inspector Stanton told Teresa Bush, Respondent's accounting clerk, that he did not believe Respondent would be assessed a penalty based upon the volumes reported.

The degree to which Respondent cooperated with the Complainant's investigation of the violations in this case and the speed and good faith with which it did or did not take action to come into compliance are disputed facts which are material to the determination of an appropriate penalty and cannot be resolved on a motion for accelerated decision. Therefore, an evidentiary hearing will be held on the appropriate penalty to assess for the violations found in this proceeding, if the parties have not executed and filed a Consent Agreement and Consent Order in advance of the hearing date.

The remaining penalty factor of "other matters as justice may require" will not be addressed in this Order. As described above, Respondent has already identified disputed issues of material fact requiring a hearing and no new factual issues are raised by either party in their arguments addressed to this factor.

ORDER

1. Complainant's Motion for Accelerated Decision as to Penalty is DENIED.

2. The parties shall report on the status of settlement negotiations 30 days from the date of service of this Order.

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Susan L. Biro

Chief Administrative Law Judge

Dated: December 17, 1997

1. Enforcement Response Policy for Section 313 of [EPCRA] (1986) and Section 6607 of the Pollution Prevention Act (1990), issued by EPA's Office of Compliance Monitoring of the Office of Prevention, Pesticides and Toxic Substances (August 10, 1992).

2. Section 16(a)(2)(B) of TSCA directs consideration of the following factors in assessing a civil penalty: "the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any prior history of prior such violations, the degree of culpability, and such other matters as justice may require."

3. The factors given consideration under TSCA § 16 are nearly identical to those used under EPCRA § 325(b)(1)(C). While the former considers the effect of a penalty on the violator's ability to continue in business, the latter considers the economic benefit derived by the violator.

4. EPCRA § 325(b)(2), which guides assessment of Class II civil penalties under EPCRA's emergency notification provisions, generally has been referenced for statutory guidance on the issue of penalty assessment under EPCRA § 325(c)(1). See e.g., In the Matter of TRA Industries Inc., EPCRA 1093-11-05-325 (Initial Decision, Oct. 11, 1996) (using TSCA §16 criteria as directed by EPCRA §325(b)(2) in assessing penalty under EPCRA §313); In the Matter of GEC Precision Corp., EPCRA 7-94-T-3 (Initial Decision, Aug. 28, 1996).

5. Respondent does direct other arguments to the nature of its violations. However, because they relate more clearly to penalty adjustment, that is where they will be discussed.

6. Respondent does raise a question about the rationality and fairness of Complainant's proposed gravity-based base penalty of $17,000 for each of Respondent's six violations when Respondent exceeded the reportable level in each instance by less than 50%. However, because no penalty is to be assessed at this stage of the proceeding and because this is not a factual issue, it will not be discussed further.

7. It is observed that the ERP states that no reduction in the penalty is allowed for culpability, and that "lack of knowledge does not reduce culpability since the Agency has no intention of encouraging ignorance of EPCRA and its requirements and because the statute [EPCRA] only requires facilities to report information which is readily available." See, ERP at 14. It is further observed that Section 325(b)(1)(C) of EPCRA, and Section 16 of TSCA, which is referenced in Section 325(b)(2) of EPCRA, include degree of culpability as a factor in determining a penalty.

8. Respondent also asserts that its actions did not result in any "harm or improper usage of toluene and xylene" and that it "took necessary precautions to avoid worker exposure or injury." See, Respondent's Reply at 8. While proper use of toxic chemicals and worker safety measures are to be encouraged, they are not relevant to a penalty assessment for Respondent's EPCRA violations.

9. Respondent's effort to create a material factual issue of Inspector Stanton's alleged failure to provide Ms. Bush with free training materials related to its EPCRA obligations is similarly unavailing. As the court in GEC Precision stated, a regulated party is "held responsible for learning the environmental obligations attendant to the use of toxic chemicals in its manufacturing process." GEC Precision Corp, supra, slip op. at 10.