UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

INITIAL DECISION

DATED: July 10, 1998

EPCRA: Pursuant to Section 325 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. §11045, Respondent Clarksburg Casket Co., is assessed a penalty of $96,900.00 for failing to file Toxic Chemical Release forms for its use of toluene and xylene in calendar years 1991, 1992 and 1993, 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 September 12, 1995, 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 Clarksburg Casket Co. (hereinafter "Respondent" or "Clarksburg"). The Complaint charged Respondent in six 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 for calendar years 1991, 1992 and 1993 for toluene and xylene, toxic chemicals which were "otherwise used" by Respondent in those years in excess of the 10,000 pound reporting threshold. The Complaint proposed a total combined civil penalty of $102,000 based upon Complainant's application of the EPA's August 10, 1992 Enforcement Response Policy for Section 313 of EPCRA ("ERP"), a copy of which was attached to the Complaint.

On October 3, 1995, Respondent filed an Answer to the Complaint, wherein it denied that it used the two toxic chemicals in excess of the reporting threshold in any of the three years at issue and requested a hearing thereon. In its Answer, Respondent also raised a detrimental reliance type defense alleging that, after the inspection which prompted the filing of the Complaint, the inspector represented to Respondent that a penalty would not be imposed based upon its usage of the chemicals. Respondent claimed that, in reliance upon this representation, it subsequently verified the accuracy of the inspector's calculations documenting that Respondent's usage of the two chemicals was in excess of the 10,000 pound reporting threshold during each of the three years at issue. Based upon this verification, the Complaint was filed and the penalty of $102,000 proposed. Respondent claimed that it would not have verified its usage as above the threshold if the inspector had advised it that a penalty would result, and challenged the inspector's calculations as erroneous.

Complainant subsequently filed a Motion for Accelerated Decision as to Liability, which was strongly opposed by Respondent. On June 6, 1997, the undersigned granted by Order Complainant's Motion and entered Judgment on the issue of liability only, in favor of Complainant as to all six counts of the Complaint.[(1)] Complainant subsequently filed a Motion for Accelerated Decision as to penalty, which was also opposed by Respondent. By Order dated December 17, 1997, that Motion was denied. As a result, the issue remaining for hearing was the appropriate penalty to be imposed on Respondent for the six EPCRA violations for which it had previously been found liable.

After due notice, a Hearing was held in this matter before the undersigned on February 10, 1998, in Clarksburg, West Virginia. Two witnesses, EPA Inspector Donald W. Stanton and EPA Region III's EPCRA Section 313 Compliance Coordinator, Craig Yussen, testified at the Hearing on behalf of Complainant. Two witnesses, Clarksburg's former Accounts Receivable Manager, Teresa Bush, and its Casket Shop Supervisor, Charles "Butch" Titus, testified at the hearing on behalf of Respondent. A total of fourteen (14) exhibits were admitted into evidence.[(2)]

The transcript of the Hearing was received by the undersigned on February 23, 1998.[(3)] Each party was given the opportunity to submit post-hearing briefs. The record closed on April 10, 1998, the filing deadline for reply briefs.

II. EPCRA SECTION 313 PENALTY CRITERIA

As to determining civil penalties, section 22.27(b) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 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).

A. Statutory Civil Penalty Criteria

EPCRA § 325(c)(1) provides that any person violating EPCRA § 313 (42 U.S.C. §11023), which delineates 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." 42 U.S.C. 11045(c)(1) (emphasis added). However, the Act 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.

As a result, the criteria set forth in EPCRA Section 325(b) (42 U.S.C. § 11045 (b)) have been relied upon to guide administrative penalty assessments for violations of Section 313. *See e.g., Catalina Yachts, Inc.*, EPA Docket No. EPCRA-09-94-0015 (Initial Decision, Feb. 2, 1998); *TRA Industries Inc.,* EPA Docket No. EPCRA 1093-11-05-325 (Initial Decision, Oct. 11, 1996); *GEC Precision Corp.*, EPA Docket No. EPCRA-7-94-T-3 (Initial Decision, Aug. 28, 1996). Section 325(b) establishes two types of administrative penalties that may be assessed for failure to notify state and local authorities of a release of certain hazardous substances as required by Section 304 (42 U.S.C. §11004): Class I administrative penalties, capped at $25,000 per violation, and Class II administrative penalties, which allow penalties of up to $25,000 per day during which a violation continues. Although violations of Section 304 are quite distinct from violations of Section 313, the relevant penalty criteria are useful as guidance as to assessment of penalties for Section 313 violations.

Section 325(b)(1)(C) of EPCRA, 42 U.S.C. §11045(b)(1)(C), provides the following criteria for determining a penalty for Class I violations of EPCRA Section 304: 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."

The criteria for Class II violations, referenced in EPCRA § 325(b)(2) and delineated in Section 16 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615, are identical, except that the latter criteria include consideration of the effect of the penalty on the violator's ability to continue to do business, and omit an inquiry into the "economic benefit or savings (if any) resulting from the violation." Since, in this case, Complainant has not alleged that Respondent received any economic benefit from the violations, and Respondent has not alleged that payment of the penalty will diminish its ability to continue to do business, the distinction is moot here.

B. EPA's Civil Penalty Guidelines

On August 10, 1992, EPA's Office of Compliance Monitoring of the Office of Prevention, Pesticides and Toxic Substances issued an Enforcement Response Policy for Section 313 of EPCRA ("the ERP"). Ex. 14. 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. 14, p. 1.[(4)]

The EPCRA ERP sets forth a matrix and/or a per-day formula which is utilized to determine a "gravity-based" penalty accounting for the circumstance level and extent level of the violation at issue. Once this gravity-based penalty is determined, the ERP provides for upward or downward adjustments to it, in consideration of other factors such as voluntary disclosure, history of prior violations, delisted chemicals, attitude, and the violator's ability to pay. Ex. 14, pp. 14-20.

All six counts of the violations at issue here involve Respondent's failure to submit yearly EPCRA Toxic Chemical Release forms (commonly known as "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" and divides such violations into two categories, depending on whether the reports were filed within or beyond a year after the due date. Category I covers situations, such as all those in the instant case, where the Form R reports are not submitted until one year or more after the July 1 due date. Ex. 14, p. 4.[5] Category I violations are considered as "circumstance level 1" 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 (such as Clarksburg's),[6] which used the toxic chemical in an amount *less than 10 times* the 10,000 pound reporting threshold in the calendar year (*i.e.*, used between 10,001 and 99,999 pounds), as in this case, are designated "extent level B." Violations by businesses of the same size which used *more than 10 times* the 10,000 pound reporting threshold of the chemical, *i.e.*, used more than 100,000 pounds in the calendar year, are designated as "extent level A."[7]

After the circumstance and extent levels are determined, the ERP provides a grid or matrix upon which those levels are mapped in order to determine the "gravity-based penalty." The matrix indicates that circumstance level 1/extent level A violations (non-reporting over one year/usage *more than* 10 times the threshold) warrant a fixed gravity-based penalty of $25,000, whereas circumstance level 1/extent level B violations (non-reporting over one year/usage *less than* 10 times the threshold) warrant a fixed $17,000 gravity-based penalty.[8] In determining the gravity-based penalty for violations involving usage of less than 10 times the threshold, the ERP does not distinguish between the extent of usage. In other words, the penalty proposed ($17,000) is the same for a company which failed to report it used one pound more than the 10,000 pound reporting threshold and a company which failed to report it used 99,999 pounds more than the 10,000 pound reporting threshold.

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% per chemical;

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

(D) other factors as justice may require, such as significant- minor borderline violations - a downward adjustment of up to 25%.

III. THE FACTUAL BACKGROUND

Respondent, Clarksburg Casket Company, manufactures wooden burial caskets. In connection therewith, it uses various chemical mixtures such as wood stains, lacquers, sealants and thinners which are composed, in part, of the toxic chemicals xylene and toluene. Ex. 1, 9, 11, 13. The parties have stipulated that Respondent used the following amounts of xylene and toluene during the years 1991, 1992 and 1993:[9]

	Toluene	Xylene
1991	10,726 lbs.	13,424 lbs.
1992	11,631 lbs.	15,499 lbs.
1993	20,125 lbs.	17,452 lbs.

See, Joint Stipulations, dated Feb. 10, 1998.

As found by the prior Order granting Complainant's Motion for Accelerated Decision

on Liability, Respondent exceeded the reporting threshold of 10,000 pounds for each of the two toxic chemicals during each of the three years, 1991 through 1993. Respondent's failure to file Form Rs for each chemical for each of those years constitutes six violations of Section 313 of EPCRA. Based upon the facts set forth below, at the hearing, Complainant proposed the imposition of a penalty of $96,000 for the six violations and Respondent countered with a proposed penalty of $12,000.

A. Testimony of Complainant's Witnesses

Complainant's first witness at the Hearing was Donald Stanton. Mr. Stanton testified that he is an EPA contractor who has performed 20-30 EPCRA section 313 inspections per year for the past nine years. Tr. 19-21. On March 28, 1995, Inspector Stanton stated he made initial contact with Respondent via a telephone conversation with Teresa Bush. In that conversation, Ms. Bush acknowledged that Clarksburg used toxic chemicals listed under Section 313, including toluene and xylene, that she was not familiar with EPCRA Section 313, that she had never made any determination regarding the need to comply with EPCRA's filing requirements, and that Respondent had not filed a Form R under that section for calendar years 1991, 1992 and 1993. Tr. 23-24, Ex. 8. On his contemporaneous report of the telephone contact, Inspector Stanton noted that he had sent Respondent a "full package" of Form R reporting materials. Tr. 25-26, Ex. 8.

As a result of his conversation with Ms. Bush, Inspector Stanton made an appointment to inspect Respondent's records regarding its usage of toxic chemicals on May 8, 1995. By letter sent by EPA's Craig Yussen dated April 18, 1995, Respondent was formally notified of the inspection. Tr. 27-29. The notice also indicated that, "[t]o save time during the inspection," Respondent should have "available for review and collection by the inspector the following documents for the 1991, 1992 and 1993:

- A list of all EPCRA § 313 chemicals used for each year specified above;
- **Annual usage summaries (pounds) of each EPCRA §313 chemical with supporting documentation for each year** indicated above (supporting documentation should include such items as beginning and end-of-year inventory, purchase records, and if applicable, import records);

* * *

- **Note: If your facility manufactures, processes, or uses mixtures which contain Section 313 chemicals, please provide for each of these mixtures a copy of the material safety data sheet (MSDS),** or other written notification which specifies the chemical composition of the mixture.

* * *

If you have any questions, please call him [the inspector] at (215) 597-3175."

See, Ex. 7 (Emphasis in original and added).

Inspector Stanton stated that, as previously arranged, on May 8, 1995, he appeared at Clarksburg's facilities for the inspection and met with Ms. Bush and Mr. Titus. Tr. 29-30. On his subsequent report, as he usually does, Inspector Stanton described Respondent's approach to him during the inspection as "open and cooperative," rather than hostile. Tr. 39-40. However, at the hearing, Inspector Stanton characterized the inspection as an unusual experience, stating that "most people are better prepared." In fact, on a scale of 1-10, Inspector Stanton opined that Respondent was a "1" in terms of preparation. Tr. 33-34. Specifically, despite being previously contacted by EPA via telephone regarding EPCRA and having been given over one month's written notice of the impending EPCRA inspection, Inspector Stanton stated that neither Ms. Bush nor Mr. Titus displayed any knowledge as to what Section 313 chemicals were or what reporting requirements existed under EPCRA. Tr. 40. Furthermore, although Ms. Bush acknowledged receiving the letter from Mr. Yussen regarding preparing for the inspection, she had not made any effort to gather together any of the information or documents referred to therein, deciding

instead to wait until the inspection to "see what it was [the inspector] really wanted." Tr. 30. Inspector Stanton testified that Respondent had not prepared the annual usage summaries requested in the letter. Tr. 31, 73-74.

Therefore, as part of the inspection, Inspector Stanton asked Ms. Bush and Mr. Titus to pull from Respondent's files the Material Safety Data Sheets (MSDS) for the lacquers, finishes and other mixtures that Respondent had used the most in 1991, 1992 and 1993. Tr. 31-32. Inspector Stanton stated that Ms. Bush and Mr. Titus only presented him with the MSDS sheets for 1993, indicating that the sheets for 1991 and 1992 were "in storage" and "unavailable." Tr. 32, 146-47. Using the available sheets and data provided by Respondent as to the amount of each mixture purchased in 1993, the Inspector calculated Respondent's usage of toxic chemicals for 1993. Tr. 151-54. Further, with Respondent's consent, Inspector Stanton extrapolated Clarksburg's usage of the same chemicals for 1991 and 1992 based upon the relative proportion of sales in those years. Tr. 32, 50. The inspection lasted a total of three hours. Tr. 33. At the conclusion of the inspection, Inspector Stanton had Ms. Bush sign the handwritten sheets in his notebook wherein he had roughly calculated Respondent's Section 313 usage, which reflected that Respondent had used toluene and xylene in each of the three years over the 10,000 pound reporting threshold. Tr. 150, Ex. 2.[(10)]

Almost two months after the inspection, on June 28, 1995, Inspector Stanton sent a letter to Ms. Bush, by facsimile, requesting that she confirm, in writing, his calculations as to Respondent's usage of toluene and xylene over the 10,000 pound reporting threshold for 1991, 1992 and 1993, (Ex. 12), which she did. Tr. 147-48, Ex. 11.[(11)]

Complainant's second witness was Craig Yussen who testified that, as EPA Region III's designated "EPCRA Section 313 Compliance Coordinator," he oversees EPCRA case development, which includes distributing work to inspectors, reviewing inspection reports generated, determining if there are potential violations, and referring matters for enforcement action. Tr. 62-63. In such capacity, Mr. Yussen stated he reviewed the inspection report generated by Inspector Stanton regarding Clarksburg and discussed the results of the inspection with him. Tr. 63-64. Based upon the results of the inspection, utilizing the ERP, Mr. Yussen stated he calculated the appropriate penalty for the six violations to be $102,000, the amount proposed in the Complaint. Tr. 65.

Specifically, Mr. Yussen testified that, using the usage figures derived by Inspector Stanton and confirmed by Ms. Bush (tr. 87), and following the penalty calculation methodology set forth in the ERP (Ex. 14), he categorized the six violations set forth in the Complaint -- Respondent's failure to file for over a year Form Rs reporting its usage of both toluene and xylene in 1991, 1992 and 1993, to an extent less then 10 times the threshold -- as "circumstance level 1/extent level B" violations. Applying the matrix set forth in the ERP resulted in a gravity-based penalty of $17,000 for each such violation for a total of $102,000. Tr. 65-69.

Mr. Yussen testified that, at the time he originally calculated the penalty, he did not reduce the gravity-based penalty by any of the adjustment factors set forth in the ERP, such as attitude or "other factors as justice may require," because he did not find any of those factors to be applicable. Tr. 69-78. Specifically, Mr. Yussen stated that in originally calculating the penalty, he determined that Respondent was *not* entitled to any reduction in the gravity-based penalty for "[good] attitude," based upon the fact that Respondent had not prepared for the inspection, did not fully comply with Inspector Stanton's document requests, and had not yet filed its Form Rs. Tr. 71-76. However, at the Hearing, Mr. Yussen testified that he had reconsidered the matter and indicated that EPA would be amenable to granting Respondent a 5% attitude reduction in the gravity-based penalties for the six counts (a total of $5,100) in light of its willingness to meet with the inspector in regard to the violations and to subsequently confirm its exceedences in writing. Tr. 75.

Mr. Yussen also testified that in originally calculating the penalty he did not

adjust the gravity-based penalty downward for "other factors as justice may require," nor would he deem it appropriate to do so now. The ERP provides for a downward adjustment of up to 25% in the gravity-based penalty, under the category of "other factors as justice may require," for violations "so close to the borderline separating noncompliance from compliance that the full penalty seems disproportionately high." Ex. 14, p. 18. At the time he originally calculated the penalty, using the usage figures agreed to by the Inspector and Ms. Bush, in all instances Respondent's usage exceeded the 10,000 pound reporting threshold by at least 3,000 pounds (although by no more than 4,300 pounds). Under the revised usage figures stipulated to by the parties shortly before the Hearing, in one instance Respondent only exceeded the threshold for reporting by 726 pounds (but in another exceeded it by 10,125 pounds). At the Hearing, Mr. Yussen explained that he considers a borderline violation one involving only up to 500 pounds above the 10,000 pound reporting threshold. Thus, either a 3,000 pound or even a 726 pound exceedence, which Mr. Yussen characterized as being more than the amount contained in a 55 gallon drum, would not be considered a borderline violation. Therefore, he did not believe an adjustment under this category would be appropriate. Tr. 98-99. In sum, Mr. Yussen proposed at the Hearing a total combined penalty of $96,900.

A. Testimony of Respondent's Witnesses

Respondent's first witness at the Hearing was Teresa Bush. Ms. Bush testified that she is currently Clarksburg's Director of Scheduling, but at the time of the inspection was Respondent's Manager of Accounts Receivable. Although she had no prior training in regard thereto (Tr. 135), in May 1994, Respondent made Ms. Bush responsible for its environmental compliance.(12) Prior to that time, from 1991 until September 1993, the comptroller of the company, Paul Martin, held such responsibility. Tr. 107. When Mr. Martin resigned from the company, some of his duties were turned over to another employee, Mary Garrett, but not environmental compliance. Tr. 132-134. Ms. Bush stated that Ms. Garrett subsequently turned over to her the responsibility for filing the Air Emissions Inventory Reports (Tier II forms) with the state, but never made her aware of Respondent's filing requirements under EPCRA §313. Ms. Bush testified that she was not aware of any Section 313 filings prior to the inspection. Tr. 133.

At the Hearing, Ms. Bush recalled her initial telephone conversation with Inspector Stanton. She did not recall receiving the full package of Form R materials, but recalled receiving the letter from Mr. Yussen confirming the inspection. Ms. Bush stated that, despite the letter, she was unsure as to what records the inspector would want to see during the inspection, so she did not compile any particular records in preparation therefor. Tr. 109, 129. Further, despite her uncertainty and the offer made in the letter to her to call if she had any questions, Ms. Bush admitted that she never undertook to clarify what records she should gather for the inspection by contacting EPA prior thereto. Tr. 130, 74-75. Ms. Bush suggested that she felt comfortable not gathering records before the inspection because she knew she had available to her at the office certain records, including state reports and MSDS for 1992 and 1993 from Chemical Coatings, apparently Respondent's major supplier, which could be retrieved if she was specifically requested to do so by the inspector during the inspection. Tr. 125-6.

Ms. Bush further testified that, at the conclusion of the inspection, she asked Inspector Stanton if there would be a penalty and testified that "he didn't really give me an answer. He just kind of said he couldn't do that." Tr. 119. Ms. Bush testified that she "felt that he was confident that we weren't going to be [penalized]," but did not elaborate as to the basis for this feeling. Tr. 119. Ms. Bush stated that, after the inspection, Mr. Stanton contacted her to request that she confirm in writing his findings that Respondent's usage of the two chemicals exceeded the threshold in each of the three years. Tr. 120-21. In response, on June 28, 1995, she sent him by facsimile a letter on company letterhead confirming the accuracy of the Inspector's conclusions. Ex. 11, Tr. 120.

Finally, in response to an inquiry regarding why Respondent has not, to date, filed its Form Rs for years 1991, 1992 and 1993, Ms. Bush stated that she has always thought the facsimile letter she sent confirming Respondent's usage would meet Form

R filing requirements. Tr. 119, 137-38. Ms. Bush testified that Clarksburg has filed its Form Rs for the subsequent years 1994, 1995 and 1996, but in calculating its usage did not use the methodology determined as appropriate by the prior Order on Accelerated Decision as to Liability issued in this case in June 1997. Instead, Clarksburg chose to calculate its usage using its own methodology, which was previously rejected as erroneous by the undersigned. Tr. 138.

Respondent's second witness at the Hearing was Charles "Butch" Titus, Clarksburg's supervisor of casket building and finishing. Tr. 141. Mr. Titus testified that he participated in the inspection by helping to procure the documents requested by the Inspector and used to calculate the amount of toluene and xylene used at the plant and answering questions about suppliers or the material safety data sheets. He recalled being able to provide Inspector Stanton with whatever records he requested. Tr. 142-43. Mr. Titus also testified that Ms. Bush had asked Mr. Stanton if Clarksburg would be fined for any EPCRA violations and that Mr. Stanton had replied, "it doesn't look that bad to me ... I don't think so, but I can't guarantee anything." Tr. 142.

IV. DISCUSSION

Respondent raises a number of challenges to the penalty Complainant has proposed be exacted from it based upon the six EPCRA filing violations for which it was previously found liable.

Respondent's primary challenge involves the application of the ERP to establish the penalty in this case. Specifically, Respondent argues that the extent of its violations were small, far less than 10 times the reporting threshold in every instance, and for EPA, under the framework of the ERP, to fine Respondent the same for being nominally over the threshold as if it were 9.99 times over the threshold is arbitrary. Instead, Respondent argues that as to the extent factor in the ERP, it would be more accurate and equitable to employ a sliding scale rather than the existing two-tier system. Tr. 160-61. In support of this proposition, Respondent cites the recent decision of my learned colleague, Judge Andrew Pearlstein, in *Hall Signs, Inc.*, EPA Docket No. 5-EPCRA-96-026 (Initial Decision, Oct. 30, 1997), appeal docketed, EPCRA 97-3. In that case, Judge Pearlstein rejected the "extent level" determination of the gravity-based penalty under the EPCRA ERP as arbitrary due to its incongruity between penalty levels and variant factors such as amount of exceedence and size of the violator. In essence, the *Hall Signs* decision questioned the ERP's use of a few, steeply graduated penalty levels rather than a sliding scale, which would more accurately portray the specifics of individuals cases.

As a preliminary matter, it must be noted that under the Administrative Procedure Act, 5 U.S.C. §§551-559, which governs these proceedings, a penalty policy, such as the EPCRA ERP, is not unquestionably applied as if the policy were a rule with "binding effect." *See, Employers Ins. of Wausau and Group Eight Technology, Inc.,* TSCA Appeal No. 95-6, 6 EAD 735, 755-762 (EAB, Feb. 11, 1997). In setting an administrative penalty, Administrative Law Judges have "the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where circumstances warrant." *DIC Americas, Inc.,* TSCA Appeal No. 94-2, 6 EAD 184, 189 (EAB, Sept. 27, 1995). Ultimately, the penalty must "reflect[] a reasonable application of the statutory penalty criteria to the facts of the particular violations." *Employers Insurance of Wausau,* Inc. 6 E.A.D. 735, 758 (EAB 1997), quoted *in, Predex Corp.*, FIFRA Appeal No. 97-8 (EAB, May 8, 1998). However, as indicated above, the procedural Rules governing this proceeding require that "any civil penalty guidelines," such as ERPs, be "considered" and that deviations from the amount of penalty recommended to be assessed in the Complaint be accompanied by specific reasons therefor. *See,* Rule 22.27(b) (40 C.F.R. §22.27(b)). Thus, while I must consider Complainant's penalty proposal derived from the ERP, I am not bound by it and, may, if I deem it appropriate, deviate from the penalty for reasons suggested by Respondent or other reasons.

However, upon review, I do not find the rationale for deviating from the penalty set forth in *Hall Signs* to be persuasive or relevant to this case.

It is clear that the decision in *Hall Signs* depended in great part on the factual specifics of the case, many of which are inconsistent with the facts here. First, Hall Signs was decided on a stipulated record, without the benefit of live testimony. Second, the Respondent in that case was cooperative throughout the inspection and in providing follow-up documentation. Third, Respondent Hall Signs came into compliance by filing its Form Rs prior to issuance of the decision. Fourth, and one of the main factors that directed the outcome in the case, was that the size of Respondent Hall Signs' business was only slightly (8%) above the 10 million dollar business distinction, which would have otherwise qualified it for being characterized as a Level "C" violation and a $5,000 penalty instead of a Level B violation and a $17,000 penalty for the same violation. Judge Pearlstein found that while the ERP stated that it considers the amount of §313 chemical involved to be the primary factor, in *Hall Signs* the size of the business in fact had as much or more impact on the outcome. Therefore, Judge Pearlstein found that "the application of the ERP extent level determination arbitrary *as applied to the facts in this case*."(13)

Judge Pearlstein's decision in *Hall Signs* raises legitimate concerns about the ERP, concerns that the EPA may wish to address in its next iteration of the Policy. The ERP, however, not only is not binding upon Administrative Law Judges, but also is not reviewable for its content by Administrative Law Judges beyond its application or lack thereof in relation to the particular facts of a case. In limiting his decision to the facts before him, Judge Pearlstein implicitly recognized the limits to his authority to invalidate the ERP. As such, and even if his opinions were binding on fellow Administrative Law Judges, which they are not,(14) his conclusions do not extend beyond the confines of the *Hall Signs* proceeding and are not necessarily appropriate for other factual scenarios.

The facts before me today do not compel similar conclusions to those of *Hall Signs*. Here, the size of Respondent's business is clearly significantly above the 10 million category, and business size is of no issue. Instead, the distinction Respondent makes is between being in violation by its chemical usage being slightly above the threshold rather than significantly above the threshold. Respondent wishes to have its penalty reduced because of the allegedly nominal extent of violation. However, the focus of EPCRA is to require users, processors and manufacturers of certain toxic chemicals over certain levels to publish the usage of these chemicals, thereby placing communities on notice as to these chemicals and facilitating local planning. Non-filing, even as to a nominal amount over the threshold, is inconsistent with this focus. Thus, it is reasonable for a non-filing violation which is slightly over the threshold amount to be assessed a significant penalty.

Moreover, because it made no effort to familiarize itself with EPCRA or to determine its need to comply, Respondent had no idea before EPA's investigation if it would be nominally or exceptionally over the threshold. Respondent now wants the benefit of the fortuitous fact that it turned out to be in only slightly over the threshold amount. Respondent's good luck does not provide a basis for rejecting a penalty calculated under the ERP as arbitrary.(15)

Further, beyond its invocation of *Hall Signs*, Respondent argues that its violations resulted from oversight, as opposed to willfulness, and so merits a reduction in the penalty amount. The argument that Respondent's violations were merely an oversight rather than the product of "a willfulness or a gross negligence," implies that it was in some way "excusably ignorant" of the requirements of EPCRA. However, I do not find factual support for that conclusion. For whatever reason, Respondent chose to place the responsibility for its environmental compliance on Teresa Bush, a person who was completely unfamiliar and inexperienced with environmental laws generally and EPCRA, in particular, and then failed to properly train and supervise Ms. Bush to assure that all applicable environmental laws were being complied with. Respondent received Material Safety Data Sheets (MSDS) with its purchases of toxic chemicals. MSDS list the chemicals in the products Respondent uses, and commonly some chemicals are marked with an asterisk, which, as often stated on the form, "[I]ndicates toxic chemical(s) subject to the reporting requirements of section 313

of Title III [of the Superfund Amendments and Reauthorization Act, *i.e.*, EPCRA] and of 40 CFR 372." Despite receiving such written notice, Respondent made no attempt to familiarize itself with the filing requirements of EPCRA or to determine for the years at issue if it needed to file. Ex. 1.

Respondent also argues that it is entitled to a downward adjustment in the penalty on the basis of "other factors as justice may require." Under that category, the ERP (at 18) provides for a reduction if a violation is "so close to the borderline separating compliance from non-compliance, that the penalty may seem disproportionately high." Respondent's minimum exceedence of the 10,000 pound threshold was 726 pounds (of toluene) in 1991, and its maximum exceedence was 10,125 pounds (of toluene), or two times the threshold amount, in 1993. As indicated earlier, Mr. Yussen credibly testified that 726 pounds of toluene equated to more than the contents of a 55 gallon drum, hardly an insignificant amount. The remaining exceedences all exceeded that amount. While the exceedences do not approach the upper limit for the extent level B of ten times the threshold, or 100,000 pounds, I conclude that in light of the facts of this case, they are not so minimal as to warrant a reduction for "other factors as justice may require."

Additionally, Respondent argues that its cooperation and positive attitude during and after the EPCRA inspection merits a reduction in the penalty amount. I find Respondent's positive characterization of its level of cooperation and attitude in this proceeding to be questionable at best and entirely unsupported by the record.

First, it is clear from the testimony of both Inspector Stanton and Ms. Bush, that Respondent essentially did nothing to prepare for the inspection even though it had already been notified that it was likely to be covered by EPCRA and that certain records would be important to the evaluation. Inspector Stanton described this level of lack of preparation as unusual a "1" on a 1-10 scale. Thus, even if Respondent actually had been extremely cooperative during and after the inspection, which it was not, its initial lack of preparation militates against any adjustment for cooperation.

Second, even during the inspection Clarksburg clearly was less than forthcoming with critical chemical usage information for 1991 and 1992, forcing Inspector Stanton to extrapolate his initial calculations from 1993 data. Tr. 32, 116. Respondent now attempts to claim that the unavailability of the records was really a misunderstanding and, had the Inspector truly demanded their production, the documents would have been provided. The fact remains that Respondent knew prior to the inspection that these records were required and there is simply no reason why the Inspector should have had to ask for them even once during the inspection, much less that he should have had to repeatedly demand that the Respondent provide them.

Third, while Respondent did initially cooperate with the Inspector to confirm the quantities reached, cooperation which, had it continued, might have entitled it to a reduction, Respondent subsequently disavowed the estimated numbers reached by the Inspector and challenged even the claim of liability. Moreover, despite continually objecting to Complainant's usage calculations for toluene and xylene for 1991, 1992, and 1993, Respondent did not offer alternative calculations until its January 16, 1997, Prehearing Exchange, well over a year after Respondent initially objected to Complainant's calculations and almost two years after the inspection.

Fourth, during the pendency of this action, Respondent delayed turning over records, the result being on-going confusion as to the amounts of toluene and xylene used by Respondent. As late as November 1996, Respondent claimed it could not state with certainty what its relevant usage levels had been in 1991, 1992 and 1993. Nevertheless, Respondent continued to maintain that its chemical usage did not exceed reporting thresholds as to either chemical in any year.

Fifth, I also note that in connection with this action Respondent attempted to turn vague, off the cuff remarks of the Inspector into official dictates and to use them as an excuse for not filing its Form Rs and an argument for not being penalized. In her August 11, 1997 Supplemental Affidavit, Ms. Bush stated unequivocally that "Inspector Stanton told me that he did not believe a penalty would be assessed

based upon the volumes reported." Her testimony at the hearing, consistent with testimony of Mr. Stanton, was that the Inspector stated he could not and would not state whether a penalty would be imposed. Tr. 119.

Finally, I find that Respondent did little to remedy its violations after being put on notice of them by Complainant. Respondent has yet to file its Form Rs for 1991, 1992 and 1993. Ms. Bush asserted she did not file any Form Rs to date because she thought the facsimile letter would suffice, although she gave no rationale for reaching this conclusion. Counsel for Respondent has argued that it has not filed them because Respondent objects to the methodology designated in the Accelerated Decision for calculating usage and claims it cannot file a Form R with a reservation of its right to challenge the amount listed. I can find nothing in the statute, regulations or forms, which would preclude Respondent from filing a Form R while reserving its rights to appeal the liability determination. Second, even by its own calculations it was over the threshold for four chemicals for the 1991 to 1993 period, requiring the filing of at least four Form Rs.

Nevertheless, despite the foregoing, and because the Complainant recommended it, I am willing to grant a 5% reduction in the penalty because Respondent was not hostile to the Inspector during the inspection.

After consideration of all of the foregoing, I find the penalty proposed of $16,150 per violation to be reasonable and appropriate. In reaching this conclusion I have considered the ERP as well as the statutory factors that can be referenced to EPCRA §313. In particular, I find the nature and circumstances of the violations indicate that such violations were significant. The MSDS sheets repeatedly notified Respondent of its need to consider the propriety of filing the Form Rs and, nevertheless, Respondent took no action. The extent and gravity of the violation are also severe and on-going. Respondent failed to file applicable forms for three years and, nearly three years after the initial inspection by the EPA, has yet to rectify its omission. Moreover, the failure to file a Form R is the most serious of all EPCRA § 313 violations, and Congress has authorized penalties of $25,000 for each violation of section 313 of EPCRA. *See, In the Matter of Spang & Company*, 6 E.A.D. 226, 240, EPCRA Appeal Nos. 94-3 & 94-4, 1995 EPA App. LEXIS 33, 34 (October 20, 1995).

Thus, evaluating Complainant's proposed penalty against the factors listed in the ERP and the penalty criteria to be considered under Section 325(b) of EPCRA does not lead to the conclusion that the penalty proposed by Complainant is inappropriate or that a nominal penalty is warranted.

Therefore, I find Complainant is entitled to the full penalty proposed in the Complaint of $102,000 reduced by the five percent which Complainant offered at the hearing. Thus, the penalty is $16,150 for each of the six violations of EPCRA for a total of $96,900.

CONCLUSION

In light of all of the factors of this case, I find appropriate the imposition of a civil penalty in the amount of $96,900 for Respondent, Clarksburg Casket Co.'s failure to file Toxic Chemical Release forms as to toluene and xylene for calendar years 1991, 1992 and 1993, in violation of Section 313 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. §11023.

ORDER

1. Respondent is assessed a civil penalty of $96,900.00.

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 $96,900.00, 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 this 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 from the service date of this Order or the Environmental Appeals Board elects, *sua sponte*, to review this decision, pursuant to 40 C.F.R. §22.30.

Susan L. Biro
Chief Administrative Law Judge

Date:
Washington, D.C.

1. [1] At the time the Motion for Accelerated Decision as to Liability was granted, the exact amount by which Respondent's usage of the two chemicals exceeded the 10,000 pound threshold in each of the three years, had not yet been determined, in part, because the method of calculation was disputed. Before the Hearing, however, the parties stipulated as to Respondent's exceedences, as determined using the methodology set forth in the Order granting the Motion for Accelerated Decision as to Liability.

2. [2] All of the exhibits, were offered into evidence by the Complainant, without objection from the Respondent, save one (Exhibit 14). Respondent's objection as to the admission of Exhibit 14, the ERP, was overruled. Tr. 82-83.

3. [3] Citation to the transcript of the hearing will be in the following form: "Tr. __."

4. [4] The page citations to the ERP are to the page numbers used in the ERP itself and not to the actual number of pages of the exhibit as a whole.

5. [5] Respondent stipulated at the hearing held in February of 1998 that, to date, it had not filed its Form Rs for the 1991, 1992 and 1993 calendar years. Tr. 9-10.

6. [6] Respondent stipulated that as of the time the Complaint was filed, and during the relevant years, it had, on average, gross annual sales of fourteen million dollars and 190 employees. Tr. 8-9.

7. [7] Respondent stipulated that, utilizing the methodology approved in the Order granting Complainant's Motion for Accelerated Decision on Liability, it exceeded the 10,000 pound threshold for both chemicals in each of the three years, but never by more 10 times the threshold. *See,* Stipulations filed February 24, 1998.

8. [8] Smaller businesses with either less then 10 million in gross sales or less than 50 employees, whose use did not exceed the threshold by a factor of 10, are assigned an extent level of "C," resulting in a $5,000 penalty according to the matrix.

9. [9] While so stipulating for purposes of this proceeding, Respondent reserved its right to appeal the methodology for calculating usage adopted by the undersigned in the Order granting Complainant's Motion for Accelerated Decision on Liability, dated June 6, 1997. Respondent proposed an alternative methodology for calculating usage which, if applied, results in it exceeding the reporting threshold in only four (4) rather than six (6) incidences in the three years.

10. [10] Inspector Stanton testified at the Hearing that he is trained as a mechanical

engineer with graduate work and experience in management of magnetic components. Tr. 53-54. He admitted that Clarksburg was his first inspection involving thinners, stains and lacquers. Tr. 49-50. In originally calculating Respondent's usage, Inspector Stanton used the wrong conversion formula. As a result, on February 21, 1996, Inspector Stanton revised his calculations. *See,* Order granting Motion for Accelerated Decision on Liability.

11. The Respondent's usage as found by the Inspector on the day of the inspection and confirmed shortly thereafter as correct by Respondent was as follows:

	Toluene	Xylene
1991	13,779 lbs.	13,059 lbs.
1992	13,968 lbs.	13,239 lbs.
1993	14,254 lbs.	13,509 lbs.

See, Exhibits 1, 2, and 11. These figures are slightly higher in two instances and slightly lower in four instances than those stipulated to by the parties as correct immediately prior to the hearing set forth in the text above.

12. At time of the inspection, Ms. Bush held herself out to the Inspector as being Clarksburg "Safety Manager." Ex. 4, 5.

13. In *Hall Signs*, Judge Pearlstein determined that instead of imposing a fixed penalty amount of $17,000 for non-filing, a $5,000 base penalty was appropriate, and that such penalty should be increased by $1,000 for each 10,000 pounds of toxic chemical used, but non-reported. In that case, the Respondent's usage was, on average, approximately 5,000 pounds above the 10,000 pound reporting threshold. As a result, in *Hall Signs*, a penalty of approximately $5,500 was imposed for each non-filing violation. Applying the same type of formula in this case would result in the imposition of approximately a $33,000 base penalty.

14. Although no authority exists which speaks to the precedential effect of one Administrative Law Judge's decision upon another, ample federal court decisions suggest otherwise. See *Mueller v. Allen*, 514 F.Supp. 998, 1001 (D. M.N. 1981) ("However, a court's decision is not binding upon courts of equal rank."), aff'd, 676 F. 2d. 1195 (8th Cir. 1982), aff'd, 463 U.S. 388 (1983). See also 18 James W. Moore Et Al., Moore's Federal Practice § 134.02 [1][a], [1][d] (2d ed. 1985)("If the prior court is at the same level as the subsequent court, but the two courts are coordinate rather than identical, as in the case of two district courts in the federal system, then stare decisis is not binding on the subsequent court).

15. In addition, usage of a sliding scale methodology employed by Judge Pearlstein in *Hall Signs* seems to raise a number of other issues. First, it implies that there is, in fact, a significant difference, for example, between non-reporting usage of 1,000 pounds above the threshold and non-reporting 2,000 pounds above the threshold. I seriously doubt this is the case. It is the non-reporting at all that constitutes the violation and creates the bulk of the risk. The higher the usage that is non-reported only represents more of a reason why the Respondent should have been aware of its reporting obligations, but all users of toxic chemicals should be aware of such requirements. Second, utilizing a sliding scale would place great significance on the exact amount of usage, and would necessarily result in factual disputes being raised and fought to establish exactly how much chemical was used in each year above the threshold. Moreover, if exact usage effected penalties, it might discourage companies once caught to avoid full disclosure for fear of incurring a higher penalty.