IN RE SPANG & COMPANY

EPCRA Appeal Nos. 94-3 & 94-4

REMAND ORDER

Decided October 20, 1995

Syllabus

Spang & Company ("Spang") and U.S. EPA Region III both appealed an initial decision assessing a $50,000 civil penalty against Spang for violations of § 313 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11023, and its implementing regulations, 40 C.F.R. Part 372. Spang admitted to fourteen violations of EPCRA § 313's reporting requirements. The presiding officer found that Spang also committed one of thirteen alleged violations of 40 C.F.R. § 372.10, which requires facilities subject to EPCRA reporting requirements to maintain records supporting its reports readily available for purposes of inspection by EPA. The penalty, which is substantially lower than the amount the Region was seeking in the complaint, reflects the presiding officer's decision to factor into the penalty assessment evidence of allegedly environmentally beneficial projects Spang had completed or at least commenced at the time of the penalty assessment. The presiding officer treated Spang's projects as "supplemental environmental projects" or "SEPs" under Agency policies addressing the use of SEPs in settling administrative enforcement cases.

On appeal, Spang contends *inter alia*, that (i) the Region lacked authority to issue the complaint alleging recordkeeping violations because it failed to obtain a needed concurrence from headquarters prior to issuing the complaint, and (ii) Spang did not violate the recordkeeping requirements because its 1987 xylene usage records for its facility in Sandy Lake, Pennsylvania were readily available for inspection at its executive offices in Butler, Pennsylvania. Alternatively, Spang argues that penalties for recordkeeping violations are not authorized by EPCRA. For the admitted late reporting violations, Spang argues that it should have received a notice of noncompliance (NON) instead of a complaint based upon a "Late Reporter Enforcement Initiative" ("LREI") issued by the Agency, and because a NON was given to one of Spang's other facilities for filing late reports. Lastly, Spang contends that its "SEPs" should be considered in this penalty calculation, and that they require the penalty to be reduced to zero.

In its appeal, the Region contends that "SEPs" cannot be considered in contested penalty assessments, but that in any event Spang's projects are not SEPs. According to the Region, Spang's projects can be considered in a penalty assessment under the applicable penalty policy, but they do not require any penalty adjustment. Spang moved to dismiss the Region's appeal on the ground that the complainant was not identified in the notice of appeal as the appealing party.

Held: Spang's motion to dismiss is denied. The Region's failure to indicate in its notice of appeal that the complainant was the party filing the appeal, rather than the "Region," is a technical violation of the procedural regulations that is considered harmless in the absence of any alleged prejudice to Spang resulting therefrom.

The Region did not need to obtain a prior concurrence from EPA headquarters prior to issuing this complaint alleging recordkeeping violations. Region III is exempt from the requirement to obtain such a concurrence for filing complaints alleging violations of EPCRA's reporting requirements, and the recordkeeping violations involved here are part of EPCRA's reporting requirements.

Spang failed to comply with the regulatory recordkeeping requirement. Spang's executive office, where the 1987 xylene usage records for the Sandy Lake facility were kept, is not the facilty to which the xylene reporting requirement applied, and therefore it is not the location designated by the regulation for the maintainance of such records.

There is no merit to Spang's contention that EPCRA does not authorize penalties for recordkeeping violations. As noted above, recordkeeping is part of the statute's reporting requirements, and therefore the statutory authorization for penalties for reporting violations includes recordkeeping violations.

Spang is not entitled to a NON for its late reporting violations under the LREI. Assuming this initiative is binding, by its own terms it does not apply to the facts of this case. The fact that one of Spang's other facilities received a NON is not relevant here.

Spang's projects are not "SEPs" as that term is used in Agency policies. SEPs embody a *quid pro quo* consisting of a legally enforceable commitment to perform an environmentally beneficial project in the future in exchange for the settlement of a case. Here, there is no *quid pro quo*, as Spang's projects have already been initiated or completed and are being offered at a contested hearing in an effort to reduce a penalty. As a matter of policy, future projects (including SEPS) should not be considered in contested penalty hearings. Spang's projects, which are not SEPs, may nevertheless be considered under the penalty policy's rubric of "other factors as justice may require." Whether Spang's projects merit a penalty adjustment under that factor is a matter of discretion best exercised in the first instance by the presiding officer. Because the presiding officer erroneously evaluated Spang's projects as SEPs, the penalty assessment is remanded for a reconsideration of the projects under the "other factors as justice may require" factor in a manner consistent with this decision.

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge McCallum:

Spang & Company ("Spang") and U.S. EPA Region III have both appealed a March 10, 1994 initial decision issued by the presiding officer, assessing a civil penalty against Spang for violations of § 313 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11023, and its implementing regulations, 40 C.F.R. Part 372. Spang admitted to fourteen violations of EPCRA § 313's reporting requirements, and the presiding officer found that Spang also committed one of thirteen alleged violations of the regulatory recordkeeping requirements. For these violations, the presiding officer assessed a penalty of $50,000.

Spang appeals the presiding officer's conclusion that it violated the recordkeeping requirements set forth in 40 C.F.R. § 372.10(c), arguing that the Region lacked the authority to issue a complaint

alleging such a violation, and that Spang in fact complied with the regulation. Spang also appeals the penalty assessment, contending that no penalty is warranted for the reporting violations involved here on the ground that the Region should have issued a notice of noncompliance for these violations instead of a complaint. Alternatively, Spang argues that the penalty should be reduced to zero in light of Spang's expenditures on purported "supplemental environmental projects," or "SEPs." The Region also appealed the penalty assessment, contending that a larger penalty is warranted because the presiding officer should not have given any credit for the so-called SEPs. Spang has also filed a motion to dismiss the Region's appeal on procedural grounds.

For the reasons provided below, we deny Spang's motion to dismiss, and uphold the presiding officer's finding that Spang violated 40 C.F.R. § 372.10(c). We reject Spang's contention that no penalty for the reporting violations is warranted here. We conclude that the presiding officer erroneously treated Spang's projects as SEPs and thus the penalty determination must be remanded. On remand, the presiding officer should instead consider Spang's projects under the "other factors as justice may require" prong of the applicable penalty policy and recalculate the penalty without regard to the Agency's SEP policies.

I. *BACKGROUND*

EPCRA § 313 requires certain facilities[1] to "submit annually, no later than July 1 of each year, a Toxic Chemical Release Inventory Reporting Form ('Form R') for each toxic chemical listed under 40 C.F.R. § 372.65 that was manufactured, imported, processed, or otherwise used during the preceding calendar year in quantities exceeding established chemical thresholds." *In re K.O. Manufacturing, Inc.*, 5 E.A.D. 798, 799-800 (EAB 1995). Information reported on the Form Rs includes the maximum amount of the toxic chemical present at the facility during the calendar year, the methods for disposing of the toxic chemical, and the annual quantity of the toxic chemical disposed of by each method. EPCRA § 313(g); 40 C.F.R. § 372.85. The first reporting year was 1987; Form Rs for 1987 were due by July 1, 1988. *Id.* A person can be subject to a penalty of up to $25,000 for the failure to file a Form R. EPCRA § 325(c), 42 U.S.C. § 11045(c).

[1] EPCRA § 313 reporting requirements apply to "owners and operators of facilities that have 10 or more full-time employees and that are in Standard Industrial Classification Codes 20 through 39 (as in effect on July 1, 1985) and that manufactured, processed or otherwise used a toxic chemical listed under subsection (c) of this section in excess of the quantity of that toxic chemical established under subsection (f) of this section during the calendar year for which a release form is required under this section." EPCRA § 313(b)(1)(A). *See also* 40 C.F.R. § 372.22 (same).

The regulations implementing the EPCRA § 313 reporting requirement also impose a recordkeeping requirement. Pursuant to 40 C.F.R. § 372.10, persons required to file a Form R must maintain for three years the materials and documentation used to determine whether a Form R should be filed, and if so, the information it should contain. 40 C.F.R. § 372.10(a). These records must be maintained at the facility to which the report applies, and "must be readily available for purposes of inspection by EPA." 40 C.F.R. § 372.10(c).

Spang & Company is a Pennsylvania corporation with its executive offices located in Butler, Pennsylvania. Two of Spang's operating facilities are involved in this case: the Power Control Division in Sandy Lake, Pennsylvania and the Magnetics and Specialty Metals Division in East Butler, Pennsylvania. Each of these facilities is subject to the requirements of EPCRA § 313.

On May 2, 1990, Region III sent written notice to the Sandy Lake facility that on May 22, 1990, the facility would be inspected for compliance with EPCRA § 313 for the 1987 and 1988 calendar years. This notice also stated that the inspector would review chemical purchase summaries, chemical inventory summaries, and chemical production/import summaries for 1987 and 1988.[2] The May 22, 1990 inspection took place as scheduled. During the inspection, the inspector asked for chemical usage records and was told that those records were not "readily available." Hearing Transcript at 11. Nevertheless, Spang employees produced a "big box" of documents from which they were able to determine that in 1988 the Power Control Division at the Sandy Lake facility "otherwise used" more than the threshold amount of xylene, a toxic chemical under EPCRA § 313.[3] Tr. at 11, 26. The documents for determining the facility's 1987 xylene use, however, were not available during the inspection. The facility's foreman admitted that those records were not available in a letter to the inspector provided that same day:

---

[2] Letter from Donald W. Stanton, Inspector/Technical Advisor, to Kenneth Ricciardella, Spang Power Control (May 2, 1990).

[3] The EPCRA § 313 reporting requirements apply to facilities that have "otherwise used" a chemical identified as toxic under the statute. EPCRA § 313(b)(1)(A). "Otherwise used" refers to any use of a toxic chemical not covered by the terms "manufacture" and "process." 40 C.F.R. § 372.3. Xylene is a toxic chemical for purposes of EPCRA's reporting requirements. *See* 40 C.F.R. § 372.3 (defining toxic chemicals for EPCRA's reporting requirements as those listed in 40 C.F.R. § 372.65); 40 C.F.R. § 372.65 (listing xylene). The threshold quantity for a toxic chemical "otherwise used" at a facility is 10,000 pounds for any calendar year. EPCRA § 313(f)(1)(A). Spang admits it used 11,662 pounds of xylene at Sandy Lake in 1987. Initial Decision at 37.

> Our records show that we used 11,662 [pounds] Xylene * * * in 1988. We do not have records for 1987. We assume the usage to be approximately the same level in 1987. We keep our inventory quantities at a relatively constant level.

Letter from Kenneth Ricciardella, General Foreman, Spang Power Control, to Donald W. Stanton, U.S. EPA Region III (May 22, 1990). The facility's records of 1987 xylene usage were located instead at Spang's executive offices in Butler.

The inspection of Spang's Magnetic and Specialty Metals Division at the East Butler facility took place on June 21, 1990. Again, the inspection was preceded by a written notice informing Spang that the inspector would be reviewing chemical purchase summaries, chemical inventory summaries, and chemical production/import summaries for 1987 and 1988.[4] Despite the notice indicating that 1987 and 1988 summaries would be reviewed, the inspector did not ask for them. After this inspection, Spang filed the 1987 and 1988 Form Rs for its Sandy Lake and East Butler facilities.

Based upon these inspections, Region III issued two complaints in December 1990 alleging that Spang violated EPCRA § 313's reporting and recordkeeping requirements. One complaint (docket no. EPCRA-III-037) alleged that Spang's Power Control Division in Sandy Lake failed to file Form Rs for its xylene usage in 1987 and 1988, and failed to retain materials and documentation pertaining to its xylene usage in 1987. The other complaint (docket no. EPCRA-III-048) alleged that Spang's Magnetics and Specialty Metals Division in East Butler failed to file Form Rs for its 1987 and 1988 usage of manganese, zinc compounds, nickel, nitric acid, aluminum oxide and sodium hydroxide.[5] It also alleged that Spang's Magnetics and Specialty Metals Division failed to retain the materials and documentation pertaining to

---

[4] *See* Letter from Donald W. Stanton, Inspector/Technical Advisor, to William T. Marsh, Magnetics Inc. Div. of Spang Inc. (June 11, 1990).

[5] At the time the complaints were filed, the applicable enforcement response policy indicated that filing a Form R late and only after an inspection for EPCRA compliance amounted to a failure to file a form R. Such "involuntary" late filings were treated more harshly under the policy than facilities that filed late on their own initiative, that is, without being prompted by EPA. *See* Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right to Know Act (Dec. 2, 1988). This distinction between types of late-filings for the purpose of assessing a penalty was rejected as arbitrary and capricious in *In re Riverside Furniture*, Dkt. No. EPCRA-88-H-VI-406S (ALJ, Sept. 28, 1989) and *In re Pease and Curren, Inc.*, Dkt. No. EPCRA-

Continued

its usage of such chemicals in 1987 and 1988. Later, in April 1992,[6] the presiding officer allowed the Region to amend the complaints with respect to their alleged violations of the recordkeeping requirements; instead of alleging that Spang failed to maintain the necessary records, the Region acknowledged that Spang had such records, and alleged only that Spang failed to maintain them in such a manner as to be readily available for inspection. According to Spang, this is the first time the Agency has sought to enforce the recordkeeping requirement through an administrative complaint.

Spang admitted that it filed the Form Rs for its 1987 and 1988 chemical use at the Sandy Lake and East Butler facilities well after the reporting dates. Thus, Spang admitted to fourteen violations of EPCRA § 313's reporting requirement. Spang denied, however, that it violated any recordkeeping requirements. Further, Spang argued that because recordkeeping is not a requirement of EPCRA § 313, the Region is without the authority to issue a complaint and impose a penalty for a violation of any recordkeeping requirements.

Pursuant to Spang's request, a hearing was held in Pittsburgh, Pennsylvania on June 30 and July 1, 1992 to contest the recordkeeping charges and the imposition of penalties for both the reporting and recordkeeping charges. At this hearing, Spang introduced evidence of expenditures it had made on ten different projects that allegedly were not required by law and that produced environmental benefits at its facilities.[7] At the time of the hearing, Spang had at least commenced, and in some instances completed, these projects. Spang contended that the cost of these so-called "supplemental environmental projects" or "SEPs" should reduce any penalty that may be assessed against it. The Region opposed any such reductions.

In an initial decision dated March 10, 1994, the presiding officer determined that Spang violated the reporting requirements of EPCRA § 313 and its implementing regulations. For Spang's admitted failure to file fourteen Form Rs on time, the presiding officer initially set a

---

I-90-1008 (ALJ, Mar. 31, 1991). Accordingly, the Agency revised its policy so that it no longer treats "involuntary" late reports as failures to report. A penalty may be reduced, however, if a report has been voluntarily filed late. *See* Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act and Section 6007 of the Pollution Prevention Act (1990) (Aug. 10, 1992).

[6] The complaints were consolidated by order of the presiding officer in June 1991.

[7] The Region did not object to the relevancy of this evidence. Instead, the Region provided testimony and legal arguments as to why this evidence does not warrant a penalty reduction.

penalty of $183,000. The presiding officer also found Spang liable for one recordkeeping violation: failing to have readily available for inspection the 1987 xylene usage records at the Sandy Lake facility. The presiding officer dismissed the twelve other recordkeeping charges because the inspector did not ask to examine the records for the East Butler facility. Initial Decision at 46-47. For the single recordkeeping violation at Sandy Lake, the presiding officer initially set a penalty of $10,000, thus bringing the total penalties to $193,000. The presiding officer then reduced this amount by ten percent, to $173,700, to reflect Spang's cooperation. Lastly, the presiding officer lowered that amount to $50,000, a reduction of $123,700 (or 71%), in consideration of expenditures made by Spang on four of the ten so-called SEPs offered by Spang at the hearing.

Both parties have appealed the presiding officer's initial decision. Spang contests the finding that it violated EPCRA § 313 by failing to have records of its 1987 xylene usage at Sandy Lake readily available for inspection. Spang alternatively contends that penalties for such recordkeeping violations are not authorized by EPCRA. Concerning the reporting violations, Spang contends that no monetary penalties should be assessed. Alternatively, Spang asserts that the penalty should have been reduced to zero in light of its alleged SEPs. The Region appealed the presiding officer's penalty assessment, but not the dismissal of the East Butler recordkeeping charges. As for the penalty assessment, the Region claims that SEPs can be considered only in a negotiated settlement between the Region and Spang, not by the presiding officer at the conclusion of a contested hearing. Alternatively, the Region argues that if SEPs can be considered by the presiding officer, they do not warrant a penalty adjustment here. Spang also moves to dismiss the Region's appeal on procedural grounds. Pursuant to the Board's order, oral argument on the penalty issues was held on September 7, 1995.

Each of the parties' contentions is discussed in the following section. For the reasons set forth below, we deny Spang's motion to dismiss the Region's appeal. We affirm the presiding officer's finding that Spang violated EPCRA § 313 by failing to have readily available for inspection the 1987 xylene usage records for Sandy Lake. We also affirm the presiding officer's conclusion that EPCRA authorizes penalties for such violations, and that a monetary penalty for the reporting violations is appropriate. Further, we conclude that the environmental projects offered by Spang to reduce the penalty are not SEPs entitled to credit as such under the applicable penalty policy because, as they have at least been commenced, they do not represent an enforceable commitment to perform an environmentally beneficial act in exchange

for the settlement of a case. But, because these projects have at least been commenced, evidence of these projects and their state of completion may nevertheless be considered under the penalty policy rubric of "other factors as justice may require." Because the presiding officer improperly evaluated Spang's projects as SEPs under this factor, we are remanding the penalty for the presiding officer to reconsider what, if any, reductions to the penalty are warranted in light of Spang's projects.

II. *DISCUSSION*

A. *Motion to Dismiss*

Spang has moved to dismiss the Region's appeal on the ground that the appeal was not filed by a "party" as required by 40 C.F.R. § 22.30(a).[8] The notice of appeal filed in this case identifies "Region III" as the appealing party. Spang contends that "Region III" is not a party that can appeal, based upon the following reasoning. The regulations define a "party" as "any person that participates in a hearing as complainant, respondent, or intervenor." 40 C.F.R. § 22.03. In turn, the regulations define a "complainant" as "any person authorized to issue a complaint on behalf of the Agency * * *." *Id.* In this case, the person authorized to issue the complaint on behalf of Region III is the Director of the Air, Toxics and Radiation Management Division of U.S. EPA Region III, Thomas J. Maslany ("the Director"). Therefore, Spang reasons, the Director, as the person authorized to issue the complaint, is the "complainant" as defined by the rules, not Region III.[9]

The Region responds that it is the Region, not the Director, that is the real party to this proceeding, and therefore its notice of appeal is not deficient. According to the Region, the Director is merely the individual within the Region authorized to sign and issue the complaint.

We agree with the Region, and accordingly we deny Spang's motion to dismiss. Although Spang's argument is based upon a technically correct reading of the applicable regulations, it ignores the legal and practical relationship between the Agency and the individ-

[8] This regulation provides, in part, that "[a]ny *party* may appeal an adverse ruling or order of the Presiding Officer by filing a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board * * *." (Emphasis added).

[9] We do not interpret Spang's motion as raising an issue as to whether the appeal was authorized. Instead, we interpret Spang's motion as raising an issue pertaining to the identification of the appealing party in the notice of appeal.

uals authorized to act on behalf of the Agency. The regulations define a "complainant" as the "person authorized to issue a complaint *on behalf of the Agency.*" 40 C.F.R. § 22.03 (emphasis added). The phrase "on behalf of the Agency" indicates that the Agency, in this case Region III, is the entity issuing the complaint. However, "Region III" cannot itself issue a complaint; it can act only through the authorized acts of its employees. Here, Region III has authorized the Director to issue complaints alleging violations of EPCRA § 313. By the Director's execution of this authority, Region III successfully initiated this proceeding. Thus, it is the Region that is the party conducting this enforcement action against Spang, and not the Director, who was merely exercising his delegated authority on the Region's behalf. The Region could have easily avoided this argument by reciting in its appeal that the Director, or the complainant, was filing the appeal on behalf of the Region. Because it did not, it has technically made a mistake. It does not necessarily follow, however, that dismissal of the appeal is the appropriate remedy for such a mistake. We have held that for the first instances of pleading deficiencies in a complaint, amendments and not dismissals are the appropriate remedies. *See In re Commercial Cartage Company, Inc.*, 5 E.A.D. 112 (EAB 1994) (dismissal with prejudice not warranted where there is reason to believe pleading deficiencies can be corrected through amendment and where there will be no prejudice from amendment); *In re Asbestos Specialists, Inc.*, 4 E.A.D. 819 (EAB 1993) (dismissal should be reserved for repeat occasions of pleading deficiencies or where amendments could not cure deficiencies). Because Spang has not asserted any prejudice resulting from this mistake, the error is considered harmless and will be overlooked. *See In re Swing-A-Way Manufacturing Co.*, 5 E.A.D. 742 (EAB 1995) (procedural error of misfiling an appeal is not prejudicial and does not require dismissal); *In re Nello Santacroce & Dominic Fanelli d/b/a Gilroy Associates*, 4 E.A.D. 586 (EAB 1993) (Region's misaddressing appeal to wrong location is harmless error where no allegations of prejudice resulting from the mistake).

B. *Recordkeeping Violations*

For the recordkeeping violation at Spang's Sandy Lake facility, Spang contends on appeal that the Region was without authority to issue a complaint alleging such a violation (the "Concurrence Issue"), and, alternatively, that the record shows Spang in fact had such records readily available for inspection (the "Availability Issue"). Neither contention has merit, and we uphold the presiding officer's finding that Spang violated the recordkeeping requirements of EPCRA § 313.

1. Concurrence Issue. Spang bases its lack of authority contention upon the alleged failure of the Region to satisfy a prior concurrence requirement contained in the Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right to Know Act, published by the Agency in December 1988 (the "1988 ERP"). The 1988 ERP detailed the Agency's enforcement policy for the then newly-enacted EPCRA requirements.[10] Because the requirement to file Form Rs under EPCRA § 313 was new at that time, the 1988 ERP required Regional enforcement personnel to obtain a written "concurrence" from EPA headquarters prior to initiating a civil administrative enforcement action alleging violations of EPCRA § 313. 1988 ERP at 5. Once the Region had successfully issued and completed three such actions, the Region could be released from this requirement—in the parlance of the 1988 ERP, the Region could obtain a "relaxation of the concurrence requirement." *Id.* Region III obtained the release on June 9, 1989: "[T]he requirement for obtaining headquarters' concurrence prior to issuance and settlement of civil administrative complaints for violations of the Section 313 EPCRA *reporting* requirement is relaxed." Memorandum from Michael F. Wood, Director, Compliance Division, to Steven R. Wassersug, Hazardous Waste Management Division (June 9, 1989) (emphasis added).

Spang contends that the release only pertains to complaints alleging *reporting* violations under EPCRA § 313, whereas the instant complaint alleges *recordkeeping* violations. According to Spang, EPCRA § 313 requires only that reports be filed; it does not require that records be kept. Therefore, Spang asserts, the relaxation of the requirement to obtain a concurrence does not apply to a complaint alleging recordkeeping violations. A concurrence is required here, Spang argues, because this complaint is the first time the Agency has attempted to enforce the recordkeeping requirements of 40 C.F.R. § 372.10(c). Because the Region admits it did not obtain a written concurrence to file this complaint, Spang maintains that the Region lacked the authority to allege any recordkeeping violations in the complaint.

In response, the Region argues that the recordkeeping requirements are really part of the reporting requirements, and therefore concurrence is not required prior to issuing a complaint. Alternatively, the Region argues, even if concurrence were required, the failure to obtain a concurrence would not create a substantive right to a dismissal in favor of a respondent, and, in any event, there is sufficient

[10] EPCRA was enacted in 1986; July 1, 1987 was the first reporting deadline established by that statute.

evidence in the record from which a concurrence may be inferred.[11] Because we agree with the Region that a concurrence was not necessary in this case, we need not address either of the Region's alternative arguments.

Contrary to Spang's argument, it is clear that the recordkeeping regulation was promulgated to implement the reporting requirements of EPCRA § 313, and therefore is in fact a "reporting requirement" for purposes of obtaining a concurrence pursuant to the 1988 ERP. The distinction that Spang attempts to draw between recordkeeping violations and reporting violations does not exist. This fact is easily demonstrated. First, the recordkeeping regulation, 40 C.F.R. § 372.10(c), appears in 40 C.F.R. Part 372, which contains all of the requirements referred to as "reporting" requirements for EPCRA § 313. This is illustrated by the title of Part 372: "Toxic Chemical Release *Reporting*: Community Right-To-Know" (emphasis added). Thus, in a very literal sense the recordkeeping requirements may be regarded as "reporting" requirements. Second, the Agency expressly relied upon EPCRA § 313 as the statutory authority for promulgating part 372. 40 C.F.R. Part 372 (citing EPCRA § 313 as the "[a]uthority" for Part 372); 53 Fed. Reg. 4500 (Feb. 16, 1988) (regulations promulgated in 40 C.F.R. Part 372 are under the authority granted by EPCRA § 313).[12] Thus, the Agency has implemented EPCRA § 313 by including, among other things, a recordkeeping requirement within the overall reporting obligations. In other words, the recordkeeping requirement reflects the Agency's interpretation of what is required by EPCRA § 313. As such, the recordkeeping requirement is one facet of the overall reporting requirements established by the Agency under the Act. Therefore, when headquarters officials established a prior concurrence requirement for regional officials in filing complaints charging "reporting" violations, they were obviously referring to the overall reporting requirements contained in Part 372, which include the recordkeeping requirement in § 372.10(c). Accordingly, when the Region obtained the release from the prior concurrence requirement, the release applied as well to the record-

[11] The presiding officer agreed with the Region, and inferred from testimony in the record that the Region had obtained headquarters' approval prior to issuing the complaint. Initial Decision at 39. Because we conclude that such concurrence was not necessary, we need not address whether the presiding officer correctly determined that the concurrence had been provided.

[12] The Agency also relied upon EPCRA § 328 in promulgating Part 372. This section of EPCRA is merely a general rulemaking provision that authorizes the Administrator to "prescribe such regulations as may be necessary to carry out this chapter." By itself EPCRA § 328 does not prescribe any substantive requirements; it merely assists in the implementation of other statutory provisions of EPCRA.

keeping requirement, for, as shown above, there is no meaningful distinction between the two categories of violations.

Equating recordkeeping with reporting in this context makes perfect sense. Implicit in the statutory requirement to report amounts of toxic chemicals maintained and disposed of at a facility is a requirement to keep records of such information so that a facility can determine if a report (Form R) must be filed, and if so, the information it must contain. If facilities were not required to keep such records, and to have them readily available for inspection, the Agency would have no means of determining whether the facility had complied with the reporting requirements.[13] As explained by the Region, "it is only by reviewing these records that EPA can determine compliance with [EPCRA] § 313." Reply Brief of Complainant at 5. The presiding officer agreed, stating that "recordkeeping is essential for accurate reporting and effective enforcement." Initial Decision at 42. We concur in that conclusion.

To the extent that Spang may be arguing that EPCRA § 313 does not confer authority on the Agency to even issue regulations imposing recordkeeping requirements on facilities, we refuse to consider that contention as a basis for reviewing the presiding officer's determination of liability on this count of the complaint. "Generally, the validity of final Agency regulations is not reviewable in Agency enforcement proceedings. Otherwise, Agency enforcement proceedings would turn into routine requests to reconsider regulations at the expense of scarce Agency resources and established rulemaking procedures." *In re Ashland Oil, Inc.*, 4 E.A.D. 235, 248 (EAB 1992) (footnote omitted).

For these reasons, we find that the recordkeeping requirements in 40 C.F.R. § 372.10(c) are part of the reporting requirements contained in EPCRA § 313. Thus, contrary to Spang's assertions, Region III did not need to obtain any further concurrences from headquarters before filing the complaint against Spang alleging violations of 40 C.F.R. § 372.10(c).

2. Availability Issue. Relying upon Spang's written and oral statements on the day of the inspection that the 1987 xylene records for Sandy Lake were not available, the presiding officer found that Spang

[13] The requirement to maintain such records for three years, 40 C.F.R. § 372.10(a), is intended to allow sufficient time for the Agency to inspect the facility for compliance. *See* 53 Fed. Reg. 4500, at 4520 (Feb. 16, 1988).

violated 40 C.F.R. § 372.10(c) by failing to have records of its 1987 xylene usage at the Sandy Lake facility readily available for inspection. Section 372.10(c) provides:

> Records retained under this section must be maintained at the facility to which the report applies or from which a notification was provided. Such records must be readily available for purposes of inspection by EPA.

Spang argues that it did not violate § 372.10(c) because the pertinent records were available at its executive offices in Butler, where it keeps all purchasing, payment and inventory records for all of its divisions. Because it also filed its form Rs from those offices (presumably by mailing them from that location), it contends that those offices are "the facility * * * from which a notification was provided," as provided in § 372.10(c). In other words, Spang equates "notification" as it is used in § 372.10(c) with the act of sending a Form R report from its Butler offices. Thus, according to Spang, by mailing a Form R from its Butler offices, that facility became "the facility * * * from which a notification was provided." We disagree for the reasons stated below.

A Form R is not a "notification" for the purposes of Part 372 and in particular § 372.10(c). "Notification" is a term of art that is used in Subpart C of Part 372, captioned "Subpart C—Supplier Notification Requirement." As used there, a notification is a notice given by certain suppliers of toxic chemicals that a product they have *distributed* or *sold* to chemical manufacturers or processors contains toxic chemicals. 40 C.F.R. § 372.45(a) and (b). A Form R is not a "notification" under that definition. Instead, a Form R is a report by a manufacturer or processor to state and federal officials that a facility has *maintained* or *disposed* of certain amounts of toxic chemicals in the previous calendar year. 40 C.F.R. §§ 372.30, 372.85. Because a Form R is not a "notification," the act of sending a Form R is not providing a "notification" for the purposes of § 372.10(c). Therefore, Spang's executive offices in Butler are not a "facility * * * from which a notification was provided" under that regulation.

Since Spang's executive offices in Butler are not a facility from which a notification was provided, Spang's compliance with the recordkeeping regulation depends upon whether the executive offices are a facility "to which the report applies." Spang does not make any such assertion, nor could it. A "facility" refers to a single site. 40 C.F.R. § 372.3. The "report" referenced in § 372.10(c) is the Form R report. *See* 40 C.F.R. §§ 372.10(a) (detailing recordkeeping requirements for

those subject to reporting requirement), 372.30(a) (describing requirement to report by completing and submitting a Form R). Thus, a "facility to which the report applies" is the single site subject to the Form R reporting requirement; in other words, the single site that manufactured, processed or otherwise used a toxic chemical in quantities exceeding established thresholds. Spang was not required to file a Form R report for xylene usage, if any, at its executive offices; instead, it was required to file such a report for its Sandy Lake facility. Because the Form R report for which the relevant records must be kept does not apply to Spang's executive offices, those offices are not a "facility to which the report applies" under § 372.10(c).

For these reasons, Spang's executive offices are not the location where § 372.10(c) requires Spang to maintain the records pertaining to the 1987 xylene usage at the Sandy Lake facility. Accordingly, the presiding officer did not err in finding that Spang failed to comply with the recordkeeping requirement in § 372.10(c).

C. *Penalty Assessment*

Both parties have appealed the presiding officer's assessment of a $50,000 penalty. Spang contends that no penalty can be assessed for the recordkeeping violation because EPCRA § 325(c) authorizes penalties only for reporting, not recordkeeping, violations (the "EPCRA § 325(c) Issue"). In addition, Spang asserts that no monetary penalty should be imposed for the reporting violations; it should have only received a notice of noncompliance ("NON") for the violations (the "NON Issue"). Alternatively, Spang contends that the penalty should be further reduced in light of its expenditures on "SEPs." In contrast, the Region appeals the presiding officer's decision to reduce the penalty in light of Spang's alleged SEPs (the "Supplemental Environmental Project (SEP) Issue").

1. EPCRA § 325(c) Issue. EPCRA § 325(c) provides that "[a]ny person * * * who violates any requirement of section 11022 or 11023 [§ 313] of this title shall be liable to the United States for a penalty in an amount not to exceed $25,000 for each such violation." Spang contends that this provision does not authorize penalties for violations of the recordkeeping requirements of 40 C.F.R. § 372.10(c). As discussed under the heading "Concurrence Issue" above, Spang believes that EPCRA § 313 requires only that reports be filed, not that records be kept. Spang therefore argues that penalties for recordkeeping violations are not authorized by § 325(c).

We have already considered and rejected Spang's interpretation of EPCRA § 313 (*see* "Concurrence Issue" above). As noted previous-

ly, the recordkeeping requirements are part of the Agency's reporting requirements, and there is no basis for making the distinction Spang attempts to make. Hence, violations of the recordkeeping requirements in 40 C.F.R. § 372.10(c) are violations of EPCRA § 313's reporting requirements, and penalties for such violations are authorized by EPCRA § 325(c).

2. NON Issue. In June 1991, approximately six months after the complaint was issued against Spang, the Agency formulated an enforcement strategy to deal with a large number of facilities that filed late reports under EPCRA § 313. This strategy is known as the "EPCRA § 313 Late Reporter Enforcement Initiative" ("LREI"). *See* Memorandum from John J. Neylan III, Director, Policy and Grants Division, Office of Compliance Monitoring, to Regional Division Directors (June 19, 1991) ("LREI Memorandum"). The LREI is a plan to allocate the Agency's limited enforcement resources among enforcement priorities.

Enforcement against late reporters such as Spang was not the Agency's top EPCRA § 313 enforcement priority; it was the third. LREI Memorandum at 2. The first was non-reporters, and the second was inaccurate reporters. *Id.* In order to devote limited enforcement resources primarily to its top two priorities, the Agency decided not to commence any enforcement action against late reporters in the third priority who missed the 1988 and 1989 reporting deadlines by 44 days or less. For those who missed the deadlines by 45 days or more,[14] the Agency decided to utilize the least punitive type of enforcement tool at its disposal: a notice of noncompliance (NON). NONs would be issued to this category of late reporters *unless* the facility had been inspected since July 1, 1988. LREI Memorandum at 2. Facilities that had been inspected since July 1, 1988, and therefore had been the target of an expenditure of the Agency's limited enforcement resources, were not covered by the LREI "[t]o avoid any interference with on going [sic] enforcement actions." *Id.*[15] In other words, if the Agency's enforcement resources had already been spent on a late reporter covered by the initiative, that enforcement effort was not cut off by the initiative. Accordingly, if a late reporter for 1988 and/or

---

[14] The Agency estimated that there were approximately 2800 late reporters in this category. LREI Memorandum at 2.

[15] This is consistent with the Agency's enforcement position at that time that facilities that reported late only after a compliance inspection were deemed non-reporters. *See supra* n.5. As non-reporters, such facilities were the Agency's top enforcement priority, and would not be eligible for a NON under the LREI. As noted above, *see* n.5, the Agency no longer treats "involuntary" late reporters as non-reporters for the purpose of assessing a penalty.

1989 was the subject of a complaint, much less an inspection, issued before the LREI, the LREI did not apply to it. Tr. at 53, 79.

On appeal, Spang argues that monetary penalties for its fourteen late reporting violations are not warranted because under the LREI the Region should have issued NONs instead of issuing this complaint. According to Spang, the LREI is a "civil penalty guideline issued under [EPCRA]" within the meaning of 40 C.F.R. § 22.14(c),[16] which the Region improperly disregarded.

Assuming, as Spang suggests, that the LREI is a "civil penalty guideline issued under [EPCRA]" binding upon the Region in issuing a complaint assessing a monetary penalty,[17] the LREI does not apply to the reporting violations admitted by Spang. Spang admits that it is a late reporter for the 1987 and 1988 years. The LREI does not apply to late reports for 1987. With respect to late reports for 1988, the LREI Memorandum explains that the LREI does not apply when, as here, the Agency inspected the facility after July 1, 1988.[18] Spang's facilities, as noted earlier, were inspected on May 22, 1990 and June 21, 1990. Moreover, Spang's late 1988 reports were the subject of a complaint

---

[16] This regulation provides, in pertinent part:

> *Derivation of proposed civil penalty.* The dollar amount of the proposed civil penalty shall be determined in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty and with any civil penalty guidelines issued under the Act.

40 C.F.R. § 22.14(c).

[17] We have serious doubts about the validity of this assumption. The only things binding upon the Region in issuing a complaint seeking monetary penalties are EPCRA § 325(c) and "any civil penalty guidelines issued under" that provision. 40 C.F.R. § 22.14(c). The LREI does not appear to be such a guideline. By its own terms, it is only an expression of how the Agency expects to decide whether to *seek* monetary penalties; it does not purport to provide guidance on *assessing* penalties under EPCRA § 325(c). Thus, it appears not to be a civil penalty guideline issued under EPCRA § 325(c) that binds the Region's enforcement discretion. *See In re Wyoming Refining Co.*, 2 E.A.D. 221 (CJO 1986) (internal Agency memorandum suggesting when a warning letter rather than a complaint is appropriate is not a civil penalty guideline and does not restrict Agency's enforcement discretion).

[18] The statement that the LREI does not apply to facilities inspected after July 1, 1988 is found in the LREI Memorandum, a document explaining the LREI and transmitting a plan for its implementation. The statement is not contained in the plan itself. Spang relies upon these circumstances to contend that the LREI consists only of the implementation plan, which does not exclude any facilities from its coverage. We are not persuaded that the memorandum explaining and transmitting the LREI implementation plan is not relevant in determining the scope of the LREI. The LREI Memorandum is a contemporaneous interpretation of the LREI, and therefore is entitled to consideration and deference here.

issued approximately six months before the LREI was issued. As explained above, the LREI applies to late reports for 1988 (or 1989) that were *not* the subject of any complaint prior to the issuance of the LREI. For these reasons, there is no merit to Spang's claim.

Spang also argues that it is being treated unfairly in this case because its facility in Booneville, Arkansas received a NON for its late 1988 reports filed the same day as the late reports involved here. We find this fact irrelevant to whether the Region properly exercised its enforcement discretion in issuing a NON instead of a complaint in this case. The full facts of the Arkansas matter are not before us. It may be that no enforcement resources were expended on the Arkansas facility, thus explaining the NON. Or, it may be, as the Region asserts, that the late filing of the Arkansas reports was prompted by the inspection of the Pennsylvania facilities, and therefore a complaint should have been issued to the Arkansas facility instead of a NON. *See* Reply Brief of Complainant at 8 n.13. If this is the case, Spang should consider itself lucky. In either event, the discrepancy does not call for dismissal of the complaint and the filing of a NON in this case. "Generally speaking, unequal treatment is not an available basis for challenging agency law enforcement proceedings." Koch, 1 *Administrative Law and Practice* § 5.20 at 361 (1985).

3. Supplemental Environmental Project (SEP) Issue. EPCRA § 325(c) authorizes penalties of up to $25,000 for each violation of EPCRA § 313. To guide the assessment of such penalties in accordance with the statute, the Agency developed the Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right to Know Act (Dec. 2, 1988) ("1988 ERP").[19] The 1988 ERP sets forth a two-step process for calculating penalties. The first step is the calculation of a "gravity-based penalty" reflecting the "circumstance level" and the "adjustment level" of the violation. 1988 ERP at 6-11.[20] Here, the presiding officer set a gravity-based penalty

[19] Unlike the LREI, discussed above, the 1988 ERP is assumed to be a "civil penalty guideline issued under" EPCRA within the meaning of 40 C.F.R. § 22.27(b) (in determining the amount of a civil penalty, the presiding officer must consider any civil penalty guideline issued under the governing statute).

The 1988 ERP was replaced by the Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act and Section 6007 of the Pollution Prevention Act (1990) (Aug. 10, 1990) ("1992 ERP"), which, by its express terms, is not applicable here, as the complaint was issued prior to the promulgation of the 1992 ERP. We note, however, that our decision with respect to supplemental environmental projects would be the same under either policy.

[20] The "circumstance level" of a violation relates to the seriousness of the violation in light of the accuracy and availability of the information to be reported. 1988 ERP at 7. The "adjustment

Continued

of $183,000 for Spang's fourteen failures to file 1987 and 1988 Form Rs on or before the applicable July 1 deadline, and a gravity-based penalty of $10,000 for Spang's failure to have its 1987 xylene usage records for Sandy Lake readily available for inspection. Thus, the total gravity-based penalty calculated by the presiding officer was $193,000. Initial Decision at 48. This aspect of the penalty calculation is not in dispute.

The second step of the penalty calculation under the 1988 ERP is to determine if an adjustment to the gravity-based penalty is warranted based upon the considerations enunciated in the policy. 1988 ERP at 7. The 1988 ERP lists four factors that may result in an adjustment to the gravity-based penalty: culpability, history of prior violations, ability to continue in business, and such other factors as justice may require. *Id.* Here, the presiding officer reduced the $193,000 gravity-based penalty by 10% in consideration of Spang's cooperative attitude (culpability factor). This reduction brought the penalty to $173,700, Initial Decision at 48, and also is not in dispute.

As a final step, the presiding officer further reduced the penalty by $123,700, to $50,000. According to the presiding officer, this 71% reduction in the penalty is appropriate in consideration of four of the ten projects Spang offered at the hearing as "supplemental environmental projects" or "SEPs". At the time of the hearing, Spang had already initiated, and in some instances completed, these ten projects, which Spang contends were not required by law or undertaken for purely business reasons. The presiding officer determined that it was appropriate to consider Spang's so-called SEPs in this penalty calculation under the rubric of the "other factors as justice may require" adjustment factor mentioned above. Initial Decision at 48 ("Nevertheless, the ERP, under the rubric of 'other factors as justice may require' provides that crediting environmentally beneficial expenditures, now referred to as 'supplemental environmental projects' (SEPs), is consistent with penalty assessment * * *.") (citing 1988 ERP at 16). In evaluating each of Spang's projects, the presiding officer relied upon a policy issued by the Agency in February 1991 explaining what types of projects qualify as SEPs and how SEPs are to be treated. Initial Decision at 24-26, 51, relying upon Memorandum from James M. Strock, Assistant Administrator, Office of Enforcement, to Regional Administrators, *et al.* (Feb. 12, 1991) (transmitting new

---

level" of the violation is measured by the amount of the toxic chemical involved, the size of the facility and the gross sales of the facility's total corporate entity. *Id.* at 7-9.

Agency policy on the use of SEPs) ("SEP Policy").[21] After evaluating each of the ten projects under the SEP Policy, the presiding officer made this last reduction to the penalty based upon four of the projects. Of these four projects, only one involved a toxic chemical, namely xylene, for which Spang filed a late report, and thus bore a direct relationship to the violations alleged in the complaint;[22] the other three involved efforts in areas governed by other environmental statutes.[23]

At issue here is the presiding officer's decision to grant this last reduction, based upon his treatment of the projects as SEPs under the SEP Policy. The Region appealed the penalty assessment, and, as clarified at the oral argument, its position is as follows. According to the Region, the projects at issue cannot be considered SEPs for two reasons. First, SEPs are projects to be commenced in the future and thus cannot include projects already commenced. ("[T]o the extent Spang's projects involve expenditures for past projects, those do not qualify as SEPs as that term is defined in the policy.") *Id.* at 4. Second, SEPs are projects agreed to in exchange for the settlement of a case. Oral Arg. Tr. at 4,7 ("SEPs are settlement mechanisms" and "SEPs are really voluntary acts that a respondent promises to perform in the future"). Because Spang's projects were not being considered in a settlement context, the Region contends that those projects are not SEPs under the ERP or the SEP Policy.

Although the Region contends that Spang's projects are not SEPs for these reasons, the Region nevertheless agrees that Spang's projects, to the extent they have been entirely completed prior to the ALJ's penalty assessment, can be considered when assessing a penal-

---

[21] This policy has been superseded by a newer SEP policy issued on May 3, 1995. *See* Memorandum from Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, to Regional Administrators (May 3, 1995)(transmitting Interim Revised Supplemental Environmental Projects Policy) ("1995 SEP Policy"). Neither policy directly applies in this case because, as explained later in this decision, Spang's projects are not SEPs as that term is used in those policies.

[22] This project involved eliminating the production line that required the use of xylene. This project was completed by the time Spang relied upon it in its argument to the presiding officer.

[23] One of the projects eliminated the discharge of heated cooling water to the environment, an area regulated by the Clean Water Act. This project had been initiated but not completed at the time of the penalty assessment. The other two projects involved improving storage facilities for unused paint and for used fuel oil containers in order to prevent spills, an area governed by the Resource Conservation and Recovery Act and/or the Comprehensive Environmental Response, Compensation and Liability Act. These projects were completed at the time of the penalty assessment.

ty under the penalty policy's rubric of "other factors as justice may require" without regard to the SEP policies. *See id.* at 50 (It is "correct" that "[a]s to wholly past projects * * * the ALJ may * * * have considered them under the rubric of other factors 'as justice may require.'"). Spang agrees that past projects can be considered, but contends further that projects that have yet to be commenced can also be considered when assessing a penalty. Oral Arg. Tr. at 47.[24] Both parties have appealed the amount by which the penalty should be reduced in light of Spang's projects: the Region contends no reduction is warranted based upon the evidence in the record, while Spang contends that such evidence justifies reducing the penalty to zero.

Where a penalty assessment is within the range of penalties approved by the applicable penalty policy, "the Board will not substitute its judgment for that of the Presiding Officer absent a showing that the Presiding Officer has committed an abuse of discretion or a clear error in assessing the penalty." *In re Pacific Refining Co.*, 5 E.A.D. 607, 613 (EAB 1994) (and cases cited therein). Here, we conclude that although the presiding officer correctly concluded that Spang's projects could be considered under the "other factors as justice may require" adjustment factor, he nevertheless clearly erred in evaluating Spang's projects as SEPs under the SEP Policy. As explained below, the projects are not in fact SEPs as that term is used in the SEP Policy, and therefore the SEP Policy does not provide an appropriate analytical, much less legal, basis for adjusting the penalty downward. Consequently, we are remanding this penalty assessment to the presiding officer to reexamine what reductions, if any, should be made to the $173,700 penalty based upon Spang's ten projects. This determination should be made without regard to the SEP Policy, and any reductions should be justified solely on the basis of the "other factors as justice may require" adjustment factor.

The first question we examine is whether Spang's projects are SEPs, and we conclude, as did the Region, that they are not. According to the 1988 ERP, one of the factors that justice may require consideration of when assessing a penalty is the respondent's "environmentally beneficial expenditures." (The SEP Policy supplants the words "environmentally beneficial expenditures" with the current terminology, "supplemental environmental projects.") The discussion of these expenditures is substantially as follows:

[24] Indeed, all ten of the projects offered by Spang to mitigate the penalty had at least been started, and in some instances fully completed, by the hearing.

> Environmentally beneficial expenditures. Circumstances may arise where a violator *will offer* to make expenditures for environmentally beneficial purposes above and beyond those required by law, in lieu of paying the full penalty. The Agency in penalty actions in the U.S. District Courts under the Clear Air and Water Acts, and in administrative penalty actions under the Toxic Substances Control Act, has determined that crediting such expenditures is consistent with the purposes of civil penalty assessment. Although civil penalties under EPCRA section 313 are administratively assessed, the same rationale applies. This adjustment, which constitutes a credit against the actual penalty amount, *will normally* be discussed only in the course of settlement negotiations. Before the proposed credit amounts can be incorporated into a settlement, the complainant must assure himself that the company is not expending the funds to come into compliance with other statutes/regulations and has not already received credits in another enforcement action for the same environmentally beneficial expenditures. Agreements to come into compliance with EPCRA would not warrant a reduction in penalty other than in the context of an attitude adjustment factor. The settlement agreement incorporating such an adjustment should make clear what the actual penalty assessment is, after which the terms of the reduction should be spelled out in detail and in a clearly enforceable manner.
>
> * * * * * * *
>
> One area of environmentally beneficial expenditures for which a reduction in penalty would be appropriate is an agreement to reduce emissions from the facility or other facilities within the company by a certain amount within an agreed upon timeframe.

1988 ERP at 16-17 (emphasis added). Two statements in foregoing passages stand out for purposes of our analysis. The first is "[c]ircumstances may arise where a violator *will offer* to make expenditures for environmentally beneficial purposes above and beyond those required by law *in lieu of* paying the full penalty."[25] The second is the

[25] This same language can be found in the 1992 ERP at 19.

statement that environmentally beneficial expenditures, or SEPs, as we will generally refer to them hereafter, "will *normally* be discussed only in the course of settlement negotiations." Taken together these two statements signify that the term "SEP" ordinarily refers to expenditures on projects that will be undertaken in the future in exchange for the settlement of the underlying enforcement action.

Despite the manifest absence of a settlement in this case, the presiding officer nevertheless characterized and treated Spang's projects as SEPs. To him the reverse implication created by the word "normally" in the second statement presented a logical opening to consider SEPs in a non-settlement context. Although this implication exists in theory, we nevertheless reject it, since it is apparent from the record that any use of SEPs outside of the settlement context has never been contemplated by the Agency in any of its policies covering SEPs. We conclude instead that the term "normally," as used above, serves little purpose except possibly as a draftsman's rhetorical tool to allow for some unknown "non-normal" contingency. For us, however, a contested, litigated penalty proceeding is not the kind of contingency which justifies abandoning the settlement-specific context in which SEPs are always employed.

Strongly buttressing this conclusion is the SEP Policy itself, upon which the presiding officer expressly relied when he invoked the 1988 ERP as the basis for evaluating Spang's so-called SEPs. The following excerpt from the SEP policy is illustrative of the meaning the Agency has ascribed to the term:

> *In settlement* of environmental enforcement cases, the United States will insist upon terms which require defendants to achieve and maintain compliance with Federal environmental laws and regulations. In certain instances, additional relief in the form of projects remediating the adverse public health or environmental consequences of the violations at issue may be included in the *settlement* to offset the effects of the particular violation which prompted the suit. *As part of the settlement*, the size of the final assessed penalty may reflect the *commitment* of the defendant/respondent to undertake environmentally beneficial expenditures ("Supplemental Environmental Projects").

SEP Policy at 1 (emphasis added). Thus, both the 1988 ERP and the SEP Policy use the "SEP" concept as referring to a project that a respondent, in the course of settlement negotiations, *offers to undertake in the*

future in exchange for a settlement. See also 1995 SEP Policy at 3-4 ("Supplemental environmental projects are defined as environmentally beneficial projects which a defendant/respondent *agrees to undertake* in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform.") (emphasis added); 1992 ERP at 19 ("Circumstances may arise where a violator will offer to make expenditures for environmentally beneficial purposes above and beyond those required by law in lieu of paying the full penalty. * * * This adjustment, which constitutes a credit against the actual penalty amount, will normally be discussed only in the course of settlement negotiations."). Given this background we agree with the Region when it states that SEPs are "voluntary acts that a respondent *promises* to perform in the future *in exchange* for some favorable penalty mitigation." Oral Arg. Tr. at 7 (emphasis added). In other words, SEPs embody legally enforceable commitments to perform future acts that represent an essential part of the *quid pro quo* the Agency expects to receive for settling a case with a reduced penalty. This *quid pro quo* is obviously missing in this case. Spang's ten projects are not ones it was offering to perform in the future in exchange for a settlement of the penalty amount proposed in the complaint; rather, they are projects Spang had already completed, or at least started, and upon which Spang is relying to obtain a penalty reduction in a vigorously contested enforcement adjudication. Thus, because Spang's projects are not being undertaken pursuant to a settlement, they do not qualify as SEPs as that term is used in those policies. Because of that, we do not believe there was any legitimate analytical basis for the presiding officer to look to the SEP Policy, and thereby employ the SEP concept, as a basis for reducing the gravity-based penalty assessment in this case.

There are several compelling policy reasons for rejecting the consideration of any future projects (including of SEPs) in litigated proceedings. These reasons stem from the conclusion that administrative adjudications are not well suited to consideration of future projects. Such adjudications, involving the resolution of contested issues, including penalty amount, by a neutral third party (the presiding officer), are not well suited to establishing the acceptability, scope, and terms of a future project such as a SEP. Further, a promise to perform a future act involves substantial legal and management problems pertaining to future oversight and enforcement, including putting additional demands on the Agency's enforcement resources. Accordingly, we conclude as a matter of policy[26] that presiding officers should not

[26] Nothing in the governing statute nor the applicable regulations addresses the question of whether to allow mitigation of a penalty assessment—which, within certain broad bounds, is a

Continued

consider future projects such as SEPs in their penalty determinations. Such projects should more appropriately be considered in negotiated settlements among the parties, pursuant to the SEP Policy.

That said, we are still left with the question of whether Spang's projects, which as previously explained are not SEPs,[27] can nevertheless be considered for purposes of mitigating the penalty amount in this case. For the reasons stated below, we conclude that Spang's projects, and expenditures incurred in support thereof, can be legitimately considered under the "other factors as justice may require" penalty adjustment factor. (For brevity's sake, we will refer to this factor as the "justice" factor.) We arrive at this conclusion quite easily because, as the Region has acknowledged, "historically, courts have always taken past actions of violators into account for purposes of penalty mitigation." Oral Arg. Tr. at 13. It is therefore within the presiding officer's prerogative to consider what type of environmental citizen Spang has been in deciding upon an appropriate penalty to assess. The justice factor, which vests the Agency with broad discretion to reduce the penalty *when the other adjustment factors prove insufficient or inappropriate to achieve justice*,[28] is clearly suited to this end.

The Region is fundamentally in agreement with this conclusion, but vigorously argues that no adjustment is warranted in this case because the record fails to support any such adjustment here. Oral Arg. Tr. at 5. Spang for its part asserts that it is unjust to penalize it at all for its reporting and recordkeeping violations in light of its record

---

discretionary determination—based upon a good faith assessment of the respondent's ability and willingness to successfully carry out a project in the future to benefit the environment in some agreed upon prescribed manner. Therefore, under such circumstances, we look upon the question as one of policy rather than law. As such, we are free to prescribe the applicable policy.

[27] Spang's projects have been wholly or partially completed; therefore, to the extent of such completion, they no longer have potential value as *quid pro quo* in settlement negotiations.

[28] As noted previously, the adjustment factors under the 1988 ERP consist of adjustments to the gravity-based penalty based upon a violator's culpability, history of prior violations, ability to continue in business, or other factors as justice may require. The "culpability" adjustment factor refers to the respondent's knowledge of the violation, degree of control over the violation, and attitude, which includes the respondent's cooperation and compliance in connection with the enforcement effort resulting in the complaint. The "history of prior violations" factor allows only *upward* adjustments to the penalty based upon prior violations of EPCRA. It does not allow downward adjustments based upon previous compliance with EPCRA or other environmental laws, or based upon activities not required by law but undertaken purely to further statutory environmental goals. The "ability to continue in business" factor allows a respondent to demonstrate that it does not have the ability to pay the proposed penalty. Spang makes no such contention here. The remaining factor, "other factors as justice may require," is discussed above.

of the environmentally beneficial projects, which it contends go well beyond the requirements of the law and economic self-interest. Resolution of this dispute properly falls initially within the jurisdiction of the presiding officer. Therefore, we are remanding the case for further proceedings consistent with this decision. In returning the case to the presiding officer, we offer the following general observations as guidance.

As a matter of policy, the Agency obviously looks favorably upon the undertaking of a project which benefits the environment and which goes beyond the requirements of environmental laws. By considering such behavior in a penalty assessment proceeding the Agency can provide an incentive for companies to engage in environmentally beneficial activities. Nevertheless, sight must not be lost of the fact that initial compliance with the law is the primary objective of the Agency's enforcement efforts and that penalties play an important deterrent role in those efforts. Therefore, the amount of credit which is allowable for environmentally beneficial projects must be tempered with the knowledge that a violation has taken place. Thus, to strike the proper balance between these conflicting forces, we are of the view that the evidence of environmental good deeds must be clear and unequivocal, and the circumstances must be such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice. This formulation for giving due credit for environmental good deeds holds faith to the underlying principle of the justice factor, which is essentially to operate as a safety mechanism when necessary to prevent an injustice. It further suggests that use of the justice factor should be far from routine, since application of the other adjustment factors normally produces a penalty that is fair and just. In addition, it also suggests that evidence of creditable projects should be sufficiently clear that the proceeding will not get bogged down in a time-consuming analysis of collateral matters that are, in reality, commonplace, and thus do not rise to the level where justice *requires* their consideration.

As noted above, the past acts of violators have historically been appropriate for consideration when assessing a penalty. Accordingly, any project that has at least been commenced may be considered under this analysis. Under the justice factor in an administrative hearing promises of future acts are not relevant. What is relevant is a respondent's *past* acts and expenditures. The greatest weight should go to completed projects for which there is tangible evidence of significant environmental benefits. *See* Oral Arg. Tr. at 12. Nevertheless, if an incomplete project is sufficiently underway, such that its ability to produce environmental benefits is not speculative, there may be

sufficient grounds for considering the expenditures made on the project to that point. With respect to the date a project was commenced, this information bears only on the weight a given project will be accorded. For example, a project commenced before an enforcement action has begun is more likely to show a greater commitment to environmental protection than one commenced after.

Whether a project warrants a penalty adjustment, and if so, how much, will of course depend upon the evidence in the record. If a respondent claims that justice requires consideration of steps taken and monies spent on a project, a respondent needs to produce evidence of those steps and expenditures. The snapshot provided by the evidence in the record will provide the factual basis that will enable the presiding officer to determine whether justice warrants a penalty reduction for those steps and expenditures, and if so, how much. Absent such evidence, there is no factual basis for concluding that the calculated penalty will produce an injustice.

As to the types of projects that may warrant a penalty reduction, we find the SEP Policy somewhat instructive. Although the SEP Policy is not applicable here, its requirement that SEPs have a "nexus between the nature of the violation and the environmental benefit to be derived from the project," SEP Policy at 2,[29] translates well into an adjudicatory context, and thus may be helpful in addressing whether a project warrants consideration under the justice factor. In our view, the stronger the nexus between a project and a violation, the more likely that the project may warrant a penalty reduction under the justice factor.[30] We reiterate, however, that no project, however close the nexus, should be credited unless the penalty which would otherwise be assessed would work an injustice.

Whether a given project rises to the level of demonstrating that justice requires a lower penalty, and the related question of how much of a reduction is necessary to achieve justice, are, like any other claims under the justice factor, committed in the first instance to the discretion of the presiding officer. Because of the open-ended nature of the justice factor and the myriad factual scenarios that may arise under it, it would be impossible, and therefore unwise, for this Board to go beyond this general guidance and try to establish a set of rules

[29] *See also* 1995 SEP Policy at 5.

[30] For example, in this case, the project involving xylene, a toxic chemical for which Spang filed a late report, may be more likely to warrant a penalty reduction than Spang's other projects, which bear no relationship to the violations for which Spang has been found liable.

to govern the application of the justice factor to a particular type of claim. Instead, the Board will adhere to its standard practice of allowing presiding officers to exercise their discretion in assessing a penalty, and then reviewing challenged penalty assessments for clear errors or abuses of discretion on a case-by-case basis. Here, the presiding officer did not in fact evaluate whether justice requires a penalty adjustment in light of Spang's projects. Instead, he mistakenly evaluated Spang's projects as SEPs. Consequently, we are remanding the penalty calculation to the presiding officer so that he may, consistent with this decision, determine whether Spang has made a valid claim for having the $173,700 penalty lowered based upon "other factors as justice may require," namely, Spang's ten projects, and if so, how much of a downward adjustment is required to achieve justice.

III. *CONCLUSION*

For the foregoing reasons, we uphold the presiding officer's determination that Spang has violated EPCRA § 313's reporting and recordkeeping requirements. The penalty assessment is remanded for a determination of whether the $173,700 gravity-based penalty should be adjusted downward based upon consideration of Spang's environmental projects under the penalty policy rubric of "other factors as justice may require" in a manner consistent with this opinion.

So ordered.