# IN RE GREAT LAKES DIVISION OF NATIONAL STEEL CORP.

EPCRA Appeal No. 93-3

***FINAL ORDER***

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Decided June 29, 1994

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Syllabus

U.S. EPA Region V filed a complaint alleging that Great Lakes Division of National Steel Corporation ("National") violated Section 103(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and Section 104 of the Emergency Planning and Community Right-to-Know Act ("EPCRA") by failing to provide required notifications to government response agencies of a hydrogen sulfide release at its plant. The Presiding Officer held that National had violated both statutes, as alleged, but reduced the total proposed civil penalty from $100,000 to $66,600.

Held: The Initial Decision is affirmed.

***Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.***

***Opinion of the Board by Judge Reich:***

The Great Lakes Division of National Steel Corp. ("National") has appealed to the Board under 40 C.F.R. § 22.30(a) an Initial Decision assessing total civil penalties of $66,600 for one violation of Section 103(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9603(a), and three violations of Section 104 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11004. In the Initial Decision, the Presiding Officer found that National had violated Section 103(a) of CERCLA and Section 104(a) of EPCRA by failing to provide the requisite timely notifications to the designated federal, State and local government agencies of the release of hydrogen sulfide ($H_2S$), a hazardous substance, at its facility on February 13 and 14, 1990. The Presiding Officer further found that National had violated Section 104(c) of EPCRA by failing to send the requisite written follow-up notice to the State emergency response commission for the State of Michigan. National acknowledges that the release of a hazardous substance in a

reportable quantity occurred, but maintains that it complied with the notification requirements of both statutes. It further argues that, should the Board find that National violated any statutory requirements, the Board should reduce the $66,600 civil penalty assessed by the Presiding Officer in light of National's good faith efforts to comply with both acts and the lack of environmental harm caused by the release.[1]

## I. *BACKGROUND*

### A. *Statutory Framework*

CERCLA and EPCRA provide, in combination, for federal, State and local governments to receive *immediate* notification of releases of hazardous substances into the environment so that these government agencies can initiate appropriate responses. Specifically, CERCLA § 103(a), 42 U.S.C. § 9603(a), provides that any person in charge of a facility from which a "hazardous substance"[2] has been released in a reportable quantity must "immediately notify"[3] the National Response Center ("NRC")[4] established under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*

EPCRA requires owners or operators of facilities to provide immediate notice of the release of an extremely hazardous substance or CERCLA hazardous substance[5] to the designated State emergency response commission ("SERC") and the emergency coordinator for the appropriate local emergency planning commission ("LECP"). 42 U.S.C. § 11004(a); 40 C.F.R. § 355.40(b)(1). The statute also requires a written follow-up emergency notice to the SERC and the LEPC as soon as

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[1] In its Notice of Appeal, National requested an opportunity for oral argument. Because the Board believes that oral argument would not materially assist it in considering the issues raised on appeal, National's request is denied.

[2] Pursuant to the Act and implementing regulations, the term "hazardous substance" includes any substance designated pursuant to CERCLA § 102, 42 U.S.C. §9602, which has been implemented at 40 C.F.R. Part 302. *See* 42 U.S.C. § 9601(14) and 40 C.F.R. § 302.3. There is no dispute that hydrogen sulfide is a substance designated under 40 C.F.R. Part 302.

[3] Although neither CERCLA nor EPCRA defines "immediately," the legislative history indicates an intent to require that notification take place without any delay. *See e.g.*, Report of the Committee on Environment and Public Works, S. REP. NO. 99-11, 99th Cong., 1st Sess. 8-9 (1985), stating that "delays in making the required notification should not exceed 15 minutes after the person in charge has knowledge of the release, and 'immediate notification' requires shorter delays whenever practicable."

[4] The National Response Center, which is operated by the U.S. Coast Guard, is then required to "expeditiously" convey that notification to other appropriate government agencies, including EPA. *See* 42 U.S.C. § 9603(a). *See* Tr. 46.

[5] *See* 42 U.S.C. § 11002(a) and 40 C.F.R. Part 355 and Appendices A and B, whereby hydrogen sulfide is listed as an extremely hazardous substance for purposes of EPCRA implementation.

practicable after the release. 42 U.S.C. § 11004(c); 40 C.F.R. § 355.40(b)(3).

EPA may assess a civil penalty of not more than $25,000 per day for each violation of CERCLA § 103(a) and each violation of EPCRA § 11004(a) or (c). *See* CERCLA § 109(b), 42 U.S.C. § 9609(b), and EPCRA § 325(b), 42 U.S.C. § 11045(b). Both statutes provide that in determining an appropriate penalty, the following factors shall be taken into account:

> The nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation and such other matters as justice may require.

B. *Factual Background and Prior Proceedings*

National operates a steel manufacturing facility in Zug Island, Michigan. At approximately 2 p.m. on Tuesday, February 13, 1990, a pilot flame in a 100-foot high stack at the facility was extinguished, and the stack began to release combusted coke oven gas containing hydrogen sulfide. Tr. 44-45 and 179-183. The release ended at approximately 9 a.m. the following morning when the gaseous plume was reignited.

On January 10, 1991, Region V served an administrative complaint on National in which it alleged that an estimated 2,100 pounds of $H_2S$ had been released at National's plant, that this amount exceeded the reportable quantity of $H_2S$,[6] and that National had not notified federal, State and local government agencies of the release until more than eight hours after becoming aware of it. In light of this delay, the Region alleged that National had violated CERCLA and EPCRA by failing to "immediately notify" the government "as soon as [National] had knowledge of the release."[7] Specifically, Count 1 alleged that National did not immediately notify the National Response Center of the release, in violation of CERCLA § 103(a). Counts 2 and 3, respectively, alleged that National did not immediately notify the Michigan Emergency Planning and Community Right-to-Know Commission (the SERC)

[6] The reportable quantity of hydrogen sulfide is 100 lbs under both CERCLA and EPCRA. *See* 40 C.F.R. § 302.4 and Table 302.4; 40 C.F.R. Part 355, Appendices A and B.

[7] National does not argue on appeal that its telephone calls to government response agencies eight hours after it became aware of the release constituted "immediate" notification. It apparently concedes that earlier notification was required and maintains that it provided such earlier notification.

and the Wayne County LEPC of the release, in violation of EPCRA § 304(a). In addition, the Region alleged in Count 4 that National violated EPCRA § 304(c) by failing to send a written follow-up notice to the SERC. The Region proposed a $25,000 penalty for each of the four counts, totalling proposed penalties of $100,000.[8]

In its Answer, National asserted that it "provided timely oral notification of the subject hydrogen sulfide release" to the designated federal, State, and local agencies, and therefore did not violate CERCLA and EPCRA, as alleged in Counts 1-3. In particular, National alleged that it had made telephone calls to each of these agencies prior to the telephone calls referred to in the complaint. National also asserted that it did not violate EPCRA § 304(c), as alleged in Count 4, because it sent a written follow-up notice to the Wayne County Local Emergency Planning Committee on February 27, 1990, which "constituted full compliance" with EPCRA requirements for written follow-up notices of a release.[9] Answer at 4. It alternatively maintained that it made good faith efforts to comply with both laws and that any violations it may have committed were "*de minimis* in nature and duration." Answer at 5.

1. *The Evidentiary Record*

A hearing was held on December 4, 1991. The parties entered into a pre-hearing stipulation that:

> During the period from about 2:00 P.M. Eastern Standard Time (EST) on February 13, 1990, to about 9:00 A.M. EST on February 14, 1990, there was a release of an estimated 2,100 pounds of hydrogen sulfide [at National's plant].[10]

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[8] Eric S. Hann, an Enforcement Specialist for Region V, testified that Region V had calculated the proposed civil penalties in accordance with the Penalty Policy. He stated that the penalty amounts were initially calculated by Margaret Rader and were recalculated by Hann when Ms. Rader left EPA. A copy of the Region's Penalty Calculation Worksheet was admitted into evidence as CX 2.

[9] RX 2. The letter indicated that a copy was being mailed to the Michigan Department of Natural Resources, Air Quality Division. According to Hartong's testimony, National believed that the Air Quality Division was the SERC office responsible for receiving written follow-up notices under EPCRA. Tr. 197-199. As discussed *infra*, the Region maintains that National sent the copy of the February 27 letter to the wrong office, and therefore, the letter did not satisfy EPCRA § 304(c).

[10] A February 27, 1990 letter from National to Mark R. Sparks, chairperson of the Wayne County LEPC, also states that 2,100 lbs of $H_2S$ were released. RX 5. We note, however, that notwithstanding the Stipulation for Hearing and the February 27 letter, National produced testimony at the hearing that the 2,100 pounds represented the entire production of gas released during the relevant time period, and that only a maximum of 231 pounds of the release was $H_2S$. Initial Decision at 4.

> [National] had knowledge of the release at approximately 9:00 A.M. EST on February 14, 1990.

Stipulation for Hearing (undated) ("JX 1"). There is no dispute between the parties as to whether National should have notified the government agencies of the release on the morning of February 14.[11] Rather, the sole evidentiary issue is whether, in fact, National provided notice on the morning of February 14, as it alleged in its Answer.

Region V, which bears the burden of proof under the Agency's Consolidated Rules of Practice,[12] relied on the incident reports that must be maintained by each of the federal, State and local government response agencies as evidence that these agencies were first notified of the release between 5 and 6 p.m. February 14.[13] The Region produced written reports which had been prepared by each of these agencies on February 14, 1990, that memorialized telephone calls from National reporting the $H_2S$ release between 5 and 6 p.m. on February 14. None of these agencies had any record of prior telephone calls from National with regard to the release. The Region maintained that these official agency records therefore demonstrated that National had first notified the NRC, the SERC, and the LEPC, of the release at 5:15 p.m., 6:08 p.m., and 5:30 p.m., respectively.

More specifically, the Region introduced the following documentary evidence into the record:

*Count 1* (untimely notification of the NRC):

(1) National Response Center Incident Report 8396 (CX 1), indicating that Roger Kalinowsky reported the incident by telephone to "J.Grez" at "17:22" [5:22

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[11] *See supra* n.7. As discussed *infra* at n.18, National does not contend that it waited until the afternoon of February 14 to notify the government in order to gather sufficient information regarding the amount of the release, but rather asserts that it made timely calls on the morning of February 14.

[12] Pursuant to 40 C.F.R. § 22.24:

> The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty * * * is appropriate.

[13] The Region's only witness was Eric Hann, a Region V Enforcement Specialist, who testified primarily on the Region's penalty calculations. Hann also testified that the Region's files contain no report of a release at National's plant on February 14 other than a fax of the incident report prepared by the NRC (Incident Report 8396). Tr. 29 and 121-122. The NRC had agreed to fax incident reports to EPA within 15 minutes of receiving an initial telephone report of a release. Tr. 44.

p.m.] February 14, 1990.[14] The report states that: "The incident was discovered on 14-Feb-90 at 17:15 local time."

(2) A certification executed by Michael Z. Ernesto, Chief, Computer and Communication Section, NRC, dated October 29, 1991, stating that he "made or caused to be made a thorough search" for "a report of the release of hazardous substances" at National between February 14, 1990, and December 31, 1990, and that Incident Report No. 8396 was the only entry made during that time period. CX 1 at 2. Ernesto further certified that the NRC regularly receives reports of hazardous substance releases, and that "[a]ll reports (oral or written) of any such releases or discharges have entries and records created for them."

*Count 2* (untimely notification of the SERC):

(1) PEAS Report of Incident No. 141-90, stating that Kalinowsky reported a release of $H_2S$ to "R. Telesz" at 6:08 p.m. February 14, 1990. CX 4 at 1.

(2) Memorandum of Emergency Release Reporting Procedures in Michigan (Nov. 1, 1991), stating that a Report of Incident is the "official record of notification" of a release. CX 4 at 2.

*Count 3* (untimely notification of the Wayne County LEPC):

(1) Title III Release Notification Form, LEPC, Wayne County, Michigan, reflecting that Mark R. Sparks, the chairperson of the LEPC, received a telephone call from Roger Kalinowsky at 5:30 p.m. February 14, 1990, concerning a hydrogen sulfide release. CX 5 at 1.

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[14] The Incident Report confirms that the duty officer notified EPA Region V by fax of the release at 5:34 p.m. February 14. *See supra* n.13.

(2) Letter from Mark R. Sparks to Region V, October 28, 1991, stating that he took a telephone call from Roger Kalinowsky at 5:30 p.m. February 14, 1990, reporting a release of hydrogen sulfide. Sparks' letter stated that Sparks had received telephone notifications of other hazardous releases from National on other occasions but that the 5:30 p.m. call was the only notification of a release he received on February 14. CX 5 at 2-4.

In support of Count 4 (no follow-up written notice to the SERC), the Region produced a letter from Kent Kanagy of the SARA Title III Unit, Environmental Response Division, Michigan DNR,[15] to EPA, dated October 1, 1990, stating that Kanagy had "reviewed our files for emergency release reports required under section 304 of SARA Title III for an incident which occurred on February 14, 1990 [at the National facility]" and that it had not received a written follow-up report regarding the release.

National objected to the admission in evidence of all of the government documents the Region introduced into evidence on hearsay grounds, in that Region V had not called as witnesses representatives of any of the government agencies that generated these documents.[16] Tr. 15 *et seq.* and 106. The Presiding Officer overruled National's objections.[17] Tr. 106.

National provided a different version of the relevant events of February 14 at the hearing. It presented oral testimony with respect to the first three counts of the complaint that its personnel had informed the federal, State and local agencies of the release on the morning of

[15] EPCRA is also known as Title III of SARA, an acronym for the Superfund Amendments and Reauthorization Act of 1986.

[16] Its objection covered CX 1 through CX 6. CX 7, to which National did not object, is an August 31, 1990 letter from Hartong to Region V.

[17] National's objections based upon the importance of these witnesses seem inconsistent with its posture at the hearing. As described in the Initial Decision, the Presiding Officer informed National, after admitting CX 1 through CX 6 into evidence, that it could move at the end of the hearing to bring in the three declarants for cross-examination. Tr. 108. National's attorney demurred, stating that the delay would place an "unfair" burden on his client. Tr. 109. *See also* Tr. 112. After testimony had concluded, the Presiding Officer reiterated his offer to continue the hearing to bring in the these witnesses. Tr. 266-67. National objected, stating that "this hearing should be concluded on the basis of the evidence offered today." Tr. 266 and 271. *See* Initial Decision at 18-19.

February 14, 1990, shortly after the plant manager had learned of its occurrence.

In particular, National's Supervisor of Environmental Control, Daniel Hartong, testified that Charles Green, National's plant manager, learned of the release at an 8 a.m. staff meeting on Wednesday, February 14, and dispatched personnel to stop it. Tr. 179 and 183. Green then notified Hartong, who notified his immediate supervisor, Roger Kalinowsky, National's Manager of Environmental Control. *Id.*

Hartong testified that he telephoned the National Response Center at about 10 a.m. on February 14 and reported that there had been a release but that National had not yet determined whether it exceeded the reportable quantity of hydrogen sulfide. Tr. 182 and 184. He did not recall the name of the person to whom he spoke and he did not recall asking for or receiving a case number from the NRC. Tr. 184-185. He did not take notes of the conversation. *Id.* Hartong further testified that he telephoned Michigan's Pollution Emergency Alerting System ("PEAS"), which is the entity designated to receive telephone notifications of hazardous releases for the State of Michigan, at 10:10 a.m., and that he called the Wayne County Local Emergency Planning Committee at 10.15 a.m. Tr. 185-186. Hartong stated that he did not recall to whom he spoke at either agency, did not obtain a case number, and did not take notes of either conversation. Tr. 213, 216-217. He stated that he and Roger Kalinowsky made efforts during that day to estimate the extent of the release.[18]

According to Hartong, after Hartong had left work, Kalinowky placed telephone calls to the NRC, SERC and LEPC to report the estimated quantity of $H_2S$ released. Tr. 187-190 and 220-221. He said that Kalinowsky called the NRC at 5:15 p.m.; the SERC at 6:08 p.m. and the LEPC at 5:30 p.m. Tr. 187-190 and CX 5. *See* CX 1. Kalinowsky did not testify.

With respect to Count 4, Hartong testified that he wrote a follow-up letter for Kalinowsky's signature to Mark R. Sparks, Wayne County Title III Committee on February 27, 1990, with a copy to K. Green of the Division of Air Quality, Michigan Department of Natural Resources ("Michigan DNR"). RX 2; Tr. 197-199 and 224. Hartong stated that he had asked a receptionist at the Northfield office of the Michigan DNR

[18] As noted above, National does not argue on appeal that it did not have sufficient information about the release to trigger its reporting obligations prior to the late afternoon calls. *See* Stipulation for Hearing and n.7, *supra.* Rather, it contends that Hartong's testimony is sufficient to show that National made the appropriate calls on the morning of February 14.

where to address the written follow-up notice of a release and had been told to address it to Mr. Green. Tr. 198-199. National does not dispute that it did not send any other written follow-up notice to the State of Michigan prior to receiving the complaint.[19]

### 2. *The Presiding Officer's Liability Determination*

The Presiding Officer issued an Initial Decision on July 13, 1993. After "sifting and weighing" the conflicting evidence in the record, he held that the Region had established by a "preponderance of the evidence" that National Steel "did not notify the NRC, the SERC or the LEPC of the release until 5:22 p.m., 6:08 p.m. and 5:30 p.m., respectively, on February 14, 1990," and therefore National had failed to provide immediate notice of the release.[20] Initial Decision at 3, 22 and 31. *See* 40 C.F.R. § 22.24. Based on a lengthy and detailed discussion of the evidence, he concluded that "there is no evidence, aside from Hartong's sole, uncorroborated testimony, that earlier calls had been made." Initial Decision at 11. *See also id.* at 13 and 30. Stating that Hartong is not an "independent witness," he found that Hartong's "interest in making self-serving statements and in testifying that he made those earlier calls is greater than the three governmental agencies which * * * [had] nothing to gain, financially or otherwise." *Id.* at 31. Therefore, he concluded that "the documents of the agencies are more convincing than Hartong's testimony." *Id.* He stated that:

> It seems highly unlikely that the three agencies, the NRC, the SERC and the LEPC, which are trained to independently receive calls regarding accidental releases, would all fail to record the earlier calls, and would all record the afternoon calls with no mention that they were follow-up calls to those in the morning.

*Id.* at 13-14.[21]

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[19] On January 31, 1991, after the complaint was filed, National sent copies of written follow-up reports it had submitted to the NRC and the Wayne County LEPC regarding four releases, including the February 13-14 release of $H_2S$, to "Title III Notification," Michigan DNR. RX 6. (National's letter states that the submission of the reports does not constitute an admission that written reports of releases are required to be served on the SARA Title III Unit.)

[20] The "preponderance of the evidence" standard, as provided for in 40 C.F.R. § 22.24, has been interpreted to require that a reasonable person would find "a contested fact more probably true than untrue." *Sanders v. U.S. Postal Service*, 801 F.2d 1328, 1330 (Fed. Cir. 1986).

[21] He added that, "where the normal day-to-day function of these agencies is to receive and record incoming calls related to releases of hazardous and extremely hazardous substances, it is presumed that they are competent, and will act in good faith." Initial Decision at 31.

The Presiding Officer rejected National's argument that the Region's documentary evidence should have been excluded from the record as unreliable hearsay, stating that "the hearsay rule is not applicable to administrative hearings so long as the evidence upon which a decision is ultimately based is both substantial and has probative value," quoting from *Cohen v. Perales*, 412 F.2d 44, 51 (5th Cir. 1969), *rev'd on other grounds sub nom. Richardson v. Perales*, 402 U.S. 389 (1971). *Id.* at 15. *See also id.* at 33.

With regard to Count 1, the Presiding Officer found Incident Report 8396 and the Ernesto certification probative of the fact that the NRC had received only one report of a release. He characterized Incident Report 8396 as "a clear and trustworthy document." *Id.* at 17. Although he concluded that the reliability of the Ernesto certification was "somewhat diminished by its lack of clarity," he concluded that its credibility had not been eroded merely because it did not indicate reports of other releases.[22]

The Presiding Officer further noted that National had failed to produce any telephone records to support its contention that it had telephoned the National Response Center at approximately 10 a.m. on February 14. *Id.* at 19. He concluded that National may not have made efforts to obtain telephone records because they may not have substantiated National's assertion.[23] *Id.* at 20 and 32.

The Presiding Officer stated that "Respondent's defenses to Counts II and III are almost identical to those of Count I" and are "no more persuasive."[24] *Id.* at 20. He rejected National's contention that the Region's evidence should not have been considered because representatives of the government response agencies were not called as witnesses. *Id.* at 18. *See*

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[22] Dennis Gould, National's Acting Manager of Environmental Control, testified that he had reported three other releases of hazardous substances to the NRC which were not mentioned in the certification. *See* Tr. 232. The Presiding Officer found that Ernesto had certified that "only one report was received *with respect to the release in question*," and therefore that Gould's unsubstantiated and self-contradictory testimony did not discredit the certification. Initial Decision at 15. *See also id.* at 21.

[23] The Presiding Officer issued a pre-hearing order directing National to produce telephone records "or other persuasive written evidence" of the morning telephone calls. Order for Production of Documents, July 12, 1991. In response to the Order, National stated that it could not obtain Michigan Bell's February 14 telephone records because Michigan Bell only retained records for six months. Response, July 22, 1991. The Presiding Officer noted that Michigan Bell stated in response to his October 22, 1991 subpoena that it retained records for 18 months. Initial Decision at 19. He stated that, based on Michigan Bell's statement, National had seven months after the complaint was filed, and one month after his July 12 order, to produce the records. *Id.*

[24] With particular reference to Count 2, he held that the PEAS report (CX 4) is an official document from the State of Michigan which National did not succeed in discrediting. *Id.* at 20.

*also id.* at 37. He stated that "the concept of fairness is served" in that National had notice in the pre-hearing exchange of the name and address of the declarants of the challenged documents (CX 1, CX 4 and CX 5), and could have requested a subpoena for them. Moreover, he noted that he had offered to subpoena these individuals at the close of the hearing and that National had objected. *Id.* at 18. *See* n.17, *supra.*

Finally, with regard to liability under Count 4, the Presiding Officer found that National had not sent a follow-up written notice to the SERC at the correct address as of January 10, 1991, the date the complaint was issued, and therefore had violated EPCRA as alleged in Count 4. *Id.* at 22-23. He stated that National's belated attempt to send a report to the correct address on January 31, 1991, following the issuance of the complaint, does not "absolve it from liability" but may affect the penalty amount. *See* Tr. 102 and CX 6.

### 3. *The Presiding Officer's Penalty Determination*

Following the liability determination, the Presiding Officer assessed penalties of $20,000 each for the violations alleged in Counts 1, 2 and 3. Initial Decision at 38 *et seq.* He assessed a penalty of $6,600 for the violation alleged in Count 4. The Presiding Officer used the Agency's Final Penalty Policy for Sections 302, 303, 304, 311 and 312 of EPCRA and Section 103 of CERCLA, dated June 13, 1990 ("the Penalty Policy") as a framework for his penalty analysis.[25] *See* Initial Decision at 25.

The Presiding Officer determined that the Region had properly characterized the violations alleged in Counts 1, 2 and 3 as gravity level A and extent level 1 on the Base Penalty Matrix for CERCLA § 103 and EPCRA § 304 violations, based on the amount released and the time that had elapsed

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[25] The Penalty Policy, a copy of which was admitted into evidence as CX 3, contains two matrices for calculating a base penalty for each violation that takes into account four statutory penalty factors reflecting characteristics of the violation itself: its "nature, circumstances, extent and gravity." Once a base penalty amount is determined, it may then be adjusted upward or downward to take account of the other statutory penalty factors, which reflect characteristics of the violator.

The "nature" of the violation, *i.e.*, the type of statutory requirement violated, determines which of the two matrices applies to the violation. The "gravity" of the violation, measured by the amount of the chemical that was involved, is reflected on the horizontal axis of the matrix and the "extent" of the violation, measured by the amount of deviation from the statutory requirement, on the vertical axis. Once the violation is assigned to the cell in the matrix where the axes intersect, the "circumstances" of the violation are evaluated as a basis for determining a specific penalty amount within the range of penalty amounts indicated in that cell. The circumstances take into account the likelihood of exposure to hazard and the adverse effect of the violation on implementing the statute.

before notice was given.[26] Initial Decision at 41. He further determined that Region had properly categorized the "extent" of all three violation as "level 1," because more than two hours had elapsed between National's discovery and its reporting of the release.[27] *Id.* at 41. However, he concluded that the "circumstances" of the violations should be categorized as "low" rather than "high" (as the Region proposed), based on convincing evidence that the gas had dispersed rapidly after the release, and therefore was not a significant hazard. *Id.* at 42. Based on his analysis, the Presiding Officer calculated a base penalty of $20,000 each for Counts 1, 2 and 3.[28] *Id.* at 42. He then considered the other penalty factors and concluded that none of them warranted an adjustment in the penalty amounts. *Id.*

The Presiding Officer calculated a $6,600 penalty for National's alleged failure to submit a written follow-up notice to the Michigan SERC. Although he concurred in the Region's categorization of the violation as gravity level A, he disagreed with its categorization of the violation as extent level 1.[29] He stated that National had "attempted to fulfill its legal duty" and had substantially complied with the law, and therefore, that the violation should be considered extent level 3. After assigning the violation to the appropriate cell on the matrix (which indicates a penalty range of $6,600 to $8,250), he concluded that $6,600 is an appropriate penalty amount, based on the low likelihood of harm from the release.[30] *Id.* at 43.

C. *National's Appeal*

National makes the following arguments in its appeal of the Initial Decision:

First, National argues that the Region's only evidence that National did not telephone the National Response Center until 5:15 p.m. (Count 1) is the Ernesto certification, which is unreliable hearsay and therefore "cannot constitute substantial evidence" of a violation in the

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[26] Level A encompasses releases in an amount more than ten times the reportable quantity. Even though some evidence had been introduced at the trial that the amount of $H_2S$ released was substantially less than 2,100 pounds (*see supra* n.7), the Presiding Officer reasonably relied on the Stipulation of Facts. Tr. 41.

[27] Pursuant to the penalty policy, a delay of two or more hours constitutes a "level 1" violation.

[28] The cell on the matrix recommends a penalty between $20,000 and $25,000.

[29] The Region considered the extent of the violation as level 1 because no report had been received within two weeks of the release. Tr. 103.

[30] The Region did not appeal any of the penalty reductions made by the Presiding Officer.

face of conflicting testimony of a live witness [Hartong]." Appeal Brief at 11 and 14. National claims the certification is "flawed" because Ernesto did not memorialize other reports of hazardous substance releases during the time period the certification purported to cover. *Id.*

Second, National argues that the Region's only evidence that National did not telephone the SERC and the LECP until 6:08 p.m. and 5:30 p.m., respectively (Counts 2 and 3), consisting of telephone logs and memoranda, was "not sufficiently probative to allow its admission into evidence."[31] Appeal Brief at 15-16. Alternatively, National argues that even if the documents are admissible, they do not constitute substantial evidence to support findings of liability. It argues that the PEAS report (SERC notification) is not probative because it "does not purport to represent that [it] reflects the only contact with Respondent on February 14, 1990." *Id.* at 16. It maintains that the Title III Release Notification Form (LEPC notification), while "not as patently deficient" as the PEAS report, is not probative because the Region did not introduce evidence whether the LEPC recorded "preliminary calls which did not provide information concerning the amount of the release." *Id.* at 17.

Third, National argues that the Presiding Officer erred in "discrediting the direct testimony" of its witnesses, Hartong and Gould, in making particular factual findings.[32] It claims that their testimony is credible and should have been given greater weight. *See* Appeal Brief at 19-23.

Fourth, National maintains that the Presiding Officer's finding that it violated EPCRA section 304(c) was not supported by substantial evidence because it is uncontroverted that National mailed a follow-up written notice to Mr. Ken Green of the Michigan Department of Natural Resources (Exhibit RX-2; Tr. 197-199.) and there is no evidence that "K. Green" was not the appropriate SERC contact person in February 1990.

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[31] National claims that the Presiding Officer erred when he ruled that it had waived its objections to the admissibility of CX 2, 4 and 5 on the ground that it had not objected to their admission prior to the hearing, citing *Calhoun v. Bailar*, 626 F.2d 145 (9th Cir. 1980) (hearsay evidence may properly be challenged by a motion to strike at the close of evidence). Appeal Brief at 15. Its argument lacks merit since the record does not indicate that the Presiding Officer issued such a ruling. Although the Presiding Officer admonished National for waiting to raise its objections until the start of the hearing, he ruled on the merits of the objections. *See* Tr. 106 and Initial Decision at 18.

[32] Specifically, National objects to the Presiding Officer's findings that "there is no evidence that respondent had a practice or operating procedure of calling immediately after a release with a later follow-up call"; that Hartong did not testify that he remembered making the morning calls prior to having his memory refreshed by reading a questionnaire he subsequently prepared at the Region's request (*see* RX 3); and that Gould had reported a release of another hazardous substance on February 14 that the NRC failed to document. *See* Initial Decision at 11-13.

Fifth, National argues that even if the Board finds that National violated CERCLA or EPCRA, it should find that the Presiding Officer abused his discretion "by rigidly applying Complainant's Penalty Policy" rather than "evaluat[ing] the facts of the present case in light of the statutory penalty criteria independent of the Penalty Policy as required by the controlling statutory provisions." Appeal Brief at 25. It asks the Board to apply the statutory penalty factors and to determine an appropriate penalty.

Region V filed a response on August 31, 1993. The Region maintains that the record supports the Presiding Officer's findings on all four counts, and therefore, that the Initial Decision should be affirmed on appeal.

## **II.** *DISCUSSION*

A presiding officer has authority to rule on the admissibility of evidence and to decide factual issues in an administrative hearing. *See* 5 U.S.C. § 556(c)(3) and (10) (providing that presiding officers may rule on offers of proof, receive relevant evidence, and make or recommend decisions) and 40 C.F.R. Part 22, Subpart D (Hearing Procedures) and 40 C.F.R. § 22.27(a) (authorizing the presiding officer to issue initial decisions). In this case, after carefully considering all of the conflicting evidence, the Presiding Officer found that Region V has met its burden of proof, and had "established by a preponderance of the evidence," that National had violated CERCLA and EPCRA as alleged in each of the four counts of the complaint. Initial Decision at 37-38. *See also* Initial Decision at 3 and 23. National has not persuaded us that the Presiding Officer's findings with regard to any of the counts were erroneous. Therefore, in accordance with 40 C.F.R. § 22.31(a), we adopt those findings as our own.

### A. *Counts 1-3*

National's arguments on appeal raise overlapping issues concerning the admissibility and probative value of the evidence Region V introduced to support Counts 1-3 of the complaint. These arguments will be addressed below.

First, with regard to admissibility, we conclude that the Presiding Officer did not err when he admitted Region V's documentary evidence in support of all three counts. National's arguments are based upon limitations on the admissibility of hearsay evidence under the Federal Rules of Evidence. However, the rules of evidence that govern this proceeding are the Agency's Consolidated Rules of Practice, not the Federal Rules of Evidence. *In re Bartlett and Company Grain*, FIFRA Appeal No. 86-5, at 6-7 (CJO, Nov. 23, 1988). The Consolidated

Rules of Practice do not exclude hearsay from Agency hearings. Rather, they provide that:

> The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value * * *."

40 C.F.R. § 22.22(a).[33] *See In re The Celotex Corp.*, TSCA Appeal No. 91-3, at 7 (CJO, Dec. 16, 1991); *In re Central Paint and Body Shop, Inc.*, RCRA Appeal No. 86-3, at 5 (CJO, Jan. 7, 1987). The Agency rule is consistent with federal court precedent that hearsay evidence is admissible in an administrative hearing. *Richardson v. Perales*, 402 U.S. 389 (1971); *McClees v. Sullivan*, 879 F.2d 451, 453 (8th Cir. 1989). *Accord, Calhoun v. Bailar*, 626 F.2d 145 (9th Cir. 1980); *McKee v. United States*, 500 F.2d 525, 528 (U.S. Ct. Cl. 1974).[34]

Second, with regard to the weight to be accorded the Region's documentary evidence, National objects to the Presiding Officer's reliance on that evidence to support a finding of National's liability in this case on the ground that it is hearsay and therefore cannot overcome Mr. Hartong's "sworn testimony." Appeal Brief at 11. However, we conclude that National's argument is without merit and that the Presiding Officer's determination was correct. Therefore, as explained below, we find that the Region has established by a preponderance of

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[33] *See In re Sandoz, Inc.*, RCRA (3008) Appeal No. 85-7, at 13-14 (CJO, Feb. 27, 1987) ("[T]he admission of evidence is a matter particularly within the discretion of the administrative law judge * * *.").

[34] Moreover, as the Presiding Officer correctly noted, there is a "well documented and well known" exception to the hearsay rule for government records, which would have provided a basis for the admission of these documents into evidence in this case even if the hearsay rule were generally applied in administrative proceedings. Pursuant to Rule 803(a)(8) of the Federal Rules of Evidence, which governs the admissibility of evidence in federal court litigation, public records and reports "are not excluded by the hearsay rule, even though the declarant is available as a witness." The Fourth Circuit Court of Appeals stated in *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300 (4th Cir. 1984), quoting from *United States v. American Tel. & Tel. Co.*, 498 F. Supp. 353, 360 (D.D.C. 1980), that the policy rationale for the exception is that public records, "by virtue of their being based on legal duty and authority, contain sufficient circumstantial guarantees of trustworthiness to justify their use at trial." The records relied upon by Region V here are precisely the type of records contemplated by Rule 803(a).

In addition, the Region's reliance on the absence of information in the public record to show the nonoccurrence of an event is also contemplated by the Federal Rules of Evidence in Rule 803(a)(10). *See*, for example, *United States v. Bowers*, 920 F.2d 220 (4th Cir. 1990), holding that Internal Revenue Service certificates of payment and computer data are admissible under the public records exception to the hearsay rule to show the "nonoccurrence * * * of a matter" — *i.e.*, the nonfiling of tax returns. *See also United States v. Davis*, 826 F. Supp. 617, 621 (D.R.I. 1993). Thus, it was perfectly appropriate to admit such evidence in this proceeding, with its more liberal evidentiary rules.

the evidence that National violated CERCLA and EPCRA as alleged in the complaint.

It is well settled that "hearsay evidence may be substantial evidence in an administrative proceeding if there are circumstances which give it credibility and probative value to a reasonable mind." *Sanders v. United States Postal Service*, 801 F.2d 1328, 1331 (Fed. Cir. 1986) (Plaintiff's uncorroborated denial of the charges against him does not outweigh statements in investigative and police reports); *McKee v. United States*, 500 F.2d 525, 528 (U.S. Ct. Cl. 1974), citing *Richardson v. Perales*, *supra*. *See also McClees v. Sullivan*, 879 F.2d 451, 453 (8th Cir. 1989) ("Hearsay evidence * * * can constitute substantial evidence if it is 'sufficiently convincing to a reasonable mind[,]' * * *."). Indeed, courts have repeatedly acknowledged that hearsay evidence that has sufficient assurances of "trustworthiness" may overcome sworn testimony. *See McKee* at 528 and cases cited therein.

Thus, the question for this Board is whether Region V's documentary evidence is inherently truthful and more credible than the evidence National offered to counter it.[35] With regard to Counts I-III, Region V met its burden of going forward and proving the alleged violations by presenting contemporaneously prepared incident reports from each of the response agencies charged by law with receiving and maintaining such reports. These reports are made on prepared forms that are aimed at securing key information regarding the nature and source of the release so that a determination can be made whether emergency action is necessary. Each of the three reports states that the release had occurred between 2 p.m. on February 13 and 9 a.m. on February 14. Each report form provides for recording on the face of the report the time the call was received. Here, each report shows a call from National made between 5:15 p.m. and 6:08 p.m. on February 14, more than eight hours after the incident ceased. Nowhere on the face of any of these reports is there any indication of any earlier reporting of the incident. The Region relies upon this evidence in making an affirmative showing that National did not provide "immediate" notification within the meaning of the relevant statutes and regulations.

The Agency also relied on documents from custodians of records from the NRC and the LEPC indicating that a search of their records

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[35] [A]dministrative decisions based on hearsay must be evaluated on a case-by-case basis to determine if the hearsay is inherently truthful and more credible thann evidence offered against it.

*Sanders* at 1331.

showed that they had no record of any earlier reporting by National regarding the incident. As described *supra*, the evidentiary record contains a certification by the Chief of the Computer and Communication Center, NRC, that the NRC's record of the 5:15 p.m. telephone call was the only written record of a telephone call from National to the NRC regarding the February 14 $H_2S$ release.[36] The record also contains an October 28, 1991 letter from the Chairperson of the Wayne County LEPC to Region V stating that the LEPC's record of the 5:30 p.m. telephone call to the LEPC was the only written record of a telephone call from National regarding the same release.[37] Thus, without question, the detailed incident reports, together with the Region's additional documentary evidence, are credible evidence as to when National's February 13-14 $H_2S$ release was officially reported to the responsible CERCLA and EPCRA agencies.

Based on the foregoing, we find that the Region met its burden of going forward with evidence that National violated EPCRA and CERCLA as alleged in the complaint. Our focus now shifts to considering whether National has provided sufficient evidence to rebut the Region's prima facie liability case. We conclude that it has not.

Clearly, none of the documentary evidence provides any support whatsoever for National's assertion. Thus, National sought to rebut the Region's evidence solely with the testimony of an employee, Hartong, who testified that, contrary to the evidence in three agency reports and other documents, he had made calls to each of the three emergency response agencies on the morning of February 14. Mr. Hartong testified that while he could not remember to whom he spoke and what information he gave, he believed that he had fulfilled National's EPCRA and CERCLA reporting obligations. In particular, Mr. Hartong testified that he could not remember "anything specific about the substance of the calls," did not recall asking for or receiving a case number from any of the three response agencies, and did not take notes of any of

[36] National argues that the NRC certification was flawed because it purported to cover all telephone calls from National on February 14 regarding the release of a hazardous substance but did not indicate that National had reported a release of waste pickle liquor on that date. National's Acting Manager for Environmental Control, Dennis Gould, testified that he had reported the waste pickle liquor release. The Presiding Officer interpreted the certification as asserting that only one report had been received on February 14 *with respect to the $H_2S$ release.* Initial Decision at 14-16 and 21. Therefore, he concluded that Gould's testimony did not discredit the certification. The Board finds that the Presiding Officer's interpretation is reasonable.

[37] While there is no express statement by the SERC to the effect that the 5:15 p.m. telephone call was the only one received as to the $H_2S$ release, the PEAS report of that call was sent to Region V in response to an information request from the Region about notifications of the February 14 release. *See* Tr. 77. There is no reason to believe that PEAS had other written records in its files relating to that release but failed to provide them in response to the request.

the supposed conversations. Initial Decision at 5 and 12. Moreover, there was no independent evidence in the record to corroborate Hartong's recollection. *See Id.* at 12 n.3. The Presiding Officer noted, for example, that despite an order from the Presiding Officer, National never produced phone logs or telephone bills which might have corroborated Hartong's recollection. In fact, to the extent that copies of telephone records showing the morning calls would have been relevant, and National chose not to obtain such records from Michigan Bell notwithstanding the Presiding Officer's order to produce telephone records,[38] the Presiding Officer drew a negative inference as to what these records would have shown.

In view of the foregoing, we agree with the Presiding Officer that it is certainly not reasonable to conclude that the three relevant agencies had been notified of the $H_2S$ release before 5 p.m. on February 14. It simply is not credible that all three agencies would have failed to record the morning telephone calls, had they occurred as National claims, and that all three agencies would have recorded the afternoon phone calls without noting that they were follow-up calls. *See* Initial Decision at 13-14 and 31. While it is certainly possible that one of the agencies could have failed to record a morning phone call, the possibility that all three agencies would do so defies belief. This is particularly true given that all the afternoon phone calls were properly recorded.[39]

For all of these reasons, the Presiding Officer concluded that Hartong's testimony was "self-serving" and not credible evidence of when National reported the February 13 $H_2S$ release.

The Board will generally give considerable deference to a presiding officer's determinations as to the credibility to be afforded the testimony of witnesses at a hearing. *See In re Wego Chemical & Mineral Corp.*, TSCA Appeal No. 92-4, at 12 n.9 (CJO, Feb. 24, 1993); *In re Boliden-Metech, Inc.*, TSCA Appeal No. 89-3, at 12 (CJO, Nov. 21, 1990) ("[A] factual determination involving issues of credibility is ordinarily entitled to deference absent compelling reasons to the contrary.") Therefore, in reaching its decision, the Board has given weight to the Presiding Officer's determination which obviously accorded little credibility and persuasiveness to Hartong's testimony. We find that,

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[38] *See* n.23, *supra.*

[39] We note further that the record contains no credible evidence that National had a practice of calling response agencies as soon as it became aware of a release and then calling a second time with additional information. Although the LEPC records reveal that National orally notified it of eleven releases between June 20, 1989, and July 8, 1991, there is no record of any occasion when National made two reports for the same release. *See* Initial Decision at 22.

given the obvious questions as to Hartong's credibility, such testimony does not outweigh the consistent and credible documentary evidence produced by the Region. Thus, we find the Region's evidence outweighs Hartong's testimony and that the Region met its burden of persuasion as to the issue of liability.

Finally, we conclude that the Presiding Officer did not err when he concluded that the proceedings had been fair, notwithstanding the absence of government witnesses at the hearing. As the Presiding Officer discussed in detail in his Initial Decision, National was afforded the opportunity to bring in witnesses from the relevant government agencies but chose not to avail itself of that opportunity.[40] *Cf. Richardson v. Perales*, 402 U.S. 389, 405-406 (1971) (social security disability claimant who did not request subpoenas for physicians whose medical reports were admitted into evidence may not complain he was denied the right of confrontation and cross-examination). *See also Williams v. Zuckert*, 371 U.S. 531 (1963); *Metal-Cote, Inc. v. City of Detroit*, 789 F. Supp. 235 (E.D. Mich. 1992).

For the foregoing reasons, we adopt the Presiding Officer's findings that National did not notify the federal, State and local response agencies of the release on the morning of February 14, and, based on those findings, we conclude that it violated CERCLA and EPCRA as alleged in Counts 1, 2 and 3.

B. *Count 4*

Contrary to National's contention, we do not find that the Presiding Officer lacks an adequate evidentiary basis for finding that the SARA Title III Unit of the Michigan DNR had been designated to receive follow-up reports on hazardous releases, and that it had not received such a notice from National. As previously discussed, the October 1, 1990 letter from Kent Kanagy of the SARA Title III Unit states that he reviewed the files of that office for such incident reports. CX 6. Hann testified that the SARA Title III Unit is the appropriate office to receive such notices. *See* Tr. 100-102. In the absence of any evidence to the contrary, the Presiding Officer did not err when he found that the notice should have been sent there.

C. *Civil penalty*

National maintains that the Presiding Officer erred in his "rigid application of the matrix" to determine civil penalty amounts. Appeal Brief at 27. It maintains that since the Penalty Policy is not a regulation promul-

[40] *See* n.17, *supra* and accompanying test.

gated in accordance with the Administrative Procedure Act, its application, "without independent review of statutory criteria," is not only unlawful but inequitable. Appeal Brief at 27. We find no error in the Presiding Officer's penalty analysis.

The Agency has issued penalty policies to create a framework whereby the decisionmaker can apply his discretion to the statutorily-prescribed penalty factors, thus facilitating the uniform application of these factors. *In re ALM Corporation*, TSCA Appeal No. 90-4 (CJO, Oct. 11, 1991). As we stated in the *Genicom* decision, a penalty policy "reasonably implements the statutory criteria, with a range of penalties to reflect differing circumstances." *In re Genicom Corporation*, EPCRA Appeal No. 92-2 (EAB, Dec. 15, 1992). Therefore, a presiding officer may properly refer to such a policy as a means of explaining how he arrived at his penalty determination. *See In re Sandoz, Inc.*, RCRA (3008) Appeal No. 85-7, at 8 (CJO, Feb. 27, 1987).[41] Agency regulations require that a presiding officer consider any penalty policy issued under the Act, although they do not mandate that he adhere to it.[42] *See* 40 C.F.R. § 22.24.

The Presiding Officer adequately considered the statutory penalty factors in making his penalty determination. He could not have made it more clear, both during the hearing and in his Initial Decision, that "the penalty policy is not going to take precedence over the statute." Tr. 27. He stated that the penalty policy is a "guideline" and that his duty is to assess a penalty in accordance with the statutory criteria. Initial Decision at 39.

Absent unusual circumstances, if the Presiding Officer's assessed penalty falls within the range of penalties determined through the proper application of an Agency penalty policy, the Board will not substitute its judgment for that of the presiding officer. *See In re Stallworth Timber Co., Inc.*, RCRA (3008) Appeal No. 89-1, at 11 (CJO, July 11, 1991).[43] Here, a total penalty of $66,600 clearly falls within that range. National has not shown that any unusual circumstances exist here. We therefore affirm the Presiding Officer's penalty assessment.

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[41] The presiding officer may satisfy his duty of articulating the reasons for his penalty determination by explaining how the facts of the particular case fit the applicable penalty policy. *In re Sandoz, Inc.* at 8.

[42] The Penalty Policy that governs these violations provides that it is "immediately applicable * * * regardless of the date of the violation." National's contention that the penalty policy may not be applied retroactively is without merit. As the Presiding Officer stated, the policy merely represents EPA's interpretation of the statutory criteria. No previous, potentially conflicting, policy was in effect at the time of the violations. *See* Initial Decision at 39.

[43] *See In re Bell & Howell Co.*, TSCA-V-C-033, 034 and 035, at 19 (CJO, Dec. 2, 1983) ("[A]bsent unusual or other compelling circumstances, it would be inappropriate on appeal to change the penalty" if it falls with the range set forth in Agency penalty guidance).

## III. *CONCLUSION*

For the reasons stated above, we hereby affirm the Initial Decision assessing a total civil penalty of $66,600 against National, consisting of a civil penalty of $20,000 each for the violations alleged in Counts 1, 2 and 3 of the complaint, and a civil penalty of $6,600 for the violation alleged in Count 4. Payment shall be made within sixty (60) days after receipt of this Order, unless otherwise agreed by the parties, by sending a certified or cashier's check, payable to the Treasurer, United States of America, to:

U.S. EPA - Region 5
Regional Hearing Clerk
P.O. Box 70753
Chicago, IL 60673

So ordered.