UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
LISTON BRICK OF CORONA,	)	**DOCKET NO. CAA-9-2005-0018**
	)	
	)	
RESPONDENT	)	

INITIAL DECISION

Pursuant to Section 113(d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7413(d), Liston Brick of Corona is assessed a civil administrative penalty of $116,402 for violations of Sections 112 and 114 of the CAA, 42 U.S.C. §§ 7412 and 7414, and its implementing regulations found at 40 C.F.R. part 63, subpart RRR, §§ 63.1500-63.1520, "National Emission Standards for Hazardous Air Pollutants for Secondary Aluminum Production."

Issued: December 18, 2007

Before: Barbara A. Gunning
Administrative Law Judge

Appearances:

For Complainant: Daniel Reich, Esquire
David Kim, Esquire
U.S. EPA, Region IX
Office of Regional Counsel
75 Hawthorne Street
San Francisco, California 94105

For Respondent: Jeffrey M. Curtis, Esquire
Varner & Brandt, LLP
3750 University Avenue, #610
Riverside, California 92501

I. PROCEDURAL HISTORY

This civil administrative penalty proceeding arises under the authority of 113(d) of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. § 7413(d). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. part 22.

On September 30, 2005, the United States Environmental Protection Agency ("the EPA"), Region IX ("Complainant" or "the Region"), filed a four-count Complaint and Notice of Opportunity for Hearing ("Complaint") against Liston Brick of Corona ("Respondent" or "Liston") pursuant to Section 113(d) of the CAA.[1/] The Complaint alleges violations of Sections 112 and 114 of the CAA, 42 U.S.C. §§ 7412 and 7414, and the federal standards for emissions from secondary aluminum production operations at 40 C.F.R. part 63, subpart RRR, §§ 63.1500-.1520, which were promulgated pursuant to Sections 112 and 114 of the CAA. The Region proposes a civil administrative penalty of $120,001.

Specifically, Count I of the Complaint alleges that from March 24, 2003 to November 17, 2004, Respondent failed to comply with performance test requirements by failing to submit a site-specific test plan, as described in 40 C.F.R. § 63.1511, in violation of Section 112 of the CAA. Count II alleges that from March 24, 2003 to the present, Respondent failed to conduct an initial performance test in violation of Section 112 of the CAA and 40 C.F.R. § 63.1511. Count III alleges that Respondent failed to submit a complete response to Requests for Information from the Complainant in violation of Section 114 of the CAA. Count IV alleges that Respondent failed to respond to a Request for Information from the Complainant in violation of Section 114 of the CAA.

Respondent filed an Answer To Complaint and Request for Hearing ("Answer") on November 1, 2005.[2/] Respondent denies each

---

[1/] The Complaint was amended as a matter of right on October 14, 2005. *See* 40 C.F.R. § 22.14(c). The term "Complaint" hereafter refers to Complainant's Amended Complaint.

[2/] Respondent is afforded 20 additional days from the date of service of the amended complaint to file its answer. *See* 40 C.F.R. § 22.14(c).

and every allegation.[3/]

Pursuant to the undersigned's Prehearing Order, entered March 3, 2006, Complainant submitted its Prehearing Exchange on April 28, 2006, Respondent submitted its Prehearing Exchange on June 1, 2006, and Complainant submitted a Rebuttal Prehearing Exchange on June 16, 2006.

On June 16, 2006, Complainant also submitted a Motion for Accelerated Decision on Liability ("Motion for Accelerated Decision") on all four counts. On June 30, 2006, Respondent submitted its Opposition to Complainant's Motion for Accelerated Decision on Liability ("Opposition to Motion for Accelerated Decision"), and on July 10, 2006 Complainant filed a Reply to Respondent's Opposition To Complainant's Motion for Accelerated Decision ("Reply to Respondent's Opposition").

An Order on Complainant's Motion for Accelerated Decision on Liability ("Order on Motion for Accelerated Decision") was entered on August 10, 2006.[4/] I granted accelerated decision in

---

[3/] Additionally, in its Answer, Respondent asserted a host of affirmative defenses, including, but not limited to: failure to state a claim upon which relief may be granted; laches; estoppel; waiver; unclean hands; statute of limitations; causation by act(s) of God, an act of war, or by the acts or omissions of a third party; cessation of Respondent's operations; and a good faith belief of compliance. Answer at ¶¶ 33-43. Respondent has the burden to prove any affirmative defense(s) it wishes to pursue. 40 C.F.R. § 22.24(a). *See, e.g., In re Norman C. Mayes* 2004 EPA ALJ LEXIS 5 at *35-36 (ALJ 2004)(upon Complainant's showing of a prima facie case, "the burden of production and persuasion shifts to respondent to establish by a preponderance of the evidence the applicability of any affirmative defenses he wishes to raise.") With regard to liability, Respondent did not pursue these affirmative defenses at the hearing or in its post-hearing brief; however, Respondent did rely on some of these allegations, such as its cessation of operations, in its argument for mitigating the penalty.

[4/] The Order on Motion for Accelerated Decision emphasizes that a motion for accelerated decision is akin to a motion for summary judgment, as the party filing the motion (i.e., the "movant") has the burden of showing that no genuine issue of material fact exists. Order on Motion for Accelerated Decision at 1-3. The Order also explains that in considering such a motion, the Presiding Officer must construe the evidentiary material and

favor of Complainant for Count I (failure to comply with the performance test requirements of 40 C.F.R. § 63.1511) and Count II (failure to conduct an initial performance test as required by 40 C.F.R. § 63.1511), as limited by Complainant's Motion, which sought only a finding that Respondent is liable for its failure to timely submit a site-specific test plan by March 24, 2003 and for its failure to timely conduct an initial performance test by March 24, 2003, respectively.[5/] Order on Mot. for Accelerated Decision at 7. *See* Mot. for Accelerated Decision at 15. However, I denied accelerated decision on Count III (failure to submit a complete response to an information request in violation of CAA § 114) and Count IV (failure to respond to an information request in violation of CAA § 114).[6/] Order on Mot. for Accelerated Decision at 9-11.

---

reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *Id*. at 2. Summary judgment on a matter is inappropriate when contradictory inferences may be drawn from the evidence. *Id.* Section 22.20(a) of the Rules of Practice authorizes the Administrative Law Judge ("ALJ"), as the Presiding Officer, to "render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a).

[5/] Complainant's motion did not request the undersigned to make a determination as to the length of time of the violations as alleged in Counts I and II of the Complaint. Accordingly, the Order on Motion for Accelerated Decision did not make a determination as to whether the violations continued until November 17, 2004 and to the present as alleged in Counts I and II of the Complaint, respectively. Order on Motion for Accelerated Decision at 7.

[6/] As previously explained in the Order on Motion for Accelerated Decision, "Complainant's myriad information requests and the responses thereto represent a daunting amount of documents at issue on a topic - 'insufficiency' - that often lends itself toward contradictory inferences . . . [and these] facts [are] better resolved within the context of an evidentiary hearing." Order on Motion for Accelerated Decision at 8, citing *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979) (even if the presiding judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be fully developed at trial).

An Order Scheduling Hearing was entered on October 24, 2006. That Order directed the parties to file a joint set of stipulated facts, exhibits, and testimony on or before January 10, 2007. Order Scheduling Hearing at 2. The hearing was scheduled to begin on Tuesday, January 23, 2007 in Los Angeles, California, continuing if necessary on January 24, 25, and 26, 2007.

On January 8, 2007, Complainant filed a set of Joint Stipulated Facts and Exhibits ("Joint Stipulations"). The parties stipulated that Liston is a corporation under the laws of the State of California and conceded the liability determinations made in the undersigned's Order on Motion for Accelerated Decision. Joint Stipulations at 1. The parties also stipulated to the authenticity of all Complainant's Exhibits and of all Respondent's Exhibits except for Exhibits 4 and 5. Joint Stipulations at 2.[7/]

An evidentiary hearing was held from January 23 through 25, 2007, in Pasadena, California. Both parties were present at the hearing and had the opportunity to put forward evidence and to cross-examine witnesses.[8/]

On March 19, 2007, Complainant submitted Complainant's Motion to Conform the Transcript to the Testimony ("Motion to Conform the Transcript") and a Memorandum in Support thereof. Respondent did not respond to nor oppose Complainant's motion. Complainant's Motion to Conform the Transcript is hereby **GRANTED**, and the record of proceeding for the evidentiary hearing shall be

---

[7/] Although the Joint Stipulations state "[t]he parties stipulate to the *admissibility*" of the described exhibits, an extensive discussion amongst the parties and the undersigned during a prehearing conference call, held on January 11, 2007, clarified that the parties intended to provide stipulation as to only the *authenticity* of the exhibits. Joint Stipulations at 2 (emphasis added).

[8/] Complainant has the burdens of presentation and persuasion in establishing that the alleged violations occurred and that the $120,001 penalty sought is appropriate. 40 C.F.R. §22.24(a). Similarly, Respondent has the burden of presenting and proving any defense to the allegations set forth in the Complaint and any response or evidence with respect to the appropriate penalty. *Id*. The ALJ, as the Presiding Officer, is responsible for determining "[e]ach matter of controversy . . . upon a preponderance of evidence." 40 C.F.R. §22.24(b).

changed accordingly.[9/]

Respondent and Complainant each filed post-hearing briefs.[10/] Complainant subsequently filed Complainant's Reply to Respondent's Proposed Finding of Fact; Conclusions of Law and Supporting Brief ("Complainant's Post-Hearing Reply Brief").

All Orders previously entered in this proceeding are incorporated by reference into this Initial Decision. For the reasons both previously stated and discussed below, having fully considered the record in the case, the arguments of counsel and Respondent, and being fully advised, I find Respondent to be in violation of the CAA and its implementing regulations as alleged in Counts I through IV of the Complaint. For these violations, Respondent shall pay a civil administrative penalty in the amount of $116,402.

II. DISCUSSION

A. Statutory and Regulatory Background

Congress enacted the Clean Air Act, 42 U.S.C. §§ 7401-7671q, in 1970, as amended, to promote public health and welfare through the prevention and control of air pollution. 42 U.S.C. § 7401(b). Specifically, Section 101(b) of the CAA enumerates four purposes of the CAA:

> (1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;
>
> (2) to initiate and accelerate a national research and development program to achieve the prevention and control of pollution;

[9/] Thus, all citations to the transcript in this Order refer to the transcript as amended to conform to the actual testimony.

[10/] The Regional Hearing Clerk for EPA Region IX ("Region IX RHC") received Complainant's Trial Brief, Proposed Findings of Fact, Conclusions of Law, Order and Attachment("Complainant's Post-Hearing Brief") on May 10, 2007. The Region IX RHC also received Respondent's Proposed Findings of Fact; Conclusions of Law and Supporting Brief ("Respondent's Post-Hearing Brief") on May 10, 2007.

> (3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and
>
> (4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

42 U.S.C. § 7401(b). A primary goal of the CAA is "to encourage or otherwise promote reasonable Federal, State, and local governmental actions . . . for pollution prevention." CAA § 101(c).

Section 112 of the CAA is devoted to the regulation of hazardous air pollutants ("HAPs"), which are believed to cause adverse health or environmental effects. *See* 65 Fed. Reg. 15689, 15691 (March 23, 2000). Specifically, CAA Section 112(d) provides that the EPA Administrator ("the Administrator") shall promulgate regulations establishing emissions standards for all HAPs, as listed in CAA Section 112(b), and these emissions standards are known as National Emissions Standards for Hazardous Air Pollutants ("NESHAPs"). CAA § 112(d)(1). Section 112(d) further provides that the NESHAPs must reflect:

> the maximum degree of reduction in emissions [of the HAPs] . . . that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies.

CAA § 112(d)(2). NESHAPs are created for each category or subcategory of "major sources" and "area sources" of HAPs, as designated by the Administrator.[11/] CAA § 112(c)-(d).[12/]

[11/] The terms "major source" and "area source" are defined in CAA § 112(a), and such definitions are discussed with regard to jurisdiction, *infra*.

[12/] Pursuant to CAA § 112(c)(3), the Administrator devises a list for each category or subcategory of area sources which the Administrator finds present a threat of adverse effects to human

Accordingly, pursuant to Section 112(d) of the Act, the EPA promulgated the NESHAP for new and existing sources at secondary aluminum production facilities[13/] ("Secondary Aluminum Emission Standards") as a final regulation on March 23, 2000. 65 Fed. Reg. 15689, 15710. EPA promulgated amendments to the Secondary Aluminum Emission Standards on September 24, 2002, and again on December 30, 2002. 67 Fed. Reg. 58787 and 67 Fed. Reg. 79807, respectively. The Secondary Aluminum Emission Standards are codified at 40 C.F.R. part 63, subpart RRR.

The Secondary Aluminum Emission Standards require owners or operators of secondary aluminum production facilities to achieve compliance with the emission limit requirements set forth at 40 C.F.R. § 63.1505, and it prescribes that such compliance occur by March 24, 2003.[14/] 40 C.F.R. § 63.1501(a). Additionally, the Secondary Aluminum Emission Standards mandate owners or operators of secondary aluminum production facilities to follow, *inter alia*, various monitoring, testing and compliance demonstration requirements and procedures. *See* 40 C.F.R. §§ 63.1510-.1512.

Under the regulations, secondary aluminum facilities may emit a variety of pollutants, including particulate matter potentially containing several metals, acid gases such as hydrogen chloride and chlorine, and organic compounds such as dioxins and furans ("D/F"), within the limitations set forth at 40 C.F.R. § 63.1505. 40 C.F.R. § 63.1504; *see* Motion for Accelerated Decision at 2. It is undisputed that a primary regulatory purpose of the NESHAP is to control emissions of D/F, which are suspected to cause serious developmental effects in animals and humans. *Id.* (citing 64 Fed. Reg. 6949 (Feb. 11, 1999)). Exposure to D/F is especially harmful to children, as they are affected by exposure levels that are not toxic to adults. Transcript of Hearing from January 23-25, 2006 ("Tr.")

---

health or the environment.

[13/] A secondary aluminum production facility is defined, in part, to include any establishment using aluminum scrap, dross or clean charge as raw material and performing processes, including thermal chip drying. *See* 40 C.F.R. §§ 63.1500(a), .1503.

[14/] Existing sources were thus given three years from the date of the final rule's promulgation to comply with the NESHAPs, while new sources that began construction or reconstruction after February 11, 1999 were required to comply with the standards by the date of promulgation or upon startup, whichever was later. 65 Fed. Reg. at 15691.

at 116[15/], discussing 64 Fed. Reg. 6946, 6949 (proposed Feb. 11, 1999); *see* Compl.'s Post-Hr'g Br. at 2. The Secondary Aluminum Emission Standards has a D/F limit that is very low, in the order of one millionth of a gram per ton of aluminum charged, because of this HAP's potent health effects. Tr. at 659.

In addition to limiting the amount of D/F that a source may emit, the Secondary Aluminum Emission Standards require, in part, that a performance test be conducted under specified conditions to ensure that the D/F emissions stay below the regulatory standard. *See* 40 C.F.R. §§ 63.1505(c),(I) and .1511(b). Specifically, the "Performance test/compliance demonstration general requirements," 40 C.F.R, §§ 63.1511(a) and (b), require, *inter alia*, that a source subject to the NESHAP have EPA approve a site specific plan and conduct an initial performance test:

> (a) *Site-specific plan*. Prior to conducting any performance test required by this subpart, the owner or operator must prepare a site-specific test plan which satisfies all of the requirements, and must obtain approval of the plan (by the Administrator of the EPA) pursuant to the procedures, set forth in § 63.7(c).
>
> (b) *Initial Performance Test*. Following approval of the site-specific plan, the owner or operator must demonstrate compliance with each applicable emission, equipment, work practice, or operational standard for each affected source and emission unit, and report the results in the notification of compliance status report as described in § 63.1515(b). The owner or operator of any existing affected source for which an initial performance test is required to demonstrate compliance must conduct this initial performance test no later than the date for compliance established by § 63.1501(a). . . .

[15/] Mr. Stanley Tong is an environmental engineer employed with EPA Region IX's Air Division Rulemaking Office and is the Region's point of contact for the Secondary Aluminum Emission Standards. Tr. at 32-33. At the hearing, Mr. Tong was a fact witness as to his direct involvement in this case and was also qualified as an expert witness regarding conducting performance tests. Tr. at 45-46, 85-86, 161.

> Except for the date by which the performance test must be conducted, the owner or operator must conduct each performance test in accordance with the requirements and procedures set forth in § 63.7(c). Owners or operators of affected sources located at facilities which are area sources are subject only to those performance testing requirements pertaining to D/F. . . .
>
> > (1) the owner or operator must conduct each test while the affected source or emission unit is operating at the highest production level with charge materials representative of the materials processed by the unit and, if applicable, at the highest reaction flux rate. . . .

40 C.F.R. §§ 63.1511(a)-(b). *See* Mot. for Accelerated Decision at 3. Moreover, the "Performance test/compliance demonstration requirements and procedures" of the Secondary Aluminum Emission Standards require that thermal chip dryers be tested for D/F emissions. 40 C.F.R. § 63.1512(b); Mot. for Accelerated Decision at 3.

Section 114(a)(1) of the CAA grants EPA broad authority to require any person who owns or operates any emission source subject to CAA § 112 to provide various information related to enforcement of the CAA and the regulations promulgated pursuant thereto. Indeed, Section 114(a)(1) provides that the Administrator may, among other things, require such owners or operators to keep and maintain records, make reports, install and operate maintained monitoring equipment and use approved emissions sampling techniques. CAA § 114(a)(1). Furthermore, CAA Section 114(a)(1) grants the Administrator broad authority to gather this information, as the Administrator can require owners and operators to provide this and "such other information as the Administrator may reasonably require" at any time. CAA § 114(a)(1). The EPA seeks such information from owners and operators of emissions sources by issuing an information request pursuant to CAA § 114 ("Section 114 Information Request"). The EPA uses its information gathering authority to determine which NESHAP requirements are applicable to a particular source, if any, and, in turn, to determine a source's compliance with the NESHAP requirements.

Section 113(d) of the CAA authorizes EPA to issue an administrative penalty order to enforce the requirements or prohibitions contained in CAA Sections 112 and 114 and any regulations promulgated pursuant thereto. Such a CAA penalty order may assess a civil penalty up to $27,500 per day per violation for each violation occurring between January 31, 1997 and March 15, 2004, and up to $32,500 per day per violation for each violation occurring after March 15, 2004.[16/] CAA § 113(d)(1); 40 C.F.R. part 19.

B. Jurisdiction

Section 113(d)(1) of the CAA grants the EPA Administrator authority to:

> issue an administrative order against any person assessing a civil administrative penalty . . . whenever, on the basis of any available information, the Administrator finds that such person –-
>
> . . .
>
> (B) has violated or is violating any . . . requirement or prohibition of this subchapter [Subchapter I - Programs and Activities - CAA §§ 7401-7515]. . . including, but not limited to, a requirement or prohibition of any rule, order, waiver, permit or plan promulgated, issued, or approved under this chapter . . .
>
> . . .

CAA § 113(d)(1); *see* 40 C.F.R. part 63 subpart RRR. An

[16/] While CAA § 113(d) states that the Administrator may assess a civil penalty of up to $25,000 per day of violation, the Debt Collection Improvement Act ("DCIA") and its implementing regulations set forth at 40 C.F.R. part 19 ("the Civil Monetary Inflation Adjustment Rule") provide for a ten percent increase in the new maximum authorized penalty under CAA § 113(d) for violations occurring between January 31, 1997 and March 15, 2004, and a thirty percent increase in the new maximum authorized penalty for violations occurring after March 15, 2004, respectively. 40 C.F.R. part 19.

administrative penalty assessed under CAA § 113(d)(1) shall be assessed by the Administrator by an order made after opportunity for a hearing on the record and in accordance with sections 554 and 556 of Title 5, commonly known as the Administrative Procedure Act. CAA § 113(d)(2)(A).

Pursuant to 40 C.F.R. § 22.1(a)(2), the Rules of Practice "govern all administrative adjudicatory proceedings for . . . [t]he assessment of any administrative civil penalty under section[] 113(d) . . . of the Clean Air Act, as amended." Further, the Rules of Practice grant an ALJ, such as myself, jurisdiction to preside in an administrative adjudication until an initial decision becomes final or is appealed. 40 C.F.R. § 22.4(c).

Thus, should the Administrator have jurisdiction over a person under any of the sections or subsections of CAA Subchapter I, and should that person be found liable for violating any of the Subchapter I sections or subsections, then the Administrator has jurisdiction to assess a civil administrative penalty against the person for the CAA violations alleged.

Respondent has admitted that it is a corporation incorporated under the laws of the State of California, and is thus a "person" for purposes of CAA jurisdiction. Answer ¶ 12; CAA § 302(e), 42 U.S.C. § 7602(e).[17/] At issue here are four alleged Counts of CAA violations, two of which invoke CAA Section 112 and two of which invoke CAA Section 114. EPA's jurisdiction over Respondent under each Section is discussed, in turn.

1. CAA § 112(d) Covers an "Owner or Operator" of a "Secondary Aluminum Production Facility" and Requires Compliance with the Emissions Standards Set Forth At 40 C.F.R. Part 63 Subpart RRR

Section 112 of the CAA regulates HAPs, which are enumerated as such in subsection (b). As noted above, the EPA, by promulgating regulations, specifies NESHAPs for each category or subcategory of major sources and area sources of HAPs. CAA § 112(c)-(d); *see* 40 C.F.R. part 63, subpart RRR. The term "major source" means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in

---

[17/] The term "person" is broadly defined under the CAA to include, *inter alia*, an individual, corporation, partnership, state, or municipality. CAA § 302(e).

the aggregate, 10 tons per year ("tpy") or more of any HAP or 25 tpy or more of any combination of HAPs. CAA § 112(a)(1). A "stationary source" is defined as any building, structure, facility, or installation which emits or may emit any air pollutant. CAA § 112(a)(3), citing CAA § 111(a), 42 U.S.C. § 7411(a). The term "area source" means any stationary source of HAPs that is not a major source. CAA § 112(a)(2).

Pursuant to CAA § 112(c)-(d), CAA jurisdiction incorporates the requirements of the regulatory NESHAPs established by the EPA Administrator for various categories of major sources and area sources of HAPs. One such emission source category is secondary aluminum production facilities. The NESHAP for secondary aluminum production (the "Secondary Aluminum Emission Standards") is promulgated at 40 C.F.R. part 63 subpart RRR, pursuant to CAA § 112. The requirements of the Secondary Aluminum Emission Standards apply to the "owner or operator of each secondary aluminum production facility as defined in [40 C.F.R.] § 63.1503." 40 C.F.R. § 63.1500(a). Under CAA Section 112(a)(9), an "owner or operator" is "any person who owns, leases, operates, controls, or supervises a stationary source." The Secondary Aluminum Emission Standards define "secondary aluminum production facility" as:

> any establishment using clean charge, aluminum scrap, or dross from aluminum production, as the raw material and performing one or more of the following processes: scrap shredding, scrap drying/delacquering/decoating, thermal chip drying, furnace operations (*i.e.,* melting, holding, sweating, refining, fluxing, or alloying), recovery of aluminum from dross, in-line fluxing, or dross cooling.

40 C.F.R. § 63.1503.

"Clean charge" means:

> furnace charge materials including molten aluminum, T-bar, sow, ingot, billet, pig, alloying elements, aluminum scrap *known by the owner to be entirely free of paints, coatings, and lubricants*; uncoated/unpainted aluminum chips that have been thermally dried or treated by a centrifugal cleaner . . .

40 C.F.R. § 63.1503. (emphasis added). Moreover, "aluminum

scrap" means "fragments of aluminum stock removed during manufacturing (*i.e.*, machining), manufactured aluminum articles or parts rejected or discarded and useful only as material for reprocessing, and waste and discarded material made of aluminum." 40 C.F.R. § 63.1503.

Any stationary source subject to the Secondary Aluminum Emission Standards must, *inter alia,* have the EPA approve a site-specific test plan and must conduct a performance test.[18/] 40 C.F.R. § 63.1511(a),(b). The CAA grants EPA jurisdiction to bring a civil administrative proceeding against a stationary source subject to 40 C.F.R. part 63 subpart RRR for any violations of those Secondary Aluminum Emission Standards. CAA § 113(d); 40 C.F.R. part 63 subpart RRR.

a) Respondent is an Owner or Operator of an Secondary Aluminum Production Facility, and is Thus Subject to CAA § 112 and the Secondary Aluminum Emission Standards at 40 C.F.R. Part 63 Subpart RRR

Respondent, a person, admitted in its Answer that it owns and operates a facility at 3710 Temescal Canyon Road in Corona, CA 92882 ("Facility") where, among other things, it produces secondary aluminum. Answer ¶¶ 12-13. For example, as part of its manufacturing process, Respondent's Facility has a smelter that melts scrap to make aluminum ingots. Compl. Ex. 7, response 5.

The Facility is comprised of multiple buildings that contain offices and various pieces of equipment, such as furnaces, thermal chip dryers, an aluminum shredder, and a baghouse. *See* Compl. Exs. 7, 10, 15. Aluminum scrap is charged into a thermal chip dryer and into a furnace. Tr. at 100-04, 164-65, 174-75; Compl. Ex. 27. Additionally, as part of the process of melting scrap to produce secondary aluminum at the Facility, emissions from the thermal chip dryer and furnace enter common ducting leading to the baghouse before they are released into the air.[19/]

[18/] Area sources must conduct a performance test pertaining to D/F. 40 C.F.R. § 63.1511(b); Tr. at 112. Furthermore, major sources must conduct additional tests, including tests for dioxin and furans, particulate matter, total hydrocarbons, and hydrogen chloride and must meet additional requirements under the NESHAPs. 40 C.F.R. § 63.1511(b); Tr. at 112.

[19/] Where there are paints, coatings, and lubricants on the aluminum scrap, D/F, which are HAPs, may be emitted from the

Tr. at 104. *See* Answer ¶ 13. Thus, the Facility meets the statutory definition of a "stationary source."[20/] CAA § 112(a)(3), citing CAA § 111(a). Moreover, because the Respondent owns and operates the Facility, Respondent is an "owner or operator" of a stationary source under the CAA. CAA Section 112(a)(9).

The record is replete with evidence that Respondent's Facility uses aluminum scrap as the raw material for preforming functions such as scrap shredding, thermal chip drying, and furnace operations. Tr. at 164-65, 174-75, 465, 679-81; Compl. Ex. 27; *see* 40 C.F.R. § 63.1503. Such uses by a stationary source make Respondent's Facility a secondary aluminum production facility subject to the jurisdiction of CAA § 112 and the Secondary Aluminum Emission Standards, at 40 C.F.R. part 63 subpart RRR.[21/] Moreover, in its Answer, at the hearing, and in its post-hearing brief, Respondent admits that it is a secondary aluminum production facility.[22/] Resp.'s Post-Hr'g Br. at 1-3; *see* Answer ¶ 13; Tr. at 401, 409-10, 590. As emphasized by Mr. Tong, an expert in performance tests under the Secondary Aluminum Emission Standards, compliance with the Secondary Aluminum

---

process. Tr. at 103-11.

[20/] Respondent did not contest at the hearing that it is an area source. Evidence shows that it is. Notably, the record does not demonstrate that Respondent is not a major source, and Complainant leaves this possibility unexplored.

[21/] Although the regulatory definition of "secondary aluminum production facility" details a possible exemption from that regulatory definition for "aluminum die casting facilities, aluminum foundries, and aluminum extrusion facilities . . . *if* the only materials they melt are *clean charge*, customer returns, or internal scrap, *and if* they do not operate sweat furnaces, *thermal chip dryers*, or scrap dryers/delacquering kilns/decoating kiln," Respondent did not claim nor demonstrate that it is such an exempt facility. 40 C.F.R. § 63.1503 (emphasis added).

[22/] Respondent raises the defense that it is no longer a secondary aluminum production facility, and thus falls outside the scope of CAA jurisdiction; however, Respondent previously admitted jurisdiction and, as discussed, *infra*, I find that such jurisdiction continued through September 2006, a time subsequent to the duration of all the violations alleged in this matter. *See* Resp.'s Post-Hr'g Br. at 1-2, 5-7, 13; Answer ¶ 13; Opp'n to Mot. for Accelerated Decision at 11; Tr. at 402, 409-10.

Emission Standards requires, *inter alia,* a secondary aluminum production facility to test each piece of processing equipment that emits HAPs, such as D/F, to make sure each piece of equipment complies with its applicable emissions standard.[23/] Tr. at 115-16, 165; *see* Tr. at 45-46. I reject Mr. Hall's contention that Liston was only required to test at one source, rather than three sources as determined by the Region.[24/] I acknowledge that the Region did agree to single port testing at one location, but I emphasize that this agreement was conditioned on Respondent's agreement to make clarifications. By not responding to the May 17, 2005 information request, Respondent failed to satisfy the conditions that would activate the Region's agreement. Thus, Respondent was required to test at three source locations.

As will be discussed in greater detail, *infra*, Respondent became subject to compliance with the Secondary Aluminum Emissions Standards on their effective date of March 24, 2003, and jurisdiction continued through September 2006, when Respondent surrendered its operating permits to the South Coast Air Quality Management District ("SCAQMD") as part of a settlement agreement with the SCAQMD and thus permanently shut down. Tr. at 417. *See* Tr. At 138-39*; In re Pepperell Assoc.*, 9 E.A.D. 83 (EAB 2000), *aff'd by Pepperell Assocs. v. U.S. Envtl. Prot. Agency*, 246 F.3d 15 (1st Cir. 2001).

[23/] Mr. Tong described the equipment-specific emissions standards in the context of the rationale for the Region's desire that Liston test at three locations (ports) instead of just one. *See* Tr. at 165; Compl. Ex. 19.

In its Answer Respondent admitted that it was required to submit a site-specific test plan but maintained that such plan was "limited to involving only one port." Answer ¶19.

[24/] Mr. Craig Hall is the Vice President and General Manager of Liston. Tr. at 375-76. He has been General Manager since 1992 and Vice President since October of 2001. Tr. at 376. He is responsible for the oversight of all secondary aluminum production, of all employees and office staff, of sales, of the trucking process, of maintenance and quality control at the Facility; basically oversight of the complete operation. Tr. at 376, 398-99. As of October 2001, when he became Vice President, he became responsible for Liston's finances. Tr. at 376-77. His responsibilities include regulatory compliance and "[t]o abide by whatever regulatory issues there were, to try to stay in compliance to the best of my knowledge." Tr. at 377.

2. An "Owner or Operator" of an Emission Source Subject to Emission Standards Under CAA § 112(d) is Also Subject to CAA § 114

As mentioned above, Section 114(a)(1) of the CAA grants EPA broad authority to require any person who owns or operates any emission source subject to CAA § 112 to provide a range of information related to enforcement of the CAA and the regulations promulgated pursuant thereto. Specifically, Section 114(a)(1) provides that the Administrator may require such owners or operators:

> on a one-time, periodic or continuous basis to -
>
> (A) establish and maintain such records;
> (B) make such reports;
> (C) install, use, and maintain such monitoring equipment, and use such audit procedures or methods;
> (D) sample such emissions (in accordance with such procedures or methods, at such locations, at such intervals, during such periods and in such manner as the Administrator shall prescribe);
> (E) keep records on control equipment parameters, production variables or other indirect data when direct monitoring of emissions is impracticable;
> (F) submit compliance certifications in accordance with subsection (a)(3) of this section; and
> (G) provide such other information as the Administrator may reasonably require.

EPA seeks such information by issuing a Section 114 Information Request.

a) <u>Respondent is Subject to CAA § 114 as an "Owner or Operator" of an "Secondary Aluminum Production Facility" Subject to CAA § 112</u>

As noted immediately above, Respondent was subject to the jurisdiction of CAA § 112 from March 24, 2003 through September of 2006. Respondent's status as a person subject to CAA Section 112 grants the Administrator jurisdiction over Respondent for purposes of Section 114 for the same period of time. Any

violation of CAA Section 114, such as failure to respond or failure to completely respond to a Section 114 Information Request, authorizes the Administrator to issue an administrative order assessing a civil penalty for such violation(s). CAA § 113(d).

C. Respondent's Arguments of Good Faith, Purported EPA Waiver, and Perceived Title V Exemption Do Not Defeat Liability

As previously discussed in the Order on Motion for Accelerated Decision, dated August 10, 2006, and as further discussed *infra*, Respondent's ignorance of the law does not obviate Respondent's liability for violating federal law. The Clean Air Act is a strict liability statute. *See, e.g., Friedman & Schmitt Constr. Co.,* 11 E.A.D. 302, 354 (EAB 2004), *aff'd,* Docket No. 2:04-CV-00517-WBS-DAD (C.D. Cal., Feb. 25, 2005) (unpublished).

Respondent first submits that its good faith belief that it was not subject to the CAA is a defense to liability. Specifically, Respondent argues, "Prior to March 23, 2003, [it] had a good faith belief that it was not subject to the CAA, in part because [it] believed that it did not emit a sufficient amount of [HAPs] to be subject to the CAA." *Id*. at 4 (citing Compl. Ex. 2, at 2). Respondent states that it relied on the representations of its outside environmental consultant in determining that it was not required to submit a test protocol or conduct a performance test. *Id.* Respondent also contends that it "only received confirmation of its non-exempt status from [the South Coast Air Quality Management District] around March 11, 2005." Resp. Ex. 4,5; Opp'n to Mot. for Accelerated Decision (footnote omitted).

Notably, Respondent did not call its consultant to testify at the hearing to corroborate this argument of good faith. Moreover, Mr. Hall testified that over the course of its business operations, Liston has hired consultants for expert assistance on a variety of regulatory matters involving the SCAQMD. Tr. at 424-25, 434-41. Respondent was aware that such assistance is available to determine the applicability of environmental laws and achieve compliance therewith if one does not feel capable of ensuring compliance on its own regard. In addition to not calling its own consultant to testify as to its good faith belief that it fell outside the jurisdiction of the CAA, Respondent also did not seek the assistance of other experts on this issue.

As previously mentioned in the Order on Motion for Accelerated Decision, Respondent does not cite any legal support for good faith belief as a defense to liability. Good faith is not a defense to liability under the Clean Air Act, which is a strict liability statute. *See, e.g., Friedman & Schmitt Constr. Co., supra,* 11 E.A.D. 302 at 354. Accordingly, although good faith may arguably mitigate the penalty, it does not defeat liability.

Respondent next submits that even if it were required to produce a test protocol and performance test, the EPA waived this requirement until October 20, 2004, when the EPA issued an Administrative Order ("AO") specifically demanding that Respondent submit a site-specific performance test protocol and conduct an initial performance test, because the Region previously issued Section 114 Information Requests that did not mention the same. Opp'n to Mot. for Accelerated Decision at 6.

In its response to the Region's Second Information Request, Respondent submitted a source test report that was completed on August 15, 2003 by Air Gas Testing & Consulting Services. Opp'n to Mot. for Accelerated Decision at 6; *see* Compl. Ex. 7 at Response 11. I reject Respondent's argument that the Region's failure to request a source test protocol and initial performance test, as required of Respondent by 40 C.F.R. § 63.1511(a), (b), in its correspondence with Respondent after the Region's receipt of this source test report, can be interpreted as a waiver of Liston's obligations to perform a further source test protocol or performance test. Opp'n to Mot. for Accelerated Decision at 6.[25/]

Complainant correctly observes that notice is not required prior to enforcing Section 112 of the CAA. Reply to Resp.'s Opp'n at 3 (citing *United States v. B&W Inv. Prop.*, 38 F.3d 362, 366 (7th Cir. 1994)); *see Friedman & Schmitt Constr. Co.,* 11 E.A.D. at 354 (CAA is a strict liability statute). The regulations clearly state that the deadline is March 24, 2003 for submission of the site-specific plan and for conducting the initial performance test. *See* 40 C.F.R. §§ 63.1511(a), 63.1501(a). Respondent's arguments, that the Region waived the

---

[25/] I note Complainant's assertion that the August 15, 2003 source test submitted by Respondent "has nothing to do with any of the requirements of the Secondary Aluminum NESHAP." Reply to Opp'n to Mot. for Accelerated Decision at 2. Additionally, I reiterate that this source test was submitted several months past the March 24, 2003 deadline set by the regulations. Order on Mot. for Accelerated Decision at 6.

March 24, 2003 regulatory deadline through what Respondent characterizes as (1) the Region's failure to mention a violation of 40 C.F.R. part 63 subpart RRR until an AO dated October, (2) the Region's unconditional continuances of Liston's test protocol and performance test deadlines, and (3) the Region's August 2005 "change of heart with respect to the number of ports required for testing," are rejected. Opp'n to Mot. for Accelerated Decision at 2. As the Region correctly points out, The EPA lacks legal authority to waive the regulatory deadline for compliance with the Secondary Aluminum Emission Standards, and the EPA's dealings with Respondent with regard to any alleged "continuances" and changes in the agreed-upon number of ports where Respondent would have to conduct performance tests cannot be construed reasonably as a "waiver" of the regulatory requirements. Reply to Opp'n to Mot. for Accelerated Decision at 3. Respondent is strictly liable for compliance.

Complainant points out that the regulations, under limited circumstances, permit an owner or operator to apply for a waiver of the performance test from the EPA, pursuant to 40 C.F.R. § 63.7(h). Reply to Resp.'s Opp'n at n.2. These regulations clearly state that until the EPA grants the waiver request, the owner or operator must comply with the requirements, 40 C.F.R. § 63.7(h)(1), and that the waiver request must be submitted prior to the performance test, 40 C.F.R. § 63.7(h)(3). Furthermore, the waiver request must be in writing. 40 C.F.R. § 63.7(h)(2). Although Respondent was granted extensions of time, Respondent has not cited any documents waiving the March 24, 2003 deadline. *See* Order on Mot. for Accelerated Decision at 7.

Finally, Respondent submits that even if the Secondary Aluminum Emission Standards do apply to it, Respondent believed that the EPA had granted it a Title V exemption or it was eligible for such exemption and is therefore not subject to liability for the violations alleged in the Complaint. Tr. at 447-50; Resp. Ex. 4.

Respondent's argument about a perceived Title V exemption is a red herring. Title V only applies if solely clean scrap is charged. Respondent's methodology of visually inspecting such scrap does not suffice to establish such scrap as within the definition of "clean charge" (aluminum scrap "known by the owner or operator to be entirely free of paints, coatings and lubricants") to which Title V applies. 40 C.F.R. § 63.1503.[26/]

[26/] A visual examination of scrap is not sufficient for purposes of classifying charge as "clean" or not. Tr. at 657-59.

Respondent is charged with this knowledge concerning "clean charge" and, moreover, Mr. Hall was given a copy of the regulatory definitions at 40 C.F.R. § 63.1503 at the time he received the first Section 114 information request, dated April 28, 2004. *See* Compl. Ex. 3. Respondent is subject to CAA Section 112 and is thus required to comply with the NESHAPs applicable to it. 40 C.F.R. § 63.1500(a); Tr. at 663.

All persons falling within the CAA's jurisdiction have a general obligation to comply with the mandates of the statute and implementing regulations. Respondent's continued assertion of its ignorance of the law and professed good faith reliance on representations of its outside environmental consultant in determining that it was not required to submit a test protocol or conduct a performance test throughout this record of proceeding does not disturb my earlier findings of liability,[27/] nor does it affect the additional findings of liability made herein.

D. Liability

The record of proceeding establishes that CAA jurisdiction covers Respondent for the entire duration of time alleged in all four Counts of the Complaint. Even though Respondent concedes that it is a secondary aluminum producer subject to the Secondary Aluminum Emission Standards, it nevertheless argues that it should not be liable for the violations alleged. Resp.'s Post-Hr'g Br. at 1-2, 5-7, 13; *see* Answer ¶ 13; Opp'n to Mot. for Accelerated Decision at 11. Respondent provides no basis for this conclusory argument. Respondent is liable for all four counts of violations alleged in the Complaint.

Although the allegations in Count I and Count II of the

Mr. Hall testified that he would receive bundles of scrap that when broken down and spread out were 20 feet wide by 20 feet deep by 2 feet high which contained various items, such as tires, batteries, and bottles. Tr. at 463-64. I agree with the Region that it is not possible for Liston to *know* through a visual determination that each reject in this bundle is *entirely free* of paints, coatings, and lubricants. Compl.'s Post-Hr'g Br. at n.6. Moreover, Respondent readily admitted at the hearing that there was contaminated charge placed in the furnace or the chip dryer. Tr. at 463, 466-68. *See also* Tr. at 145; Compl. Ex. 7.

[27/] The earlier findings of liability are summarized on page 11 of the Order on Motion for Accelerated Decision.

Complaint were fully and finally adjudicated in the Order on Motion for Accelerated Decision, as limited by the Complainant's Motion, I nevertheless revisit these issues here. The Order on Motion for Accelerated Decision qualified the findings of liability for Counts I and II by limiting the duration of the violations to one day, pursuant to Complainant's Motion.[28/] Thus, the additional findings of continuing liability for Counts I and II made herein elaborate on my earlier findings of liability for these Counts, but they do not disturb my previous findings. Additionally, at the hearing, further support was presented that bolstered the previous limited findings of liability on Counts I and II.

Also, the testimony and evidence presented during the hearing on this matter clearly establish Respondent's liability for the remaining Counts, *i.e.* Counts III and IV. Respondent's liability for each of the alleged violations under Section 112 of the CAA (by way of its implementing regulations at 40 C.F.R. part 63 subpart RRR) and Section 114 of the CAA is discussed below, in turn.

[28/] Complainant's Motion for Accelerated Decision sought findings that "Liston failed to submit a site specific test plan prior to March 24, 2003, in violation of 40 C.F.R. § 63.1511," and that "Liston failed to conduct an initial performance test prior to March 24, 2003, in violation of 40 C.F.R. § 63.1511," for Counts I and II, respectively. Motion for Accelerated Decision at 15. I granted Complainant's Motion as to these two Counts, making such a qualified finding of liability. Order on Motion for Accelerated Decision at 5,7. That is, the Order on Motion for Accelerated Decision limited the findings of liability for Counts I and II to one day violations. *See* 40 C.F.R. §§ 63.1511(a), .1501(a)(regulatory deadline for submitting a site-specific test plan and for conducting an initial performance test is March 23, 2004). However, I note that this determination was only in part a full and final adjudication of the violations as alleged in Counts I and II of the Complaint, as Count I of the Complaint alleges that Respondent's violations of 40 C.F.R. § 63.1511 continued from March 24, 2003 to November 17, 2004, and Count II of the Complaint alleges that Respondent's violations of 40 C.F.R. § 63.1511 continued from March 24, 2003 to present (*i.e.,* the date of the filing of the Complaint, September 30, 2005). Complaint at ¶¶ 17, 20.

1. Respondent Failed to Submit a Site-Specific Performance Test Plan, Pursuant to CAA § 112 and 40 C.F.R. § 63.1511(a)

In Count I of the Complaint, the Region alleges that from March 24, 2003 to November 17, 2004, Respondent failed to submit a site-specific test plan in violation of Section 112 of the CAA and 40 C.F.R. § 63.1511. Complaint ¶ 18. It further alleges that on October 20, 2004, Complainant issued an Administrative Compliance Order ("AO") to Respondent, and that Paragraphs 16-18 of that Order required Respondent to prepare a site-specific test plan and conduct an initial performance test, as defined in 40 C.F.R. § 63.1511.[29/] Complaint ¶ 19; Compl. Ex. 11. Finally, it alleges that Respondent's contractor, Accurate Environmental Services ("AES"), submitted a site-specific test plan on November 17, 2004, to perform D/F testing. Complaint ¶ 19.

March 24, 2003 is a key date, and the first alleged date of violation under Count I in this matter, because March 24, 2003 is the regulatory deadline for submitting a site-specific performance test plan in accordance with the Secondary Aluminum Emission Standards. *See* 40 C.F.R. §§ 63.1511(a), .1501(a). As previously determined and further supported at the hearing, there is no dispute that Respondent did not submit a site-specific performance test plan by March 24, 2003. Order on Motion for Accelerated Decision at 5. The only remaining determination with regard to liability under Count I, as alleged in the Complaint, concerns the duration of Respondent's violation. *See* Order on Motion for Accelerated Decision at 7.

As discussed, *supra*, Respondent is subject to the jurisdiction of the CAA under Section 112, and its arguments of good faith reliance on the advice of others, a purported compliance waiver from the EPA, and its perceived Title V exemption do not overcome that jurisdiction or defeat its liability for failure to comply with CAA Section 112 while subject to its jurisdiction. Complainant has shown by a preponderance of the evidence that Respondent's failure to submit a site-specific performance test plan continued, as alleged in

---

[29/] The Region notes that the AO required these actions in an effort to determine Respondent's compliance with the D/F emission limits of the Secondary Aluminum Emission Standards, as well as to determine if Respondent made sufficient usage of chlorine to qualify it as a major source of HAPs, subject to additional testing requirements. Tr. at 127-38; Compl. Ex. 3, 8, 21; Compl.'s Post-Hr'g Br. at 4.

the Complaint, from March 23, 2004 to November 17, 2004, when Respondent's contractor, AES, submitted a source test protocol to the Region.

2. Respondent Failed to Conduct an Initial Performance Test, Pursuant to CAA § 112 and 40 C.F.R. § 63.1511(b)

In Count II of the Complaint, the Region alleges that Respondent failed to conduct an initial performance test for D/F, in violation of Section 112 of the CAA and its implementing regulations at 40 C.F.R. § 63.1511, from March 24, 2003 to the present (September 30, 2005).[30/]

As previously discussed in the context of liability under Count I, with regard to Count II, March 24, 2003 is a key date because it is the regulatory deadline for conducting an initial performance test in accordance with the Secondary Aluminum Emission Standards, and it is the first alleged date of violation under Count II in this matter. *See* 40 C.F.R. §§ 63.1511(a), .1501(a). As previously determined and hereby reiterated, there is no dispute that Respondent did not conduct an initial performance test by March 24, 2003. Order on Motion for Accelerated Decision at 5. The only remaining determination with regard to liability under Count II, as alleged in the Complaint, concerns the duration of Respondent's violation. *See* Order on Motion for Accelerated Decision at 7.

As discussed, *supra*, Respondent is subject to the jurisdiction of the CAA under Section 112, and its arguments of good faith reliance on the advice of others, a purported compliance waiver from the EPA, and its perceived Title V exemption do not overcome that jurisdiction or defeat its liability for failure to comply with CAA Section 112 while subject to its jurisdiction. Complainant has shown by a preponderance of the evidence that Respondent's failure to conduct an initial performance test for D/F continued, as alleged in the Complaint, from March 23, 2004 to September 30, 2005.

[30/] As the Complaint was filed on September 30, 2005, the undersigned interprets "to the present," as used in the allegations of the Complaint, to mean to September 30, 2005.

3. Respondent Failed to Submit a Complete Response to Complainant's Request for Information, In Violation of CAA § 114

Although the Order on Motion for Accelerated Decision granted accelerated decision on liability for Counts I and II as limited by Complainant's motion (finding Respondent liable for failure to submit a site-specific performance test plan by the regulatory deadline and for failure to conduct an initial performance test by the regulatory deadline, in violation of CAA § 112 and 40 C.F.R. § 63.1511,) the Order denied accelerated decision on the Region's two remaining allegations contained within Counts III and IV.

In Count III of the Complaint, titled Incomplete Response to Information Request, Complainant alleges that Respondent failed to submit a complete response to requests for information from the Complainant in violation of Section 114 of the CAA.[31/] Complaint ¶ 23. The Region assesses Count III as a one day violation. Tr. at 338. By letter dated April 28, 2004, the Region issued an Information Request ("First Information Request"), and the Region subsequently granted an extension to July 5, 2004 for Respondent's response to the requested information.[32/] Compl. Ex. 3. Complainant received Respondent's response, dated June 29, 2004, and alleges that it was incomplete.[33/] Complaint ¶ 24; Compl. Ex. 7. Consequently, the Region issued another request for information by letter dated July 20, 2004 ("Second Information Request") to obtain the complete responses to the April 28, 2004 information request. Compl. Ex. 8. On July 28, 2004, Respondent requested an extension to this Second

---

[31/] The Region requested information from Respondent pursuant to CAA Section 114 in an effort to determine the applicability of the Secondary Aluminum Emission Standards to Respondent's Facility and to determine compliance with such standards. Tr. at 98-99.

[32/] The First Information Request was issued after the March 23, 2004 deadline for regulatory compliance with the Secondary Aluminum Emission Standards had passed.

[33/] Complainant argues that the June 29, 2004 response was incomplete because it failed to provide information with respect to: (1) whether Liston was a major source for HAPs; (2) whether Liston's scrap met the definition of "clean charge" as defined in 40 C.F.R. § 63.1503; (3) how aluminum is processed through the equipment; and (4) which equipment was permanently shut down. Compl.'s Post-Hr'g Br. at 3.

Information Request. Complaint ¶ 24; Compl. Ex. 9. Complainant received a response from Respondent to the Second Information Request, dated August 17, 2004, which Complainant alleges was also incomplete.[34/] Complaint ¶ 24.

As previously discussed, the Region argues that the incomplete information provided by Respondent had the effect of thwarting Complainant's attempts to determine compliance with the Secondary Aluminum Emission Standards from April 28, 2004, when the information was first requested, to the present date, *i.e.*, September 30, 2005, the date the Complaint was filed. Mot. for Accelerated Decision at 9. Complainant contends that there were numerous inadequate responses to information requests, regarding whether an initial performance test would be conducted at the highest production level as required by the regulations, regarding gaseous chlorine (in relation to determining whether Respondent is a major source for HAPs), regarding whether the equipment was permanently shut down, regarding a scale drawing of how the aluminum was processed, regarding information on what materials are charged in the furnaces and the chip dryer, regarding an approveable test plan, and regarding copies of requested temperature logs for Respondent's afterburner. *Id.* at 10-12. The Complainant asserts that any one of the failures to provide complete information would be sufficient to establish Section 114 liability. *Id.* at 9.

In the Order on Motion for Accelerated Decision, I noted that Complainant's myriad information requests and the responses thereto represent a daunting amount of documents at issue on a topic – "insufficiency" – that often lends itself towards contradictory inferences, and I determined that liability is better resolved within the context of an evidentiary hearing. Order on Mot. for Accelerated Decision at 8, citing *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

After considering the evidence presented at the hearing and the arguments within the parties' post-hearing briefs, I find Respondent violated CAA Section 114, as alleged in Count III of the Complaint, by failing to submit a complete response to the Region's First and Second Information Requests.

[34/] Complainant argues that the August 17, 2004 response was also incomplete with respect to all the same issues as the first response, except that Liston submitted a "partially acceptable process diagram" in its second response. Compl.'s Post-Hr'g Br. at 4.

Respondent's failure to submit a complete response to the Section 114 requests is based on a variety of inconsistencies. This finding was made without reliance on Complainant's contention that the follow-up Site Plan, Complainant's Exhibit 10, is only a "partially acceptable" response. *See* Compl.'s Post-Hr'g Br. at 4. Despite Respondent's contention that it provided two scale drawings sufficient to show the schematics of its aluminum processing, I agree with the Region that the Site Plan Respondent initially provided in response to the Region's First Information Request, Complainant's Exhibit 7, is incomplete, as it does not explain how the secondary aluminum process works. Compl.'s Post-Hr'g Br. at 12; *see* Opp'n to Mot. for Accelerated Decision at 9. However, I find that Respondent's follow-up submission of a different Site Plan, Complainant's Exhibit 10, cured many of the questions that remained unanswered by the previous submission.

As pointed out by the Region, one of Respondent's deficiencies in its replies to the First and Second Information Requests is its failure to provide information on the typical amount of flux charged into its aluminum processing equipment each year, specifically the amount of solid chloride flux and chlorine gas that it used. Compl.'s Post-Hr'g Br. at 8-9. Specifically, Respondent's response to the First Information Request did not include any information on gaseous chlorine, despite the Region's questioning on the amount of flux charged and the indication of the existence of chlorine tanks on the site plan submitted in that response. Compl. Ex. 7, response 4; Tr. at 130-31. Moreover, Liston's reply to the Second Information Request, which sought the quarterly usage of chlorine from the chlorine tanks from March 2003 to the present, was likewise silent on the quantity of chlorine gas used. Tr. at 132; *see* Compl. Ex. 8 at Question 2b; Compl. Ex. 10. The Region sought this information to determine whether Liston was a major source for HAPs, which it would be if it emitted greater than 10 tons per year of hydrochloric acid ("HCL").[35/] *Id*.

Also of concern is Respondent's failure to provide information to determine whether an initial performance test would be conducted at the highest production level. Compl.'s Post-Hr'g Br. At 9-11; *see* 40 C.F.R. § 63.1511(b)(1). For example, Table 1 in the Region's Second Information Request requested that Respondent provide the amount of scrap charged from March 2003 to March 2004. Compl. Ex. 8. Respondent

---

[35/] Major sources are subject to additional testing requirements. Tr. at 132-34.

responded that it charged approximately 7 million tons. Compl. Ex. 10. Tr. at 152. The Region correctly notes a contradiction, as 7 million tons equates to 799 tons per hour, yet Liston's consultant submitted a source test protocol that stated "some of the material is [run] through the dryer and then charged into the furnace for approximately 6.5 tons per hour." Compl.'s Post-Hr'g Br. at 11, citing Compl. Ex. 14 and Tr. at 152-53. I agree with the Region that Mr. Hall's attempt at the hearing to explain away the contradiction as a unit mistake, arguing he intended to indicate 7 million *pounds* per year charged instead of 7 million *tons*, is incredible. *See* Compl. Post-Hr'g Br. at 11, citing Tr. at 491, 570-71.

Additionally, Respondent's responses to the First and Second Information Requests are considered incomplete by its failure to provide information regarding which equipment was permanently shut down. Compl.'s Post-Hr'g Br. At 12. In its First Information Request, the Region directly put forth a three-part question on the operating status of Respondent's equipment, which asked Respondent to provide information stating: (1) which equipment is currently being used or has an active SCAQMD permit, (2) for equipment not being used, the date when the equipment was shut down, and (3) for equipment not being used and shut down, whether such was a permanent shut down. Compl. Ex. 3. In response to the First Information Request, Respondent indicated that one dryer with afterburner, one furnace, and the baghouse were active and the rest of the equipment had not been operated since 2001. Compl. Ex. 7 at Response 2; Tr. at 130-40. In its Second Information Request, the Region asked for some substantiation that the equipment mentioned in Respondent's initial response had not actually operated since 2001. Compl. Ex. 8 at Question 1. I agree with the Region that Respondent's response, providing emissions certifications and copies of the permits for Respondent's equipment, was mostly nonresponsive. Compl.'s Post-Hr'g Br. at 13. Thus, I conclude that Respondent did not provide a complete response to the Region's First and Second Information Requests, in violation of CAA § 114.

4. Respondent Failed to Respond to Complainant's Request for Information, In Violation of CAA § 114

In Count IV of the Complaint, titled Failure to Respond to Information Request, Complainant alleges that on May 17, 2005, it sent Respondent another information request ("Third Information Request"), seeking to clarify the errors and omissions in Respondent's earlier responses and seeking Respondent's source test plan. Complaint ¶ 26. Count IV further alleges that Complainant requested a written reply within fourteen (14)

calendar days, and that no reply was received from Respondent. *Id.* at ¶¶ 26-27. The Region assesses Count IV as a one day violation. Tr. at 338. In its Answer, Respondent states that it "believes that it submitted a complete response," and denies Complainant's allegations. Answer ¶ 26. Further, Respondent argues that the EPA lacks jurisdiction to assess liability as alleged in Count IV because Liston ceased to be a secondary aluminum producer (*i.e.*, was not subject to CAA Section 114) as its main furnace was inoperable at the time of the alleged receipt of the Third Information Request. *See* Opp'n to Mot. for Accelerated Decision at 8; Tr. at 417. At the hearing, Mr. Hall asserts that he personally never received the Third Information Request. Tr. at 506.

In the Third Information Request, the Region recounts the history of the parties' past information requests and responses and other dealings between the parties, including a March 23, 2005 conference call. Compl. Ex. 21 at 1-2. Reportedly, in the March 23, 2005 conference call, Respondent and its contractor, AES, provided clarifications to several of Complainant's questions regarding a revised source test protocol. *Id.* at 2. Specifically, the May 17, 2005 letter requests information which appears to either primarily or solely relate to the performance testing of Respondent's Facility. *See id.* at 2-3.

The Region's Third Information Request arrived at the Liston Facility on May 27, 2005, and a certified mail receipt was signed upon its delivery by Cari Scoggins. Compl. Ex. 33. Mr. Hall testified that Ms. Scoggins was an employee of Liston who signed for the certified letter addressed to him in violation of Liston's strict policy not to sign for any mail that was addressed to "Craig Hall." Tr. at 505-06. Thus, Respondent testified at the hearing that he never personally received the Third Information Request and was in fact out of town at the time of its receipt, as he was in Cincinnati, Ohio, from mid-May to mid-July for a period of four or five weeks. Tr. at 501-02; 505-06. As the Region demonstrated on its cross-examination of Mr. Hall and in its Post-Hearing Brief, Mr. Hall's assertions regarding his four or five-week absence from the Facility from May to July of 2006 and his insistence that he never received the Third Information Request were contradicted or rebutted. Compl.'s Post-Hr'g Br. at 16-17, citing Tr. at 531-34, 542, 376;Compl. Exs. 20, 23. Thus, Mr. Hall's insistence that he was without knowledge or receipt of the Third Information Request lacks credibility. I further observe that Respondent could have sought a statement from Ms. Scoggins or subpoenaed her testimony to corroborate Mr. Hall's story, but, notably, it did not.

The Third Information Request seeks a written response from Respondent within fourteen (14) calendar days of receipt of the request,[36/] pursuant to Section 114 of the CAA. Compl. Ex. 21 at 1. In fact, in that request, Complainant directed that Respondent "shall submit the requested information via certified mail with return receipt requested" to the EPA. Compl. Ex. 21 at 3. Complainant points out that Respondent has not provided a return receipt to demonstrate a response was sent, nor did the Region ever receive a response to the May 17, 2005 information request. Motion for Accelerated Decision at 13. Thus, I conclude that Respondent completely failed to respond to a Section 114 Information Request in violation of CAA Section 114.

Respondent "does not dispute that it did not respond directly to the questions raised in the May 17, 2005 request." Opp'n to Mot. for Accelerated Decision at 10; *see* Tr. at 507. Rather, Respondent states that it sent correspondence to the Region, initiated prior to the Region's mailing of the May 17, 2005 request, indicating that Respondent was no longer in an operative condition. *Id.*; *see* Compl. Exs. 21, 33. Presumably, Respondent refers to two letters. First, Respondent refers to its initial response to the Region's April 26, 2005 letter (Complainant's Exhibit 19), which is dated May 9, 2005. Compl. Ex. 20. Second, Respondent refers to its letter in response to the Region's May 20, 2005 follow-up letter seeking clarification on Respondent's initial May 9th response (Complainant's Exhibit 22), which is dated June 15, 2005. Compl. Ex. 23.

Respondent's May 9, 2005 letter to the Region states, "Per your letter dated April 26, 2005, it is physically impossible to meet condition #8." Compl. Ex. 20. Condition number 8 in the Region's April 26, 2005 letter directs, "Liston shall commence testing within twenty (20) calendar days of receipt of this letter." Compl. Ex. 19. Respondent's use of the term "physically impossible" prompted the Region to issue it's May 20, 2005 follow up letter noting, "EPA is not aware of any facts that make it 'physically impossible' for [Liston] to perform the source test immediately." Compl. Ex. 22. Respondent's follow-up letter to the Region, dated June 15, 2005, briefly states, "Please be advised that Liston Brick has not operated its furnace since May 26, 2005 due to refractory issues. We are in the middle of

---

[36/] Mr. Tong testified that the Region sent the May 17, 2005 information request by U.S. Postal mail, return receipt requested, and that the request was delivered to Respondent on May 27, 2005. Tr. At 71-74, 136; Compl. Ex. 33.

curing the furnace as I write this letter."[37] Compl. Ex. 23; *see* Tr. at 168-70.

Respondent insists that its furnace was no longer in operation at the time of the EPA's May 17, 2005 information request, and thus it was not required to respond to the request after pointing out the furnace's status to the Region. Respondent insinuates that its initial May 9, 2005 letter informed the Region that it was "physically impossible" to run a test on its furnace. Respondent claims that such physical impossibility was further explained by its June 15, 2005 letter to the Region, which informed the Region that its furnace became inoperable as of May 26, 2005.

Respondent's June 15, 2005 letter does not directly answer the questions posed by Complainant's May 17, 2005 information request. However, Respondent contends that it ceased smelting operations somewhere between March and May of 2005 and had no further plans to operate its smelting facilities,[38] and therefore posits that the May 17, 2005 information request was superfluous because the Region lacked authority to continue its disclosure demands on its facility. Opp'n to Mot. for Accelerated Decision at 10; *see* Resp.'s Post-Hr'g Br. at 3, 9; Tr. at 400-09. Respondent argues that it had ceased to be a secondary aluminum producer under the Secondary Aluminum Emission Standards by the time it received the Third Information Request, so the EPA lacks jurisdiction to penalize Respondent for failure to respond.[39] *Id.*; *see also id.* at 8 (arguing that once Respondent ceased operating its smelting plant, it fell outside the jurisdiction of the NESHAP, because it was no longer a secondary aluminum producer at that point).

---

[37] Notably, May 26, 2005 is immediately one day prior to the Respondent's receipt of the Third Information Request. Compl. Ex. 33.

[38] I note that other than Mr. Hall, Respondent did not call other witnesses, such as Liston's source tester or contractor, to discuss the operating status of Liston's equipment, nor did it proffer any documents concerning the status of the equipment.

[39] That is, Respondent argues that the EPA lacked jurisdiction to demand a response to its Third Information Request because Respondent's furnace ceased to operate the day before Respondent's employee signed the certified mail receipt for the Third Information Request.

The Region takes a different approach to the meaning and impact of Respondent's May 9, 2005 and June 15, 2005 letters, respectively. The Region contends that Respondent's statement in its May 9, 2005 letter implies Respondent's contention that it was physically impossible to do a source test in the 20-day time period requested, rather than that it was physically impossible to operate the furnace, as Respondent would argue. The Region also points out that the June 15, 2005 letter does not state, nor imply, that the furnace was taken out of operation for anything more than a temporary period, as it specifically notes the furnace was in the process of being cured at the time of the letter's construction. Thus, the Region reads Respondent's June 15, 2005 letter as evidencing that Respondent was not shut down, and therefore continued to be a secondary aluminum producer subject to CAA jurisdiction. Reply to Resp.'s Opp'n at 7; *See* Compl. Ex. 23.

At the hearing, Mr. Tong testified that a piece of equipment is "permanently shut down," revoking CAA jurisdiction under the Secondary Aluminum Emission Standards, when either: (1) the equipment's operating permit has been surrendered back to the granting air district, or (2) the equipment is not functionally operating and is physically impossible to ever operate again. Tr. at 138-39. Prior to Respondent's surrender of its permit in September of 2006, a date well after the issuance and receipt of the Third Information Request, the record does not show that there were significant process or operational changes sufficient to qualify any of Liston's equipment as "permanently shutdown," *i.e.* physically impossible to ever operate again.[40/] Tr. At 184. I do not find Respondent's act of shutting down the furnace to cure it significant enough to terminate the Region's jurisdiction. Even if the furnace was inoperable at this time, it was not permanently shut down. *See In re Pepperell Assoc.*, 9 E.A.D. 83, 99-100 (EAB 2000), *aff'd by Pepperell Assocs. v. U.S. Envtl. Prot. Agency*, 246 F.3d 15 (1st Cir. 2001)(disconnection of a facility's pipes is alone not enough to end EPA jurisdiction because steps could be taken to put the facility back into service; complete preclusion of future operation is required to end jurisdiction).

[40/] Mr. Tong testified that the statement in Respondent's June 15, 2005 letter was the first time the Region was made aware that repairs were occurring on the furnace and no indication was given when the furnace might be started again. Tr. at 170.

Indeed, Mr. Hall testified that the "physical impossibility to test" referred to the inability to accomplish multisource testing on twenty days of notice. Tr. at 478. Also, Mr. Hall never testified that Liston surrendered its permits because of the furnace being permanently shut down; rather, he testified that he had every intent to cure the furnace and continue processing secondary aluminum, and that he closed the business and surrendered its SCAQMD permits only because of a concurrent eminent domain lawsuit.[41/] Tr. at 628.

Respondent's June 15, 2005 letter simply informed the Region that the furnace was no longer in operation, not that it was permanently shut down and taken indefinitely out of operation. Thus, the Region's argument is more persuasive. Jurisdiction over Respondent under the Secondary Aluminum Emission Standards continued until September 2006 when Respondent surrendered its permit to SCAQMD. Inasmuch as Respondent failed to provide a response to the Third Information Request while subject to CAA Section 112 and the Secondary Aluminum Emission Standards jurisdiction, I find Respondent liable for the violations alleged in Count IV.

Alternatively, regardless of the status of the Liston's furnace at the time Respondent received the Third Information Request, there is no evidence in the record before me showing that the Respondent was not subject to the Secondary Aluminum Emission Standards and CAA Sections 112 and 114 jurisdiction at that time based on the operation of the chip dryer. Tr. at 170. Moreover, CAA Section 114(a)(1), provides that the EPA may request information of "any person who owns or operates any emission source. . . who the Administrator believes may have information necessary for the purposes set forth in [Section 114]." Section 114(a)(1)(G) explains how broad the EPA's authority is to request information from such persons, as it grants the Administrator authority to request "such other information as the EPA may reasonably require." Thus, arguably, even if there were a permanent shut down of Respondent's operations, Complainant may have believed that the information was necessary for the purposes set forth in Section 114.

[41/] Respondent surrendered its air permits in September 2006 pursuant to a settlement agreement with the SCAQMD. Tr. at 559.

III. PENALTY

Under Section 113(d) of the CAA, the EPA Administrator may issue an administrative order assessing a civil administrative penalty against any person who the Administrator finds, *inter alia*, "has violated or is violating any . . . requirement or prohibition of this subchapter [Subchapter I, CAA §§ 101-193] . . . including, but not limited to, a requirement or prohibition of any rule . . . promulgated, issued, or approved under this chapter." CAA § 113(d)(B). Thus, Section 113(d) authorizes the Administrator to enforce the requirements or prohibitions contained in CAA Sections 112 and 114 and the regulations at 40 C.F.R. part 63, subpart RRR promulgated pursuant thereto.

In determining the amount of any penalty assessed under CAA Section 113(d), the Administrator or the court, as appropriate, must take into consideration various penalty criteria. Specifically, CAA Section 113(e) mandates that the Administrator or the court:

> shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

CAA § 113(e)(1). To assist enforcement officials in taking the above factors into consideration when devising penalties under the CAA specific to any given case, the EPA published a document entitled, "Clean Air Act Stationary Source Civil Penalty Policy" ("CAA Penalty Policy"), dated October 25, 1991. Compl. Ex. 30. The CAA Penalty Policy is a guidance document intended to provide a rational, consistent and equitable methodology for generally applying the statutory penalty factors enumerated in CAA Section 113(e)(1) to particular cases. *See* Complaint ¶ 29.

A civil administrative penalty under CAA § 113(d) may assess a civil penalty up to $27,500 per day per violation for each violation occurring between January 31, 1997 and March 15, 2004, and a civil penalty up to $32,500 per day per violation for each

violation occurring after March 15, 2004.[42/] CAA §§ 113(d)(1), (e)(2); 40 C.F.R. part 19. The EPA's authority to assess penalties under Section 113(d) is limited to matters where the total penalty sought does not exceed $220,000, unless a joint waiver with the Department of Justice is obtained.[43/] CAA § 113(d)(1); Complaint ¶ 3. Such penalty shall be assessed after opportunity for a hearing on the record in accordance with the Administrative Procedure Act, specifically the laws at 5 U.S.C. §§ 554, 556. The final assessment of civil penalties is committed to the informed discretion of the court. 40 C.F.R. § 22.27(b); *United States v. Mac's Muffler Shop, Inc.,* 25 ERC (BNA) 1369, *21-22 (N.D. Ga. Nov. 4, 1986) (citing *United States v. ITT Continental Baking Co,* 420 U.S. 223, 230 n.6 (1975)); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,* 451 F.3d 77,87 (2d Cir. 2006); *United States v. Gurley*, 384 F.3d 316, 324 (6th Cir. 2004), *reh'g denied* 2005 U.S. App. LEXIS 425 (6th Cir. January 6, 2005)(en banc).

A. The Region's Calculation of the Proposed Penalty

In this case, the Region requested the assessment of a $120,001 penalty pursuant to Section 113(d) of the CAA. Complaint ¶ 28,30; Compl.'s Post-Hr'g Br. 19, 22; Tr. at 328, 338-39. Mr. John Brock, an environmental engineer with the Region's Air Enforcement Office who acts as a case developer devising penalty calculations in CAA cases, provided testimony at the hearing on the Region's penalty calculation in this case. Tr. at 309-10, 328, 336. The Region, as Complainant, has the burdens of presentation and persuasion to show, by a preponderance of the evidence, that the penalty sought is appropriate. 40 C.F.R. §

[42/] *See* n.16, *supra*, explaining the inflationary adjustments authorized by the Civil Monetary Inflation Adjustment Rule.

[43/] Although Section 113(d)(1) states a maximum administrative penalty amount of $200,000, this figure must be adjusted for inflation under the Civil Monetary Inflation Adjustment Rule. For penalties effective between January 30, 1997 and March 15, 2004, the inflation-adjusted penalty amount under Section 113(d)(1) is $220,000; for penalties effective after March 15, 2004, the inflation-adjusted penalty amount is $270,00. The Complaint cites $220,000 as the maximum inflation-adjusted penalty amount in this case. Thus, in the interest of due process, the undersigned observes $220,000 as the statutory maximum civil administrative penalty in this matter; however, as discussed, *infra*, a penalty in this case is assessed for violations that occur both before and after the March 15, 2004 increase in the inflationary adjustment.

22.24.

At the hearing, through Mr. Brock's testimony, the Region described how the proposed $120,001 penalty was calculated. As set forth in the Complaint, the Region determined individual figures for two basic components, Economic Benefit and Gravity (with the noted components of: Length of Time of Violation; Importance to the Regulatory Scheme; and Size of the Violator), and applied inflationary adjustments to these assessments under the Civil Monetary Inflation Adjustment Rule on a count-by-count basis. Compl. ¶ 30; *see* Tr. at 329; *see also* Compl. Ex. 30 at 3. At the hearing, Mr. Brock elaborated on the factors considered when calculating the proposed penalty by giving testimony on additional sub-components that were considered, yet given zero value and thus not enumerated in paragraph 30 of the Complaint.[44/] Ultimately, the amounts calculated for each factor the Region considered were added together to arrive at the final proposed penalty of $120,001.

1. Economic Benefit Component

In devising a penalty, the first component the Region considered was Liston's Economic Benefit. Economic Benefit is a factor designed to reflect the financial gain that a corporation receives for failure to comply with an environmental regulation. Tr. at 329; *see* Compl. Ex. 30 at 4-6. The Economic Benefit component is designed to "level the playing field" between a violator and its complying competitors, with deterrence as an important goal. Tr. at 329; *see* Compl. Ex. 30 at 4. Mr. Brock testified that Liston, through its violations of the CAA and its implementing regulations, avoided expending, at minimum, $20,000, which is the estimated cost of the source test that Respondent did not perform, yet was required to under the Secondary Aluminum Emission Standards. *Id*. Mr. Brock explained that the Region's figure for Economic Benefit was derived by using the EPA's BEN computer model,[45/] which uses input variables such as costs avoided and the length of time that a benefit is received. Tr. at

---

[44/] Mr. Brock referred to a demonstrative exhibit of a chart, included in the Complainant's Prehearing Exchange, not in the record before me, when giving testimony on the CAA penalty factors. Tr. at 325-28.

[45/] The CAA Penalty Policy describes BEN as an EPA computer model available to the Regions for performing a detailed economic analysis of the economic benefit of noncompliance. Compl. Ex. 30 at 5.

330, 345-47.[46/] Mr. Brock testified that the Region assessed $14,897 as the appropriate figure to reflect Respondent's Economic Benefit. Tr. at 330.

2. Gravity

Next, the Region considered the various factors comprising the Gravity component in its penalty calculation. Mr. Brock described that there are four main components of Gravity: (1) Actual or Possible Harm; (2) Importance to the Regulatory Scheme; (3) Size of the Violator; and (4) Adjustments to Gravity. Tr. at 330; *see* Compl. Ex. 30 at 8-19. With the exception of the Size of the Violator component, evaluating each of these components requires an analysis of sub-components as well. Mr. Brock described each, in turn.

a) Actual or Possible Harm

To calculate the penalty for the first main component of Gravity, Actual or Possible Harm, the Region analyzed four sub-components: (a) Level of Violation; (b) Toxicity of Pollutant; (c) Sensitivity to the Environment; and (d) Length of Time of Violation. Tr. at 330; *see* Compl. Ex. 30 at 9-14. Mr. Brock testified that the Region was not able to assess a penalty for the first three sub-components because a source test was never performed, so the extent to which the D/F emission limits were exceeded, if at all, and the associated toxicity and environmental sensitivity impacts, if any, are each unknown. Tr. at 330-31. Thus, the Region assigned zeros for the values of these three sub-components and did not enumerate these sub-components in the Complaint. Tr. at 331.

When assessing a figure for the final sub-component, the Length of Time of Violation, the Region used a duration of 17 months.[47/] Tr. at 331. Mr. Brock testified that, rather than assigning a Length of Time of Violation separately for each of the four Counts of violations, which, in hindsight, he admits he

---

[46/] Mr. Brock did not recall the exact formula employed by the BEN computer model in this case, nor could he mathematically state its input variables. Tr. at 346-47. He testified only to an awareness of some of the input variables used in the model. *Id.*; *see* Tr. at 350.

[47/] The Region did not explain nor justify its use of 17 months as the appropriate Length of Time of Violation, and it therefore appears arbitrary but to the benefit of Respondent.

"should have" done, he used a general time frame of 17 months to account for the duration of all four Counts. Tr. at 337. Mr. Brock stated that a 17 month duration is not an overestimate of the Length of Time of Violation because if each Count were assigned a separate Length of Time of Violation, Counts I and II would have exceeded 17 months, resulting in a higher penalty value for the Actual or Possible Harm component of Gravity.[48/] Tr. at 331, 337. According to the Length of Time of Violation matrix in the CAA Penalty Policy, a $20,000 penalty is assessed for a 17 month duration of violation. Compl. Ex. 30 at 12; *see* Tr. at 331.

Thus, according to Mr. Brock's testimony and the Complaint, the Region assessed $20,000, prior to inflationary adjustments, for the Actual or Possible Harm component of Gravity. Tr. at 331.

b) Importance to the Regulatory Scheme

To calculate the penalty for the second main component of Gravity, Importance to the Regulatory Scheme, the Region analyzed the violations alleged in each Count of the Complaint as individual sub-components. That is, the four sub-components are: (a) failure to report, here, the test plan; (b) failure to conduct a performance test; (c) incomplete response to a Section

---

[48/] According to Mr. Brock, the Length of Time of Violation for Count I (failure to comply with requirements for a site-specific performance test plan) should have been 20 months, beginning on the effective date of the regulation (March 24, 2003) and ending with the submission of the first test plan (November, 2004), and a 20 month Length of Time of Violation warrants a $25,000 penalty assessment. Tr. at 337. Moreover, Mr. Brock testified that the Length of Time of Violation for Count II (failure to conduct a performance test) should have been 26 months, beginning on the effective date of the regulation (March 24, 2003) and ending with Liston's alleged shut down of the facility (May 2005), and a 26 month Length of Time of Violation warrants a $30,000 penalty assessment. Tr. at 337-38. Mr. Brock noted that the Region treated Counts III and IV as one day violations, which each warranting a $5,000 Length of Time of Violation penalty assessment. Tr. at 338. Mr. Brock thus argued that, in sum, the Length of Time of Violation penalty assessment for all four Counts, had their lengths been assessed individually rather than treated generally as a 17 month length of violation, could have been $65,000. Tr. at 338.

114 request; and (d) failure to respond to a Section 114 request.[49/] Tr. at 331-32; *see* Compl. Ex. 30 at 12-14. Mr. Brock testified that according to the CAA Penalty Policy, sub-components (a), (b), and (d) each have a $15,000 penalty associated with them, while sub-component (c) [incomplete response to a Section 114 request] affords the Region enforcement discretion to assess an associated penalty between $5,000 and $15,000. Tr. at 332; *see* Compl. Ex. 30 at 12-13. In this case, EPA calculated an intermediate value of $10,000 to account for Liston's "numerous examples of incomplete responses." Tr. at 332; *see* Tr. at 357.

Thus, according to Mr. Brock's testimony and the Complaint, the Region assessed $55,000, prior to inflationary adjustments, for the Importance to the Regulatory Scheme component of Gravity. Tr. at 331. The Region assessed $15,000 for Respondent's failure to report a test plan (Count I), $15,000 for Respondent's failure to conduct a performance test (Count II), $10,000 for Respondent's incomplete response to a Section 114 request (Count III), and $15,000 for Respondent's failure to respond to a Section 114 request (Count IV).

c) Size of the Violator

The third main component of Gravity, Size of the Violator, does not require an analysis of sub-components, as it is an assessment based on the net worth or net current assets of corporations or partnerships and sole proprietorships, respectively. Compl. Ex. 30 at 14; *see* Tr. at 332. To calculate

---

[49/] As previously noted, to assist the Tribunal's understanding of the Region's penalty calculation, Mr. Brock's testimony followed enumerations displayed on a demonstrative exhibit. *See Tr.* at 325-28. The listing in the demonstrative exhibit reverses the order of Counts III and IV when listing sub-components (*i.e.* it lists the third sub-component as "Failure to respond to 114 request," which is actually Count IV in the Complaint, and it lists the fourth sub-component as "Incomplete response to 114 request," which is actually Count III in the Complaint). Complaint at 6-7. This reversal could be due to the Region's similar reversal of such Counts in the "Importance to the Regulatory Scheme" section in the Complaint's enumeration of the penalty. Complaint ¶ 30. To avoid confusion, this decision re-enumerates the latter two sub-components of Importance to the Regulatory Scheme to correspond to the order of Counts III and IV in the Complaint, and it adjusts references in Mr. Brock's testimony to correspond accordingly.

the penalty for this third main component of Gravity, the Region had to make a determination of Liston's net worth. Mr. Brock explained that he used a Dun & Bradstreet report to estimate Liston's net worth based on a percentage of its sales, as the Dun & Bradstreet Report does not state Liston's net worth.[50/] Tr. at 332-33, 343; Compl. Ex. 32.

The Dun & Bradstreet report identified Liston's sales at $12 million. Compl. Ex. 32; Tr. at 333. Mr. Brock testified that he took ten percent (10%) of this sales figure to determine Liston's net worth, which he determined to be $1.2 million. Tr. at 333. Mr. Brock explained his rationale for using ten percent of Liston's total sales to approximate the corporation's net worth by stating, "That's a rule of thumb that I've used in the past. It's not a set formula or EPA policy . . . [rather] I consulted with my colleagues and . . . [they advised] when the net worth is not available, and all you have is sales, that a 10 percent factor could be used." Tr. at 344. Mr. Brock acknowledged that the Region would have considered better information on Liston's net worth if such were provided by Respondent. *Id*.

According to the Size of the Violator matrix in the CAA Penalty Policy, a $10,000 penalty is assessed for a corporation with a net worth of $1.2 million. Compl. Ex. 30 at 14; *see* Tr. at 333. Thus, according to Mr. Brock's testimony and the Complaint, the Region assessed $10,000, prior to inflationary adjustments, for the Size of the Violator component of Gravity. Tr. at 333.

d) Adjustments to Gravity

To calculate the penalty for the final main component of Gravity, Adjustments to Gravity, the Region analyzed four sub-components: (a) Degree of Willfulness or Negligence; (b) Degree of Cooperation; (c) History of Noncompliance; and (d) Environmental Damage. Tr. at 333; *see* Compl. Ex. 30 at 15-19. Mr. Brock testified that sub-components (a), (c), and (d) only permit an upward adjustment of the penalty, while sub-component (b) allows the EPA to adjust either upward or downward. Tr. at 333-34. Mr. Brock explained that the Region did not make any adjustments to the Gravity component based on these factors. Tr.

[50/] The Dun & Bradstreet report is dated June 21, 2005. Tr. at 344. Mr. Brock testified that he had not run a more current report, but if the corporation is still active, there would be a report and it is his belief that a Dun & Bradstreet report for 2006 would then be available. Tr. at 345.

at 334. However, he noted that the Region could have made an upward adjustment given Liston's history of noncompliance with the SCAQMD. Tr. at 334. The Region did not find that a downward adjustment of the penalty assessed for the Gravity component was justified, as the Region believed Liston lacked a degree of cooperation. Tr. at 334.

Thus, the Region assigned zeros for the values of these four sub-components, did not enumerate these sub-components in the Complaint, and did not make any adjustments to the Gravity component.

In sum, the Region assessed $85,000, prior to inflationary adjustments, to account for the Gravity component of the proposed penalty. This figure is the sum total of the $20,000 assessed for the Actual or Possible Harm component of Gravity, the $55,000 assessed for the Importance to the Regulatory Scheme component of Gravity, the $10,000 assessed for the Size of the Violator component of Gravity, and the zero amount assessed for the Adjustments to Gravity component.

3. Inflationary Adjustments to Gravity

The CAA Penalty Policy was developed in 1991. *See* Compl. Ex. 30. To account for inflation that has occurred since that time, the EPA makes inflationary adjustments to the Gravity component of its penalty assessments. Tr. at 335. These inflationary adjustments are based on the figures recommended by the Civil Monetary Inflation Adjustment Rule, and they are set forth in EPA policy memorandums. *See* Tr. at 335. Specifically, penalties for violations occurring between January 1997 and March 15, 2004 are upwardly adjusted for inflation by 10%, while penalties for violations occurring after March 15, 2004 are upwardly adjusted for inflation by 28.95%. Tr. at 335, 350-51.

Mr. Brock testified that applying the inflationary adjustments to the Gravity components in the instant case, he upwardly adjusted the penalty by $20,104. Tr. at 335. Adding this inflationary adjustment amount ($20,104) to the Gravity subtotal ($85,000) resulted in an assessment for the Gravity component, adjusted for inflation, of $105,104.[51/] Tr. at 336.

[51/] Mr. Brock's testimony is such that he first describes the calculation of all the individual sub-components of Gravity, to arrive at a $85,000 Gravity component subtotal, he then explains how he applied inflationary amounts to each sub-component to

Combining the amount assessed for the proposed penalty's two components, the Economic Benefit component ($14,897) and the Gravity component ($105,104) yields a total penalty proposal of $120,001. Tr. at 336.

a) The Region's Explanation and Attempted Justification of the Errors In Its Inflationary Adjustment

As noted, *supra*, the Region generally calculated the Length of Time of Violation in the instant case as 17 months. Tr. at 331. Mr. Brock testified that to arrive at the inflation-adjusted penalty proposal of $120,001, the entire 17 month Length of Time of Violation was adjusted for inflation at the higher amount [of 28.95%] that was applicable after March 15, 2004. Tr. at 354. Mr. Brock stated that not calculating the inflation adjustment for this penalty sub-component at a 10% inflationary factor for the period prior to March 15, 2004 "was an error." Tr. at 354. He further stated, "I should have used a separate length and [sic] time of violation for each of the four counts and had a separate inflation adjustment for each of those, as I did in my modified calculation, but I didn't do that the first time" making the proposed calculation inadequately performed.[52/]

---

achieve a total inflation adjustment figure of $20,104, and he finally explains that he added the subtotal figure ($85,000) to the inflationary adjustment figure ($20,104) to achieve an assessment for the Gravity component in the amount of $105,104. In contrast, the calculation set forth in Paragraph 30 of the Complaint does not demonstrate subtotals; rather, it details the inflation-adjusted figures for each sub-component of Gravity. I note, however, that adding the amounts of the inflation-adjusted sub-components of Gravity as listed in the Complaint ($24,432 + $ 18,324 + $18,324 + $19,085 + $12,723 + $ 12,216) results in the same inflation-adjusted subtotal for the Gravity component given by Mr. Brock's testimony: $105,104.

[52/] Mr. Brock testified that for penalty purposes, he calculated Count I using the period of time between the issuance of the First Information Request, on April 28, 2004, and the filing of the Complaint, on September 30, 2005. Tr. at 363. He testified that he realized after-the-fact that applying only the 28.95% to the 17 months used for this Count was an error. Tr. at 363. The correct dates for Count I, he argued at the hearing, would be from "[t]he effective date of the regulation . . . which was March 24, 2003 . . . [to] when we received the first draft of the test plan in November of 2004 . . . a violation of 20 months." Tr. at 365. Using the corrected dates, Count I encompasses a period of time

Tr. at 355-56. He testified that if the proper inflationary factors were used for each count, rather than for the entire gravity subtotal, the penalty amount sought in the Complaint would have been less. Tr. at 356; 372-73; *see* Compl's Post-Hr'g Br. at Attachment 1, Scenario 1.

Mr. Brock stated at the hearing, "it should be noted, as was in the prehearing exchange . . . that the 17 months could be considered differently . . . [because] [i]t should be assigned separately for each of the four counts, and each count would have a separate length of time violation . . . [such that] the length of time for two of those counts would have exceeded 17 months . . . [producing] a value higher than $20,000." Tr. at 331. Mr. Brock thus argued that, in sum, the Length of Time of Violation penalty assessment for all four Counts, had their lengths been assessed individually rather than treated generally as a 17 month length of violation, could have been $65,000. Tr. at 338. *See* n.48, *supra*. Mr. Brock noted that a count-by-count approach to the Length of Time of Violation would have also altered the applicable inflationary adjustment, as the 17 month Length of Time of Violation used in EPA's calculation of the penalty was treated as occurring "entirely after March of 2004," when the inflationary adjustment jumped from 10% to 28.95%, while the duration of Counts I and II covers periods of time occurring both before and after that increase. Tr. at 348; *see* n.48. Thus, the Region argues that recalculating the penalty to account for such a correction in the Length of Time of Violation sub-component would, at minimum, result in a penalty figure of approximately $175,000. Tr. at 352; Compl's Post-Hr'g Br. at Attachment 1, Scenarios 3 and 4.

Nevertheless, the Region noted at the hearing that it was not seeking a higher penalty, finding it more appropriate to "stick with [the $120,001 referenced in the Complaint] in the matter of fairness." Tr. at 338-39. The Region did not seek to introduce into the record the method of calculation employed in its Prehearing Exchange, even after being advised that it was not in the record. Tr. at 326-27. Further, the Region expressly stated at the hearing that it did not wish to amend its Complaint

---

both before and after the March 15, 2004 date when the inflationary factor increased from 10% to 28.95%. Tr. at 365. In his corrected calculation, recalculated for the proper inflation adjustment to amount in a $175,000 proposed penalty, Mr. Brock used 10% for the time period between March of 2003 and March 15, 2004, and he used 28.95% for that part of the violation that occurred between March 15, 2004 and November 2004. Tr. at 365.

to correct for the described errors in its penalty calculation methodology. Tr. at 367-68. Complainant explained that not using the recalculated penalty amount it theoretically could have sought was to Respondent's benefit, and suggested that the Region would leave the final calculation determination to the undersigned, who "has discretion to decide what the appropriate penalty is and whether even $120,000 is the appropriate penalty." Tr. at 368.

B. Response to the Region's Calculation of the Proposed Penalty

1. The Region's Attempt to Justify Ordering a Higher Penalty than that Pled

The Region's Prehearing Exchange was not admitted into the record before me, nor did the Region attempt at the hearing to introduce the different methodology for penalty calculation that it employed in its Prehearing Exchange; rather, the Region simply requests post-hearing that I consider such.[53/] As the undersigned explicitly stated at the hearing, the recalculation that the Region insists would justify ordering a penalty amount higher than the $120,001 penalty requested in the Complaint is not in the Complaint that informed the Respondent of the charges against it. Tr. At 369.

The Region repeatedly asserts that the penalty *could* be higher than the $120,001 sought in the Complaint if the Region had not committed the calculation errors testified to by Mr. Brock. The Region's corresponding suggestion that the undersigned may cure the calculation errors in the Complaint, which admittedly understated the penalty sought, by recognizing that the penalty *could have* been pled and proven at a much higher rate is rejected. Although the Rules of Practice do afford the ALJ the authority to assess a penalty different in amount from the penalty proposed by a complainant in the pleadings, such approach is not appropriate to increase the penalty amount above that proposed in the Complaint to cure calculation errors that had the effect of understating the amount of the penalty pled. 40 C.F.R. § 22.27(b). In virtually all EPA administrative cases, the amount of the proposed penalty could be far greater than that pled. However, due process concerns arise under such approach. The Respondent must be able to prepare its case based on the

---

[53/] The Region attempts to rely on a footnote in its Prehearing Exchange for the proposition that Respondent had notice it could be assessed a higher penalty. Tr. at 370-71.

prehearing pleadings and the evidence presented at hearing. Although the Region presented Mr. Brock's testimony concerning the calculation of the penalty, this testimony, standing alone, has some deficiencies, particularly in light of the Region's burden of proof to establish the appropriateness of the penalty by a preponderance of the evidence. *See* 40 C.F.R. § 22.24.

Although the Rules of Practice allow for liberal amendment of the Complaint to cure pleading defects, I am confined to the record of proceeding. *See* 40 C.F.R. § 22.14(c). The appropriateness of the Region's proposed penalty shall accordingly be adjudged solely on the evidence in the record before me. *See* 40 C.F.R. § 22.27(b).

2. The Economic Benefit Component

As correctly noted by Respondent, Mr. Brock was not able to adequately explain the calculation of the Economic Benefit via the BEN model. Resp.'s Post-Hr'g Br. at 12; Tr. at 707. Although Mr. Brock identified that $20,000 was entered in the BEN model to represent the Respondent's avoided costs, as this was the estimated minimum amount that Respondent's competitors expended to comply with the Secondary Aluminum Emission Standards, and that 17 months was entered to adjust Economic Benefit for the length of the violation, Mr. Brock was not able to identify other additional factors employed in the model. Tr. at 329-30, 346-350; *see* Compl. Ex. 30 at 4-8. He admitted he did not know how the BEN model calculated the Economic Benefit or the formula it used. Tr. at 347, 350. Respondent analogized the workings of the BEN computer model as "akin to a black box" and objected that the Region lacked foundation for justifying the Economic Benefit portion of the penalty. Resp.'s Post-Hr'g Br. at 12. I agree that the Region's failure to adequately explain the foundation behind the modeling system it uses deprives the Respondent of its right to properly cross-examine the witness and to challenge the accuracy and appropriateness of the penalty. The EPA's blind reliance on the BEN model in and of itself does not satisfy the Region's burden of proof to show, by a preponderance of the evidence, that Respondent received an economic benefit.

Nonetheless, here the record clearly shows that the economic benefit derived by Respondent's failure to conduct the required D/F testing far exceeded the proposed Economic Benefit amount of $14,897 (inclusive of inflation adjustments). Mr. Hall testified that conducting the test at one location or source area would likely cost $12,000, while testing at three source areas would cost an additional amount of $24-25,000. Tr. at 474-75.

Respondent then testified that these estimations were not inclusive of the additional costs he would have had to incur for maintenance work such as cleaning out the ducts, welding, crane rental, and lost production time, which would have put his costs at testing somewhere between $75,000 and $100,000, depending on the number of source areas tested. Tr. at 474-78. Respondent's own testimony belies his argument that the Region's calculation of the Economic Benefit is overstated or should be eliminated in its entirety. Resp.'s Post-Hr'g Br. at 12. I further note that Mr. Hall testified that he advised the Region of these costs. Tr. at 477-78.

3. The Gravity Component

As discussed, *supra*, the Region used a general time period of 17 months to represent the Length of Violation component, combining all the Counts. As this is the time period pled in the Complaint, of which Respondent was apprised, I do not disturb it.

Respondent's assertion that the alleged violations were mere "paperwork" violations and that there is no evidence that there were violations of the emission standards is specious. Tr. at 20-24. There was no way to determine or confirm if the emission standards were violated because Respondent did not conduct any testing at its Facility to determine D/F emissions. Tr. at 176.

Respondent questions the $10,000 assessment for Count III [incomplete response to a Section 114 request], arguing that a lesser amount, or no assessment, is appropriate. I disagree. As discussed, *supra*, the Region selected an intermediate value of $10,000 to account for Liston's "numerous examples of incomplete responses." Tr. at 332; *see* Tr. at 357. As pointed out by the EPA, the CAA Penalty Policy affords the Region enforcement discretion to assess a penalty between $5,000 and $15,000 for an incomplete response to a Section 114 request. Tr. at 332; *see* Compl. Ex. 30 at 12-13. Inasmuch as the Region has demonstrated that Respondent's responses to the first two Information Requests were incomplete in many material respects, and even contradictory, I agree that the mid-range amount of $10,000 is appropriate and reasonable.

Regarding the Size of the Violator component, I observe that the evidence presented consisted of the testimony of Mr. Brock and the corresponding Dun & Bradstreet document for Liston. Compl. Ex. 32. Mr. Brock explained that he estimated Respondent's net worth as $1.2 million based on the calculation of 10% of Respondent's sales, which were identified at $12 million. Tr. at 332-33. This estimation of net worth without

further explanation does not, in itself, adequately establish Liston's net worth to exceed $1 million. Mr. Brock noted that no other financial information was proffered by Respondent, who had been afforded an opportunity to furnish such financial information.

Respondent challenges the Region's estimation of its net worth as exceeding $1 million. At the hearing, Mr. Hall testified that Liston is "flat broke." Tr. at 515; *see* Resp.'s Post-Hr'g Br. at 13. However, Respondent's testimony on cross-examination reflects that, pursuant to a Purchase and Sale Agreement and Joint Escrow Instructions dated August 11, 2006, as amended by an Amendment to Purchase and Sale Agreement and Joint Escrow Instructions, dated October 12, 2006, the Riverside County Transportation Commission ("RCTC") has offered Craig Hall, as Vice President and General Manager of Liston, $8,240,530 to purchase Liston's property located at 3710 Temescal Canyon Road in Corona, California. This purchase is subject to an escrow withholding from the purchase price of an amount equal to 200% of the estimated cost to complete a remediation plan, not to exceed $3 million. The hold-back amount will be placed in an interest bearing account for Mr. Hall. Tr. at 547-55.

Mr. Hall explained that he is very nervous about the finalization of the sales because the Riverside County Hazardous Material Department ("RCHMD") wants to verify and test for contamination at the site. Tr. at 554-55. Also, Mr. Hall claims that the Liston property is subject to $4.5 million in loans secured by the property. Although the record before me does not reflect that the purchase of Liston's property by the RCTC has been finalized, the Purchase and Sale Agreement shows that the value of the property is at least several million dollars.

First, I reject Respondent's argument the Liston's net worth is less than $5,000 because the real property is not a current asset. Indeed, Liston's primary asset since the demolition of the secondary aluminum production facility is the real property owned by Liston, and it is not improper to include the value of real property in determining Respondent's net worth. Respondent submitted no proof of the alleged $4.5 million debt secured by the Liston property, and his self-serving testimony is not sufficiently probative or credible to establish this claimed encumbrance on the land. Even assuming, *arguendo*, that the $8.24 million purchase price is subject to the $3 million escrow holdback and the $4.5 million debt, there remains more than

$740,000.[54/]

Further, I observe that at the hearing Mr. Hall indicated that he had been given up to $175,000 by the RCTC from the escrow account to perform demolition services at the Facility on behalf of RCTC. Tr. at 547. Additionally, Respondent is pursuing an eminent domain claim against the City of Corona for Liston Facility Property that is not part of the RCTC purchase. Tr. at 612.

4. Inflationary Adjustments

The evidence of record concerning the application of the Civil Monetary Inflation Adjustment Rule to the proposed $120,001 penalty lacks clarity.

The Complaint reflects that the Region upwardly adjusted penalties for inflation on a count-by-count basis, as to the Length of Time of Violation sub-component, and as to the Size of the Violator component of Gravity. The penalty assessments for the Length of Time Violation, Counts I and II, and the Size of the Violator were upwardly adjusted twenty-two percent (22%). The penalty assessments for Counts III and IV were upwardly adjusted twenty-seven point two-three percent (27.23%). Counts III and IV concern violations occurring after March 15, 2004, and I must assume the Region added the 10% increase, which became effective in January 1997, and the 17.23% increase, which became effective on March 15, 2004, pursuant to the Civil Monetary Inflation Adjustment Rule to arrive at the 27.23% inflationary adjustment it applied to these two Counts. My understanding of the Civil Monetary Inflation Adjustment Rule is that the 10% and 17.23% increases are calculated on a compounded basis rather than the straight addition approach. The 22% increase applied to the remaining Counts, Counts I and II, is not explained.

At the hearing, Mr. Brock testified that the penalties were upwardly adjusted to reflect the 10% increase effective for violations occurring after January 1997 and the 17.23% increase effective for violations occurring after March 15, 2004, with a

---

[54/] Respondent insinuates that site remediation would cut into Liston's proceeds from any potential sale, should its land be found greatly devalued due to contaminated soil. I am unsympathetic to Respondent's argument that it should be assessed a lower penalty for its CAA violations because its assets may be devalued on account of contamination discovered at the Facility.

compounded rate of 28.95%. Tr. at 335, 364. Even with such compounding, he arrived at the same amount stated in the Complaint. Moreover, the record is not clear as to what periods of time the Region used to calculate the Length of Time of Violation. For example, the Complaint states that Count I continued from March 24, 2003 to November 11, 2004 and that Count II extended from March 24, 2003 to the "present," but the length of violation was stated to be "20 months." At the hearing, Mr. Brock testified that the entire "17 month" period of violation occurred after the March 24, 2003 inflationary adjustment increase, but that the Region was limiting that amount to the amount proposed in the Complaint in order to be fair to Respondent. Tr. at 348, 353-54. Mr. Brock also explained that Counts III and IV were deemed to be one day violations under the CAA Penalty Policy and that the compounded rate of 28.95% was therefore applicable to those violations.

C. Calculation of Penalty Assessed Herein

The EPA, not the ALJ, should be responsible for accurately calculating the proposed penalty on a technical basis in an administrative civil penalty proceeding. It is not the role of an ALJ to engage in technical decisions of recalculation based on EPA policy. The ALJ's function is not to be a human calculator. Nevertheless, in the interest of fairness to Respondent, I assess the appropriate penalty in this matter according to the following methodology, which is based on the record of proceeding before me.

1. Economic Benefit Component

As discussed, *supra*, based on Respondent's own admissions, the penalty assessed for the Economic Benefit component of the proposed penalty, $14,897, is pled and proven appropriate.

2. Gravity, As Adjusted for Inflation Under the Civil Monetary Inflation Adjustment Rule

In assessing the Gravity component of the penalty, in accordance with the structure employed by the Complaint, I consider, in turn, the various factors comprising the four main components of Gravity. That is: (1) Actual or Possible Harm; (2) Importance to the Regulatory Scheme; (3) Size of the Violator; and (4) Adjustments to Gravity. As explained, *infra*, the penalty assessed for the Gravity component of the penalty is $ 101,505.

a) Actual or Possible Harm

The Region proposed a penalty of zero for three of the four sub-components of the Actual or Possible Harm component of Gravity (Level of Violation; Toxicity of Pollutant; and Sensitivity to the Environment). I find the zero penalty assessment approach for employed by the Region for these three sub-components to be questionable. It allows a respondent who refuses to test to lessen the penalties assessed against it; whereas a respondent who tests and reveals a significant deviation from the standard adds an appreciable amount to the penalty assessed. Although I may not agree with the Region's logic, I will not assess penalties for factors that the Region did not plead, in the interest of due process.

Regarding the remaining sub-component, the Length of Time of Violation, the Region proposed a generalized 17 month duration. Inasmuch as the 17-month period was pled and the two emission standard violations (Counts I and II) exceeded 17 months, I will not disturb this determination. According to the CAA Penalty Policy, a $20,000 penalty, prior to inflationary adjustments, is appropriate for a 17-month Length of Time of Violation. Compl. Ex. 30 at 12. However, for calculating the inflationary adjustment for the Length of Time sub-component, I find it more appropriate to calculate the Length of Time of Violation based on averaging the length of time of the violations alleged in all four Counts of the Complaint, respectively. Such approach is more representative of the charges in the Complaint. Taking the average length for all four Counts results in a figure of 381.5 days to represent the Length of Violation component of Gravity for inflationary adjustment purposes.[55/]

The violations alleged in Count I of the Complaint (failure to submit a site-specific test plan) occurred from March 24, 2003 to November 17, 2004. Complaint ¶ 18. This is a total of 604 days. Meanwhile, the violations alleged in Count II of the Complaint (failure to conduct an initial performance test) occurred from March 24, 2003 to the "present," which is interpreted as the date of the filing of the Complaint, September 30, 2005. This is a total of 920 days. Finally, the Region assesses Counts III and IV each as one day violations. In accordance with the pleadings, I similarly treat the length of each of these violations as one day. Tr. at 338; *see* Compl. at 6-7.

[55/] 604 + 920 + 1 + 1 = 1526. 1526/4 = 381.5 days.

To arrive at the inflation-adjusted penalty for the Length of Violation component of Gravity, the number of days must first be allocated to the appropriate time period relative to March 15, 2004, which is the date of the increase in the appropriate inflationary amount. The above-described 381.5 days began as of March 24, 2003, the effective date of the regulations at issue. Thus, 357 of the 381.5 days (93.578%) occurred prior to March 15, 2004, and the remaining 24.5 days (6.422%) occurred after March 15, 2004.[56/]

Thus, the lower inflationary rate of 10% (effective January 1997 through March 15, 2004) applies to 357 of the 381.5 days (March 24, 2003 - March 15, 2004), while the higher inflationary rate of 28.95%[57/] (effective March 15, 2004) applies to the remaining 24.5 days. Thus, allocating the percentage of days relative to the corresponding inflationary rate for each "portion" of the $20,000 figure, pre-inflation, assessed for the Length of Violation component of Gravity results in a penalty of $22,243.39, adjusted for inflation, for this component.[58/]

b) Importance to the Regulatory Scheme

To calculate the penalty for the second main component of Gravity, Importance to the Regulatory Scheme, the Region analyzed the violations alleged in each Count of the Complaint as individual sub-components (*i.e.,* failure to report the test plan; failure to conduct a performance test; incomplete response to a Section 114 request; and failure to respond to a Section 114 request). Because the penalties assessed for each Count, prior to adjustments for inflation, were pled and proven appropriate, I agree with the Region's figures, as provided in the CAA Penalty Policy. Tr. at 332; *see* Compl. Ex. 30 at 12-13. Thus, I find the following penalty assessments, prior to any inflationary adjustment, appropriate for the Importance to the Regulatory

---

[56/] (357/381.5) x 100 = 93.578%
(24.5/381.5) x 100 = 6.422%

[57/] As noted, *supra*, my understanding of the Civil Monetary Inflation Adjustment Rule is that the 10% and 17.23% increases it proscribes are calculated on a compounded basis rather than the straight addition approach.

[58/] $20,000 x .93578 x 10% = $20,587.16
$20,000 x .06422 x 28.95% = $1,656.23
$20,587.16 + $ 1,656.23 = $22,243.39

Scheme component of Gravity: $15,000 for Respondent's failure to report a test plan (Count I); $15,000 for Respondent's failure to conduct a performance test (Count II); $10,000 for Respondent's incomplete response to a Section 114 request (Count III); and $15,000 for Respondent's failure to respond to a Section 114 request (Count IV). However, I differ from the Region on the appropriate inflationary-adjusted assessments for each of these Importance to the Regulatory Scheme sub-components.

As noted in the discussion of the Length of Violation component of Gravity, *supra*, the violations alleged in Count I of the Complaint continued for 604 days, the violations alleged in Count II continued for 920 days, and the violations alleged in Counts III and IV each were one day violations. To arrive at the inflation-adjusted penalty for each sub-component of the Importance to the Regulatory Scheme component of Gravity (*i.e.,* for each Count in the Complaint), the number of days associated with each Count are allocated to the appropriate time period relative to the March 15, 2004, increase in the appropriate inflationary amount. Employing such methodology yields the following: $17,662.41 for Count I; $18,239.50 for Count II; $12,895.00 for Count III; and $19,343.00 for Count IV.[59/]

c) Size of the Violator

As discussed, *supra*, Respondent did not attempt to produce financial documents that would corroborate Mr. Hall's self-serving testimony that it is not a corporation whose net worth exceeds $1 million. Indeed, based on Mr. Hall's own testimony, Respondent did not sufficiently rebut the Region's presentation that Liston's net worth exceeds $1 million. Thus, I find the penalty assessed for the Size of the Violator component of

---

[59/] The Region, in error, applied an inflationary adjustment figure of 27.23% to the penalties proposed for Counts III and IV. As noted, *supra*, I must assume the Region added the 10% increase, which became effective in January 1997, and the 17.23% increase, which became effective on March 15, 2004), of the Civil Monetary Inflation Adjustment Rule to arrive at the 27.23% inflationary adjustment it applied to these two Counts. My understanding of the Civil Monetary Inflation Adjustment Rule, however, is that the 10% and 17.23% increases are calculated on a compounded basis rather than the straight addition approach. Thus, I apply a 28.95% inflationary adjustment to Counts III and IV, as I have done consistently in the remaining Counts for violations occurring after March 15, 2004.

Gravity, $10,000, prior to inflationary adjustment, is pled and proven appropriate.

Regarding the Size of the Violator component of Gravity, the Region applied the same inflationary adjustment, spanning a generalized 17 month duration, as it did to the Length of Violation sub-component to the Actual or Possible Harm component of Gravity. Using the same logic as applied with regard to the Length of violation component, explained *supra,* I similarly find it more appropriate to adjust the Size of the Violator component by inflationary rates that proportionately account for the increase in the inflationary adjustment that occurred on March 15, 2004. Using, again, 381.5 days as the duration for the four counts of violations, 93.578% of the pre-adjusted $10,000 penalty for the Size of the Violator component is adjusted for inflation by 10%, while 6.422% of the pre-adjusted $10,000 penalty for the Size of the Violator component is adjusted for inflation by 28.95%. This results in a penalty of $11,121.70, adjusted for inflation, for this component.[60/]

d) Adjustments to Gravity

The Region chose not to assess any penalty adjustments to the Gravity component, as provided for in the CAA Penalty Policy. As noted, *supra*, the CAA Penalty Policy provides that the EPA may consider the following factors in adjusting the Gravity component it assesses: (a) degree of willfulness or negligence; (b) degree of cooperation; (c) history of noncompliance; and (d) environmental damage. Additionally, as noted *supra*, I reject the Region's suggestion that I simply consider these factors as a justification for curing the calculation defects of the penalty assessments proposed in the Complaint. I will not alter my assessment of the penalty assessed under the Gravity component in this matter for factors that the Region did not plead, in the interest of due process to Respondent.

Thus, in total the penalty assessed for the Gravity component of the proposed penalty is $101,505.

[60/] $10,000 x .93578 x 10% = $10,293.58
$10,000 x .06422 x 28.95% = $828.12
$10,293.58 + $828.12 = $11,121.70

3. Culpability

Respondent contends that if liability is found on the Counts alleged in the Complaint, it was not culpable in this matter and thus the penalty should be reduced or eliminated. *See* Resp.'s Br. at 5-6. This contention is without merit. As discussed, *supra*, the CAA is a strict liability statute and Respondent has hired environmental consultants in the past to assist it in understanding and keeping apprised of environmental statutes and regulations pertaining to the secondary aluminum production industry. *See* Tr. at 436-440. Moreover, Respondent, as a business whose operations have the capability to release toxic emissions into the surrounding community, is assumed to have known about and is charged with keeping abreast of the statutes and regulations affecting secondary aluminum production facilities. Although Mr. Hall testified that he lacks formal education concerning the secondary aluminum production process and attempted to portray himself as a "lame," uneducated individual, the record demonstrates that he operated a rather productive and successful secondary aluminum production facility for several years. *See* Tr. at 485-88. The record does not demonstrate that Mr. Hall was confused by the Region's Information Requests or correspondence. Rather, the record indicates that he wanted to avoid testing for D/F at three sources and was not forthright in his responses to the Information Requests. Notably, Respondent did not produce any documents or testimony to corroborate Mr. Hall's self-serving testimony that Respondent lacked culpability. Thus, Respondent is liable for the violations alleged and the penalty sought is not excessive.

4. Total Penalty Assessed

In light of the aforementioned discrepancies, I have recalculated the appropriate penalty. In sum, adding the penalty assessed for the Economic Benefit component of the penalty to the penalty assessed for the Gravity component of the penalty results in a total penalty of $116,402.

In view of the foregoing discussion, Respondent's motion for the recovery of reasonable attorney's fees and costs is **DENIED**. Answer at 8.

IV. FINDINGS OF FACT

1. Between March 24, 2003 and November 17, 2004, Respondent failed to submit a site-specific test plan for its secondary aluminum production facility.

2. Between March 24, 2003 and September 30, 2005, Respondent failed to conduct an initial performance test for D/F.

3. Respondent failed to submit a complete response to Complainant's April 28, 2004 and July 20, 2004 information requests.

4. Respondent failed to respond to Complainant's May 17, 2005 information request.

V. CONCLUSIONS OF LAW

1. Respondent is an "owner or operator" of a "secondary aluminum production facility" within the meaning of 40 C.F.R. § 63.1503 and, thus, is subject to the requirements of 40 C.F.R. part 63, subpart RRR, §§ 63.1500-63.1519 (National Emission Standards for Hazardous Air Pollutants for Secondary Aluminum Production ("Secondary Aluminum NESHAP")).

3. Respondent violated 40 C.F.R. § 63.1511 for failing to submit a site-specific test plan by March 24, 2003, and thus Respondent violated Section 112 of the CAA.

4. Respondent violated 40 C.F.R. § 63.1511 for failing to conduct an initial performance test for dioxin and furans by March 24, 2003, and thus Respondent violated Section 112 of the CAA.

5. Respondent violated Section 114 of the CAA for failing to submit a complete and/or accurate response to Requests for Information from the EPA.

6. Respondent violated Section 114 of the CAA for failing to submit a response to a Request for Information from the EPA.

7. An appropriate and reasonable civil administrative penalty for Respondent's violations of Sections 112 and 114 of the CAA, and their implementing regulations at 40 C.F.R. §§ 63.1511 is $116,402. 42 U.S.C. § 7413(e).

ORDER

1. Respondent Liston Brick of Corona is assessed a civil administrative penalty in the amount of $116,402.

2. Payment of the full amount of this civil administrative penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below.[61/] Payment shall be made by submitting a

---

[61/] Alternatively, Respondent may make payment of the penalty as follows:

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read " D 68010727 Environmental Protection Agency "

OVERNIGHT MAIL:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Contact: Natalie Pearson
314-418-4087

ACH (also known as REX or remittance express)

Automated Clearinghouse (ACH) for receiving US currency

PNC Bank

certified or cashier's check in the amount of $116,402, payable to "Treasurer, United States of America," and mailed to:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

3. A transmittal letter identifying the subject case title and EPA docket number (CAA-09-2005-0018), as well as Respondent's name and address, must accompany the check.

4. If Respondent fails to pay the penalty within the prescribed statutory period after entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 31 C.F.R. §§ 13.11, 901.9.

---

808 17th Street, NW
Washington, DC 20074
Contact – Jesse White 301-887-6548
ABA = 051036706
Transaction Code 22 - checking
Environmental Protection Agency
Account 310006

CTX Format

ON LINE PAYMENT:

This payment option can be accessed from the information below:
WWW.PAY.GOV
Enter sfo 1.1 in the search field.
Open form and complete required fields.

Appeal Rights

This Order constitutes an Initial Decision as provided in Section 22.17(c) of the Rules of Practice, 40 C.F.R. § 22.17(c). Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency unless an appeal is filed with the Environmental Appeals Board within thirty (30) days of service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this decision.

_____
Barbara A. Gunning
Administrative Law Judge

Dated: December 18, 2007
Washington, D.C.