**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**REGION 10**
1200 Sixth Avenue
Seattle, Washington 98101

August 24, 2007

Reply To
Attn Of: ORC-158

Eurika Durr, Clerk
Clerk of the Environmental Appeals Board
1341 G Street, NW
Washington, DC 20005

Re: Altex Distributing, Inc.
CAA-10-2006-0240

Dear Ms. Durr:

Enclosed is one true copy of the entire administrative record of Altex Distributing, CAA-10-2006-0240, for review by the Environmental Appeals Board. Also enclosed is a certified index of the entire administrative record.

The attorneys for this matter are Deborah Hilsman and Stephanie Mairs. Deborah may be reached at 206-553-1810. Stephanie may be reached at 206-553-7359.

Sincerely,

Carol D. Kennedy
Regional Hearing Clerk

Enclosures

cc: Richard McAllister, RJO , (w/o enclosures)
Deborah Hilsman, (w/o enclosures)
Stephanie Mairs, (w/o enclosures)

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**REGION 10**
1200 Sixth Avenue NW
Seattle, Washington 98101

| | |
|---|---|
| **IN THE MATTER OF:** | **DEFAULT ORDER AND INITIAL DECISION** |
| Altex Distributing, Inc. | |
| Respondent | Docket No. CAA-10-2006-0240 |



## I. STATEMENT OF THE CASE

This is a proceeding under the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties*, 40 C.F.R. Part 22 (Consolidated Rules), by the U.S. Environmental Protection Agency, Region 10 (EPA or Complainant), to assess a civil penalty under Section 113(d) of the Clean Air Act (CAA), 42 U.S.C. § 7413(d), and Section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 42 U.S.C. § 11045, against Altex Distributing., Inc. (Respondent), for alleged violations of Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and Section 312 of EPCRA, 42 U.S.C. § 11022.

EPA has moved for a Default Order under 40 C.F.R. § 22.17(b) of the Consolidated Rules, and has requested the assessment of a civil penalty in the amount of $134,390 for those violations, as proposed in the Complaint. For the reasons set forth below, Complainant's Motion for Default Order is hereby GRANTED. The Respondent, Altex Distributing Inc., is hereby found in default and a civil penalty in the amount of $134,115 is assessed against it.

## II. BACKGROUND

### A. Procedural History

On March 24, 2006, the Director of the Office of Compliance and Enforcement, U.S. EPA Region 10, acting pursuant to a lawful delegation, filed a Complaint against Respondent alleging violations of Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and Section 312 of EPCRA, at Respondent's facility located at 200 Post Road in Anchorage, Alaska. Prior to the filing of the Complaint, the EPA Administrator and the Attorney General for the U.S. Department of Justice jointly determined that the Complaint, which includes the allegation of a CAA violation that commenced more than 12 months earlier but does not seek more than $270,000 in CAA penalties, is an appropriate administrative penalty action under Section

113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1).

The Complaint alleges violations that were detected during an inspection of Respondent's facility by an EPA contractor that took place on October 25, 2004, through follow-up investigations and correspondence, and from an inspection of the facility by EPA that took place on February 8, 2006. A report of the October 25, 2004 inspection recounts that the 60,250 pounds of chlorine and 4,700 pounds of sulfur dioxide were present at the facility during the inspection. During that inspection, the Respondent provided the inspectors with information disclosing that in 2003 Respondent had 60,000 pounds of chlorine and 5,000 pounds of sulfur dioxide stored at the facility. In a phone call on December 16, 2004 with an EPA On-Scene Coordinator that is memorialized in a memorandum attached as Exhibit 15A to the Motion for Default Order, the Respondent disclosed that 50,000 pounds of chlorine and 5,500 pounds of sulfur were present at the facility. Follow-up investigations found that the Respondent had not submitted a Risk Management Plan to EPA, and had not submitted Emergency and Hazardous Chemical Inventory Forms to the State Emergency Response Commission (SERC), the Local Emergency Response Commission (LERC), or the fire department with jurisdiction over the facility. Attachment 19A to the Motion for Default Order is a memorandum by EPA with copies of electronic messages from the Alaska SERC and the Anchorage LEPC and fire department which report that Altex Distributing did not submit the required Emergency and Hazardous Chemical Inventory Form. Attachment 19A also notes that the Threshold Planning Quantity for chlorine is 100 pounds and sulfur dioxide is 500 pounds. An inspection by EPA on February 8, 2006, determined that there were no chemicals at the facility in regulated quantities, as documented in a memorandum attached as Exhibit 19C to the Motion for Default Order.

Count 1 of the Complaint alleges that the Respondent failed to submit a Risk Management Plan, as required by Section 112(r) of the CAA and 40 C.F.R. § 68.150. Count 2 of the Complaint alleges that the Respondent failed to submit to the SERC a completed Emergency and Hazardous Chemical Inventory Form (EHCIF) that includes chlorine and sulfur dioxide for calendar year 2004, as required by Section 312(a) of EPCRA, 42 U.S.C. §§ 11022(a), and 40 C.F.R. Part 370. Count 3 of the Complaint alleges that the Respondent failed to submit to the LERC and fire department a completed EHCIF for calendar year 2004, as required by Section 312(a) of EPCRA, 42 U.S.C. §§ 11022(a), and 40 C.F.R. Part 370. Count 4 of the Complaint alleges that the Respondent failed to submit to the SERC, the LERC, or the fire department a completed EHCIF that includes chlorine and sulfur dioxide for calendar year 2003, as required by Section 312(a) of EPCRA, 42 U.S.C. §§ 11022(a), and 40 C.F.R. Part 370. The Respondent was served with the Complaint by certified mail, return receipt requested. EPA has provided a copy of the return receipt which shows the Complaint was received by Respondent on April 19, 2006.

On May 22, 2006, Respondent filed an unopposed motion for extension of time to file its answer to the Complaint, signed by Robert M. Curry, President of Altex Distributing, Inc. On May 23, 2006, the undersigned, as Presiding Officer in this matter, granted Respondent's Motion for Extension of Time to File Answer and the answer became due on June 19, 2006.

On February 16, 2007, EPA filed the Motion for Default Order, which was properly

served on Respondent as attested to in a Certificate of Service signed by Matthew Goers, Criminal Investigator for EPA. A declaration by the Regional Hearing Clerk attached to the Motion for Default Order attested that as of the date the Motion for Default Order was filed, Respondent had not filed an Answer to the Complaint, as required by 40 C.F.R. § 22.15.

B. Statutory and Regulatory Background

Section 112(r) of the Clean Air Act, 42 U.S.C. § 7412(r), directed the Administrator of EPA to promulgate regulations to prevent accidental releases of regulated substances and minimize the consequences of those releases that do occur. The regulations, known as the Risk Management Program regulations, are codified at 40 C.F.R. Part 68. The Risk Management Program regulations apply to all stationary sources with processes that contain more than a threshold quantity of regulated substance. The rules at Part 68 include a list of regulated substances, at threshold quantities, which would be subject to release prevention, detection, and correction requirements. Each facility subject to the Risk Management Program regulations must submit to EPA a Risk Management Plan (RMP) and update it no later than the date upon which a regulated substance is first present above a threshold quantity in a new process. Chlorine and sulfur dioxide are included on Table 1 of 40 C.F.R. § 68.130 entitled "List of Regulated Toxic Substances and Threshold Quantities for Accidental Release Prevention," which shows chlorine has a minimum threshold quantity of 2,500 pounds and sulfur dioxide has a minimum threshold quantity of 5,000 pounds.

Section 301 of EPCRA, 42 U.S.C. § 11001, established a system of State Emergency Response Commissions and Local Emergency Response Committees. Section 312(a) of EPCRA, 42 U.S.C. §§ 11022(a), and its implementing regulations at 40 C.F.R. Part 370 require the owner or operator of a facility that is required by the Occupational Safety and Health Administration (OSHA) to prepare or have available a material safety data sheet (MSDS) for a hazardous chemical, to submit a completed EHCIF to the SERC, the LEPC, and the fire department with jurisdiction over the facility. The EHCIF may be a Tier I form, promulgated at 40 C.F.R. § 370.40, or a Tier II form, promulgated at 40 C.F.R. § 370.41. Facilities are required to submit a completed EHCIF (Tier I or Tier II) for all extremely hazardous chemicals present at the facility at any one time in amounts equal to or greater than 500 pounds or the threshold planning quantity designated by EPA, whichever is lower. EPA has designated chlorine and sulfur dioxide as "extremely hazardous substances" at 40 C.F.R. Part 355, Appendices A and B, entitled "The List of Extremely Hazardous Substances and Their Threshold Planning Quantities."

## III. PROCEDURE

Section 22.15 of the Consolidated Rules requires the respondent to file an answer with the Regional Hearing Clerk within 30 days after service of the complaint.

Section 22.7 of the Consolidated Rules authorizes the Presiding Officer to grant timely motions for an extension of time to file an answer to the complaint.

Section 22.15(d) of the Consolidated Rules provides: "Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation."

Section 22.17 of the Consolidated Rules provides a party may be found to be in default

upon failure to file a timely answer to the complaint; a motion for default may seek resolution of all or part of the proceeding, including the assessment of a penalty; and when the Presiding Officer finds that default has occurred, "he shall issue a default order against the defaulting party as to any or all parts of the proceeding. [ ] If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice."

Section 22.27(b) of the Consolidated Rules provides that if the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, "the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with the civil penalty criteria set forth in the Act."

## IV. FINDINGS OF FACT

Pursuant to 40 C.F.R. § 22.17(c) and based upon the entire record, the following allegations are deemed admitted, and I make the following findings:

1. The Respondent, Altex Distributing, Inc., a corporation doing business in the State of Alaska, is the owner and operator of a facility located at 200 Post Road, Anchorage, Alaska.
2. During the period May 1, 2003 through September 1, 2005, Respondent used, stored, manufactured, handled, or moved on-site more than 2,500 lbs. of chlorine in a single process and more than 5,000 lbs. of sulfur dioxide in a single process at the facility which is a stationary source under the CAA.
3. On October 25, 2004, the Respondent's facility contained 60,250 pounds of chlorine and 4,700 pounds of sulfur dioxide. At times in 2003 and 2004, over 5,000 pounds of sulfur dioxide and at least 50,000 pounds of chlorine were stored at the facility. The minimum threshold quantity established under 40 C.F.R. § 68.130 is 2,500 pounds of chlorine and 5,000 pounds of sulfur dioxide.
4. Respondent did not submit to EPA a risk management plan for the facility from at least May 1, 2003 to September 1, 2005.
5. OSHA required Respondent to prepare, or have available, an MSDS for chlorine and sulfur dioxide, which are listed as toxic and hazardous substances under OSHA regulations at 29 C.F.R. § 1910.1000, Table Z-1.
6. Respondent failed to submit a completed Emergency and Hazardous Chemical Inventory Form that includes chlorine and sulfur dioxide to the SERC, the LEPC, or the fire department for calendar years 2003 and 2004.
7. EPA and the Attorney General for the U.S. Department of Justice have jointly determined that the Complaint, which includes the allegation of a CAA violation that commenced more than 12 months earlier but does not seek more than $270,000 in CAA penalties, is an appropriate administrative penalty action under Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1).
8. On March 24, 2006, EPA filed a Complaint against Respondent alleging violations of Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and Section 312 of EPCRA, at Respondent's facility located at 200 Post Road in Anchorage, Alaska, and assessing a penalty of $134,390.
9. The Complaint was lawfully served on Altex Distributing, Inc. April 19, 2006.
10. On May 22, 2006, Respondent filed an unopposed motion for extension of time to file its answer to the Complaint, which was granted on May 23, 2006, and the answer became due on

June 19, 2006.

11. The Respondent failed to file an Answer to the Complaint.

12. On February 16, 2007, EPA filed the Motion for Default Order.

13. On April 10, 2007, the Motion for Default Order was hand delivered to Michael Curry, for Altex Distributing, Inc.

14. The Respondent has failed to respond to Complainant's Motion for Default Order.

## V. DISCUSSION

The record in this case shows that Respondent failed to answer the Complaint despite being granted an extension of time to do so. The Consolidated Rules at 40 C.F.R. § 22.17 provides that failure to answer a complaint is grounds for an order of default. Respondent's failure to admit, deny, or explain material allegations of the CAA and EPCRA violations alleged in the Complaint constitutes an admission to the allegations under 40 C.F.R. § 22.15(d).

In order for a default order to be entered against Respondent, the Presiding Officer must conclude that EPA has established a *prima facie* case of liability against Respondent. To establish a *prima facie* case of liability, EPA must present evidence sufficient to establish a given fact which, if not rebutted or contradicted, will remain sufficient to sustain judgment in favor of the issue which it supports, but which may be contradicted by other evidence. Black's Law Dictionary 1190 (6th ed. 1990).

The facts set forth in the Complaint, as summarized above in the Findings of Fact, establish jurisdiction over the Respondent and show that the Respondent's storage of chlorine and sulfur dioxide violated CAA § 112(r) and EPCRA § 312. Since the Respondent did not file an Answer to the Complaint, it has presented no evidence to contravene the facts alleged in the Complaint. Pursuant to the Consolidated Rules at 40 C.F.R. § 22.17(a), default by the Respondent constitutes, for purposes of this proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations.

## VI. CONCLUSIONS OF LAW

Pursuant to the Consolidated Rules at 40 C.F.R. § 22.17, and based upon the record, I conclude as follows:

1. The Respondent, Altex Distributing, Inc., a corporation doing business in the State of Alaska, is the owner and operator of a facility at which more than 2,500 lbs. of chlorine in a single process and more than 5,000 lbs. of sulfur dioxide were used, stored, manufactured, handled, or moved on-site.

2. The Respondent did not submit to EPA a risk management plan for the facility from at least May 1, 2003 to September 1, 2005, as required by Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and 40 C.F.R. § 68.150.

3. Respondent did not submit a completed Emergency and Hazardous Chemical Inventory Form that includes chlorine and sulfur dioxide to the SERC, the LEPC, or the fire department for calendar years 2003 and 2004, as required by Section 312(a) of EPCRA, 42 U.S.C. §§ 11022(a),

and 40 C.F.R. Part 370.

4. EPA and the Attorney General for the U.S. Department of Justice jointly determined that the Complaint, which includes the allegation of a CAA violation that commenced more than 12 months earlier but does not seek more than $270,000 in CAA penalties, is an appropriate administrative penalty action pursuant to Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1).

5. The Complaint was lawfully and properly served on the Respondent in accordance with Section 22.05(b)(1) of the Consolidated Rules, assessing a penalty of $134,390 for violations of Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and Section 312 of EPCRA, 42 U.S.C. § 11022, alleged in the Complaint.

6. The Respondent failed to file a timely answer to the Complaint, as required by Section 22.15(a) of the Consolidated Rules.

7. In accordance with Sections 22.15(d) and 22.17(a), Respondent's failure to file an answer constitutes an admission by Respondent of all the facts alleged in the Complaint and a waiver of Respondents right to a hearing regarding the factual allegations.

8. The Complainant has moved for a Default Order in a manner consistent with Section 22.17 of the Consolidated Rules, and the Motion for Default Order was lawfully and properly served upon the Respondent.

9. The Respondent has failed to respond to EPA's Motion for Default Order.

10. EPA's uncontested factual allegations establish a *prima facie* case for liability for the violations of CAA § 112(r) and EPCRA § 312.

11. Due to the Respondent's failure to file an Answer to the Complaint or to respond to the Motion for Default Order, the Respondent is in default, and there are grounds for issuing a default order for the violations described above.

## VII. DETERMINATION OF PENALTY

The following reviews the factors for determining a penalty under the CAA and EPCRA. Pursuant to section 22.27(b) of the Consolidated Rules, any penalty assessment is to be based on the statutory factors, in consideration of the penalty guidance issued for that particular statute. Section 22.27(b) requires the Presiding Officer to set forth in the initial decision the specific reasons for assessing a penalty that is different than that proposed by the Complainant. That section also provides that, in the case of a default, the Presiding Officer shall not assess a penalty greater than the amount proposed in the complaint or requested in the motion for default order, whichever is less. In addition, section 22.17(c) of the Consolidated Rules provides that the presiding officer shall order the relief sought in the complaint or motion for default order "unless the requested relief is clearly inconsistent with the record of the proceeding or the Act."

I note that the penalties proposed by EPA were calculated considering that both Section 113(d) of the CAA, 42 U.S.C. § 7413(d), and Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1), as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, authorize a civil administrative penalty for each violation of the CAA or EPCRA of up to $27,500 for each day of violation occurring between January 31, 1997 and March 15, 2004, and $32,500 for each day of violation occurring after March 15, 2004.

After reviewing the record, I find that EPA appropriately considered the facts alleged in the Complaint and the statutory factors described above. EPA has presented evidence to show it considered the Respondent's ability to pay the penalty, and, based on that information, reasonably presumed that Respondent could pay the penalty and continue in business. As described below, the penalty amounts proposed for each violation are consistent with the applicable penalty policy, and I find the proposed penalties are reasonable.

A. Violations of Section 112(r) of the CAA

Section 113(e) of the CAA enumerates the factors EPA must consider when assessing administrative penalties for CAA violations. These factors are: the size of Respondent's business; the economic impact of the proposed penalty on Respondent's business; Respondent's full compliance history and good faith efforts to comply; the duration of the violation as established by any credible evidence; payment by Respondent of penalties previously assessed for the same violation; the economic benefit of noncompliance; and the seriousness of the violation (in addition to such other factors as justice may require). EPA has issued a policy, entitled "Combined Enforcement Policy for Section 112(r) of the CAA," dated August 15, 2001, (the CEP), attached as Exhibit 20 to the Motion for Default Order, which provides guidance for determining the appropriate penalty for the CAA violation. The CEP provides that a proposed penalty is calculated by assessing the economic benefit of the noncompliance and the gravity of the violation. The gravity component evaluates the seriousness of the violation, the duration of the violation, and the size of the violator, which can be adjusted to account for other factors: degree of willfulness or negligence, degree of cooperation, history of noncompliance, and environmental damage. Based upon an evaluation of the facts alleged in the Complaint, the factors in Section 113(e) of the CAA, and the application of the CEP and the Civil Monetary Penalty Inflation Adjustment Rule, EPA proposed a penalty of $67,286, of which $8,535 was for the economic benefit component of the penalty and $58,751 was for the gravity component.

The record in this proceeding shows a penalty calculation was included in the Complaint and the Motion for Default Order which were served on Respondent. The Motion for Default Order included as Exhibit 15 a declaration by the Region 10 Risk Management Program Coordinator (RMPC) describing the background of the violations, and how the statutory and penalty policy criteria were applied in this case. Attached to the declaration as Exhibit 15K is a memorandum by the RMPC that described factors considered in assessing a penalty for the seriousness of the violation, and a second memorandum that described how the economic benefit and total penalty were calculated.

In calculating the penalty, Complainant first considered the gravity of the violation, noting the CEP considers the seriousness of the violation by evaluating the extent of the deviation (Major, Moderate, or Minor), and type of facility. The facility was classified as a "Program 2" facility pursuant to EPA regulations at 40 C.F.R. § 68.10(c). The failure to file a risk management plan was deemed a moderate violation because EPA found that the Respondent had at least developed an "emergency contingency plan" in 2002 for the storage of chlorine and sulfur dioxide which described measures Respondent would take to notify emergency responders in case there was a release. The penalty matrix in the CEP shows the range of penalties for

Program 2 facilities with a moderate violation as between $12,001 and $25,000. The CEP also provides the penalty for the "Seriousness of Violation" component can be adjusted upward of 25 percent to 50% percent, depending upon whether the potential "worst-case" consequences of a release.

EPA saw this as a very serious violation when considering the potential effect of a release of chlorine or sulfur dioxide, because the facility is located in a an area surrounded by businesses, schools and residences. In addition, EPA noted that chlorine is very toxic. When considering these factors, the RMPC recommended a penalty of $25,000, the highest penalty possible in the matrix. The RMPC considered the worst case situation from a release at the facility would have a "major impact" on human health, and recommended an upward adjustment of 25 percent, for a total penalty of $31,250 for the seriousness of the violation.

The second factor considered when assessing the gravity of a violation is the duration of the violation, and Table II of the CEP is used to calculate a penalty for the duration of the violation. EPA's information was that the Respondent had failed to have the required Risk Management Plan from May 1, 2003 through September 1, 2005, at which time EPA's information is that Respondent stopped storing chlorine or sulfur dioxide in threshold or greater amounts at the facility. For a violation that lasts 28 months, the CEP determines that the Respondent should be assessed a penalty per month that increases the longer the duration. The penalty component for duration of the violation calculated the penalty as $500/month for the first 12 months, $1,000/month for the second 12 months, and $1,500 of the final 4 months. Following the CEP methodology, I calculate the penalty for the duration component to be $24,000 ($6,000 for months 1-12, $12,000 for months 13-24, and $6,000 for months 25-28). I note that the penalty proposed by EPA in the Complaint assessed a lower amount of $21,500 for the duration factor of the gravity component. As described above, Section 22.27 of the Consolidated Rules provides that in the case of a default, the Presiding Officer shall not assess a penalty greater than the amount proposed in the complaint or requested in the motion for default order, whichever is less. Therefore, for purposes of calculating the penalty for this factor of the gravity component, I will use the penalty proposed by the Complainant of $21,500.

The third factor for assessing the gravity of the violation described in the CEP is the size of the violator. Table III of the CEP describes how a penalty should be scaled to the size of the violator, and provides that the size adjustment for a company with net worth under $1,000,000 is $0. Since EPA was unable to determine the Respondent's net worth, the Complainant evaluated gross sales revenues reported for 2004 and 2005. The Complainant decided the information showed Respondent's net worth may be less than $1,000,000, so no penalty was assessed for size.

The RMPC also considered whether to adjust the penalty under the CEP to reflect the degree of willfulness or negligence, degree of cooperation, history of noncompliance, or environmental damage. The RMPC recommended no adjustment, noting the Respondent did not have a history of CAA violations and had not acted in a way that warranted other adjustments.

The final step in calculating the gravity component of the penalty for the CAA violation is to adjust the penalty consistent with the Civil Monetary Penalty Inflation Adjustment Rule cited above. Since that rule took effect on March 15, 2004, only the violations occurring after that date are adjusted to account for inflation. As noted above, a memorandum by the RMC summarizing the economic benefit and gravity components of the violations evaluated how the penalty would be adjusted under the Rule cited above. In the final rulemaking for the Civil Monetary Penalty Inflation Adjustment Rule, published February 13, 2004, 7121 Federal Register, EPA determined that 17.23 percent is the appropriate inflation adjustment for violations occurring after the rule was published. The RMC concluded that seventeen and one-half months occur between March 15, 2004 and September 1, 2005 when the inflation adjustment applies, which represents 63 percent of the total 28 month duration of the violation. The RMC increased the gravity component of the penalty for those seventeen and one-half months by 17.23 percent. In summary, EPA proposed that the total gravity penalty for violations occurring after February 2004, which represents 63 percent of the period in violation, should be increased by 17.23 percent.

When combining the penalty factors for seriousness of the violation ($31,250) and duration of the violation ($21,500), and then increasing the penalty under the Civil Monetary Penalty Inflation Adjustment Rule by 17.23 percent for seventeen and one-half months of the violation, the total penalty for the gravity component is increased by $5,726 ($52,750 x 0.63 x 0.1723). Therefore, when adding the penalties for seriousness ($31,250) and duration ($21,500) to the adjustment for inflation ($5,726), the total gravity component of the penalty is $58,476. I note that the Complaint and the Motion for Default assessed an adjustment for inflation totaling $6,001, which I have not been able to duplicate, and the Complainant concluded that the total gravity component of the penalty would be $58,751. Section 22.27(b) of the Consolidated Rules requires the Presiding Officer to explain in detail in the initial decision how the penalty assessed corresponds to the penalty criteria in the applicable Act and penalty policy, and to set forth the specific reasons for assessing a penalty that is different than that proposed by the Complainant. In the preceding paragraphs I have explained in detail the basis for calculating the adjustment for inflation using the proposed penalties and factors used by the Complainant consistent with the statutory factors and the CEP. Although the penalty I calculate decreases the penalty proposed by the Complainant, the record does not support the Complainant's proposed adjustment for inflation. Therefore, consistent with the record and in accordance with the applicable penalty policy, I find the appropriate gravity component of the penalty is $58,476, which includes an adjustment for inflation of $5,726.

The second component of a penalty under the CEP is the economic benefit to the Respondent from avoiding the cost of compliance. Attached as Exhibit 15K to the Motion for Default Order is a memo from the RMPC that summarizes the economic benefit calculations. As a first step, EPA developed an estimate of the costs to develop ($8,000) and maintain ($820) a risk management plan. Those costs were then used in EPA's BEN software program to calculate the economic benefit to the Respondent, and the BEN program output for this case was attached to the Motion for Default as Exhibit 15F. The RMPC reported that the BEN software calculated that the Respondent accrued an economic benefit of $8,535 as the result of failing to develop and maintain a risk management plan.

Based on my review of the record, I have determined that the penalty amount sought for the violation of the CAA described in the Complaint is supported by the record and is not inconsistent with the statutory factors for assessment of a penalty. Therefore, I see no reason to alter the proposed penalty other than a minor change in the adjustment for inflation noted above. Complainant's consideration of all components of the penalty is a reasonable application of the facts with respect to the reporting violations under the CAA, and is consistent with the guidance provided by the penalty policy. Complainant's consideration of Respondent's financial situation is also reasonable. Respondent was on notice of Complainant's position regarding the size of business when it received the Complaint, and had an additional opportunity to challenge Complainant's position as described in the Motion for Default Order. When combining the gravity and economic benefit components of the penalty, the total penalty to be assessed against the Respondent for violating Section 112(r) of the CAA adds the gravity component and the economic benefit component to total $67,011 ($58,476 + $8,535). Accordingly, I assess a penalty of $67,011 for the violations of the CAA described in the Complaint as Count 1.

B. Violations of Section 312 of EPCRA

Section 325(b)(1)(C) of EPCRA enumerates the factors EPA must consider when assessing administrative penalties for EPCRA violations. These factors are the nature, circumstances, extent, and gravity of the violations, the violator's ability to pay, prior history of violations, degree of culpability, economic benefit or savings resulting from the violations, and any other matters that justice requires. EPA has issued a penalty policy entitled "Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act," dated September 30, 1999 (the ERP), which was attached to the Motion for Default as Exhibit 21. Based upon an evaluation of the facts alleged in the Complaint, and after considering the statutory factors and the ERP, EPA proposed a penalty of $67,104 for the EPCRA violations alleged in this Complaint, of which $604 was for the economic benefit component of the penalty and $66,500 was for the gravity component.

The record in this proceeding shows a penalty calculation was included in the Complaint which was served on Respondent. The Motion for Default included as Exhibit 19 an affidavit of the Region 10 Enforcement Program Coordinator (EPC) describing the background of the violations, and how the statutory and penalty policy criteria were applied in this case. Attached as Exhibit 19B to the Motion for Default Order is a memorandum by the EPC that described specific factors considered in assessing a base penalty for the violations, and how the economic benefit penalty was calculated.

In calculating the penalty under the ERP, EPA first calculates the base penalty considering the nature of the violation, the extent of the violation, the gravity of the violation, and the circumstances of the violation. The ERP specifies that failure to submit required reports or forms to each "point of compliance" is a separate violation. The ERP at Table II includes Base Penalty Matrices for Violations Which Occur After January 30, 1997, that considers both how long the violation takes place and the amount of the regulated chemical involved. For previous years of noncompliance with Section 312 of EPCRA that are detected, the ERP

provides that those violations are assessed a flat penalty of $1,500.

When EPA considers how the penalty is determined under the ERP, the first factors to measure are the nature, extent, gravity and circumstances of the violation. The ERP categorizes the failure to file reports as Emergency Preparedness Violations, and instructs EPA to take into account, among other things, the potential for emergency personnel, the community and the environment to be exposed to hazards due to noncompliance, the relative proximity of the surrounding population, the public's ability to access the information, and the effect noncompliance has on the LEPC's ability to plan for chemical emergencies. Violations are considered "Level 1" where the Respondent fails to submit the inventory form to the SERC, LEPC, or fire department within 30 calendar days of the reporting deadline. Table II of the ERP, which addresses violations occurring after January 30, 1997, recommends a penalty of up to $27,500 for a Level 1 violation where the regulated chemical was present at greater than 10 times the regulated quantity.

EPA recommended the highest penalty in the applicable ERP matrix for the violations occurring after March 15, 2004, since Altex Distributing, Inc. had never come into compliance, and the facility is located in an area with businesses, residences, and schools. An additional consideration is that the Respondent had failed to file the required reports for 2000, 2001, 2002, and 2003, so emergency response agencies and the public had never been alerted to the potential hazards at the facility. Since the chlorine was present in quantities much greater than 10 times the threshold planning quantity, the EPC recommended a penalty of $27,500, which after being adjusted for inflation in accordance with the Civil Monetary Penalty Inflation Adjustment Rule is $32,500 because the violations extended beyond March 2004. The EPC proposed separate penalties of $32,500 for two violations in the year 2004, one for failure to report to the SERC and the second for failure to report to the LEPC and fire department. Since the LEPC and fire department were co-located, EPA believed it was appropriate to consider the failure to notify those agencies as one violation. For the failure to submit the required reports in 2003, EPA proposed a penalty of $1,500. In sum, EPA proposed penalties of $32,500 for failure to file required reports with the SERC in 2004; $32,500 for failure to file required reports with the LEPC/fire department in 2004; and $1,500 for failure to file required reports with the SERC, LEPC and fire department in 2003, totaling $66,500.

The ERP also provides guidance on how the penalty can be adjusted for a number of reasons, including the Respondent's ability to pay and continue in business, prior history of violations, degree of culpability, economic benefit or savings, size of business, attitude, voluntary disclosure, and other matters as justice may require. EPA's review of the adjustment factors found that based on sales data, there was no reason to indicate the Respondent would demonstrate an inability to pay the penalty. Although there was no prior history of violations, the EPC noted that the degree of culpability had been considered when selecting the highest range of the penalty for a Level 1 violation. To determine the economic benefit to the Respondent, the EPC referred to Table III of the ERP, which estimates the typical costs for the required actions would be $604. After reviewing the other factors described in the ERP, EPA did not recommend any adjustments except for economic benefit. In summary, the total penalty proposed by EPA for the EPCRA violations is $67,104 ($32,500 + $32,500 + $1,500 + $604).

Based on my review of the record, I have determined that the penalty amount sought for the EPCRA violations described in the Complaint is supported by the record and is not inconsistent with the statutory factors for assessment of a penalty. Therefore, I see no reason to alter the proposed penalty. Complainant's consideration of all components of the penalty is a reasonable application of the facts with respect to the reporting violations under EPCRA, and is consistent with the guidance provided by the penalty policy. Complainant's consideration of Respondent's financial situation is also reasonable. Respondent was on notice of Complainant's position regarding the size of business when it received the Complaint, and it had an additional opportunity to challenge Complainant's position as described in the Motion for Default Order. Accordingly, for the violations of EPCRA described in the Complaint as Counts 2, 3, and 4, I assess a penalty of $67,104.

C. Penalty Summary

In consideration of the foregoing, including application of the relevant statutory factors and in consideration of the applicable penalty policies, I have determined that a penalty of $134,115 should be assessed in this proceeding, reflecting a penalty of $67,011 for violations of Section 112(r) of the CAA and a penalty of $67,104 for violations of Section 312 of EPCRA.

## VIII. DEFAULT ORDER

Pursuant to the Consolidated Rules at 40 C.F.R. Part 22, including 40 C.F.R. § 22.17, I find the Respondent is in default, and I hereby ISSUE a Default Order and Initial Decision, and ORDER Respondent to comply with all the terms of this Order:

(1) Respondent is assessed a civil penalty in the amount of $134,115.

(2) Respondent shall pay the civil penalty by certified or cashier's check payable to the "Treasurer of the United States of America" within thirty days after this default order has become a final order pursuant to 40 C.F.R. § 22.27(c). The check shall be identified with the EPA docket number of this case, and shall be accompanied by a transmittal letter identifying the case name and EPA docket number, plus the Respondent's name and address. Such payment shall be forwarded to:

U.S. EPA Region 10
P.O. Box 360188M
Pittsburgh, Pennsylvania 15251

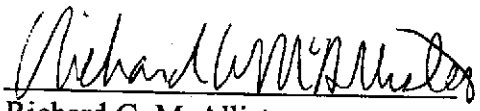
A copy of the payment shall be mailed to:

Regional Hearing Clerk
EPA Region 10 (ORC-158)
1200 Sixth Ave. NW
Seattle, Washington 98101

(3) This Default Order constitutes an Initial Decision pursuant to 40 C.F.R. § 22.17(c). Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five days after its service upon the parties unless (1) an appeal to the Environmental Appeals Board is filed by any party to the proceedings within thirty days from the date of service provided in the certificate of service accompanying this order and in accordance with 40 C.F.R. § 22.30; (2) a party moves to set aside the Default Order; or (3) the Environmental Appeals Board elects to review the Initial Decision within forty-five days after its service upon the parties.

**IT IS SO ORDERED.**

Dated: August 24, 2007



Richard G. McAllister
Presiding Officer

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States that the following statement is true and correct.

The undersigned certifies that the original of the attached **Default Order and Initial Decision**, In the Matter of: Altex Distributing, Inc., Docket No. CAA-10-2006-0240, was delivered to the Regional Hearing Clerk for filing on August 24, 2007, and copies sent to the following addresses by the methods indicated.

| | |
|---|---|
| By Federal Express: | Eurika Durr<br>Environmental Appeals Board<br>1341 G Street, NW<br>Washington, DC 20005 |
| By Certified Mail<br>Return Receipt | Mr. Michael Curry<br>Altex Distributing, Inc.<br>P.O. Box 241868<br>Anchorage, Alaska 33524 |
| By Hand Delivery: | Deborah Hilsman<br>U.S. Environmental Protection Agency<br>1200 Sixth Avenue, ORC-158<br>Seattle, WA 98101 |
| By Hand Delivery: | Stephanie Mairs<br>U.S. Environmental Protection Agency<br>1200 Sixth Avenue, ORC-158<br>Seattle, Washington 98101 |

Dated: August 24th, 2007