IN RE CLARKSBURG CASKET COMPANY

EPCRA Appeal No. 98–8

FINAL DECISION

Decided July 16, 1999

Syllabus

Clarksburg Casket Company ("Clarksburg"), a manufacturer of wooden burial caskets based in Clarksburg, West Virginia, appeals two rulings rendered by Chief Administrative Law Judge Susan L. Biro ("Presiding Officer"). The rulings—an interlocutory order granting U.S. EPA Region III's ("the Region" or "Region III") motion for accelerated decision as to liability, and a subsequent Initial Decision—held Clarksburg liable for six violations of section 313 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11023, and assessed a $96,900 administrative penalty. The Presiding Officer found that Clarksburg failed to file toxic chemical release forms containing information about its use of toluene and xylene, two toxic chemicals, in calendar years 1991, 1992, and 1993.

On appeal, Clarksburg contends that the Presiding Officer erred in granting Region III's motion for accelerated decision because she failed to view the facts at that stage in the proceedings in the light most favorable to Clarksburg, the nonmoving party. This argument springs from the Presiding Officer's selection of a method by which to convert toluene and xylene *volume* (in gallons) to *weight* (in pounds) to determine whether the EPCRA reporting threshold of 10,000 pounds had been exceeded for the years in question. Under the EPCRA regulations, chemical suppliers, such as those providing Clarksburg with toluene- and xylene-containing wood stains, lacquers, finishes, and other products, must specify, pursuant to 40 C.F.R. § 372.45(b)(3), the weight percentage of each toxic chemical in the products they sell. Clarksburg contends that the weight percentages so provided are percentages of the total weight of volatile organic compounds ("VOCs") in a product, rather than percentages of the total weight of the product. The Region, however, argued successfully before the Presiding Officer that the weight percentages constitute percentages of a product's total weight.

Clarksburg also raises several challenges to the penalty assessment contained in the Initial Decision. First, Clarksburg argues that the EPCRA Enforcement Response Policy ("ERP"), which the Presiding Officer used in assessing the penalty, is arbitrary because it does not distinguish between violations of only 700 pounds versus 89,999 pounds over the reporting threshold, and thus the Presiding Officer erred by relying on it. Second, Clarksburg argues that the Presiding Officer did not properly apply the penalty adjustment factors available under EPCRA and the ERP.

Held: The Presiding Officer properly found that no genuine issues of fact existed for trial at the time she granted the Region's motion for accelerated decision as to liability. As a matter of law, the weight percentage of a toxic chemical that suppliers are required by 40 C.F.R. § 372.45(b)(3) to report to their customers must be the percentage of the chemical in

the total weight of a product, not in the VOCs of the product. Clarksburg did not proffer sufficient evidence that a genuine issue of fact existed concerning whether its suppliers provided information in a manner inconsistent with the regulation. The inferences that Clarksburg seeks to draw from the limited, circumstantial evidence in support of its position are not reasonable or permissible in light of the applicable law and record evidence. No reasonable decisionmaker could find in Clarksburg's favor on this record.

The Presiding Officer held, and the Board finds, that application of the ERP was fully appropriate for addressing the circumstances of these violations and for assuring the violations are dealt with in a fair and consistent manner. As the Board has previously held, failure to comply with EPCRA reporting requirements is sufficient to warrant the assessment of a substantial penalty. Finally, the Presiding Officer did not err in applying the penalty adjustment factors.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Stein:

Clarksburg Casket Company ("Clarksburg"), a manufacturer of wooden burial caskets based in Clarksburg, West Virginia, appeals two rulings rendered by Chief Administrative Law Judge Susan L. Biro, the Presiding Officer in this case. The rulings—an interlocutory order granting U.S. EPA Region III's ("the Region" or "Region III") motion for accelerated decision as to liability, and a subsequent Initial Decision—held Clarksburg liable for six violations of section 313 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11023, and assessed a $96,900 administrative penalty. The Presiding Officer found that Clarksburg failed to file toxic chemical release forms containing information about its use of toluene and xylene, two toxic chemicals, in calendar years 1991, 1992, and 1993. For the reasons expressed below, we affirm the Presiding Officer's rulings and uphold the $96,900 penalty.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

EPCRA section 313 applies to owners and operators of, among other categories, facilities that in a given calendar year: (1) have ten or more full-time employees; (2) fall within Standard Industrial Classification ("SIC") Codes 20 through 39; and (3) use 10,000 pounds or more of a "toxic chemical" listed in 40 C.F.R. § 372.65, the "Toxic Release Inventory." EPCRA § 313(b)(1)(A), (f)(1)(A), 42 U.S.C. § 11023(b)(1)(A), (f)(1)(A); 40 C.F.R. §§ 372.3, .22, .25(b), .65. Owners and operators whose facilities have these characteristics must file a toxic chemical release form

("Form R") by July 1 for each toxic chemical so used in the preceding calendar year. EPCRA § 313(a), 42 U.S.C. § 11023(a); 40 C.F.R. § 372.30(a).

Under the EPCRA regulations, toxic chemicals present as a component of a mixture[1] or trade name product[2] must be included in the overall determination of whether an applicable reporting threshold has been exceeded. 40 C.F.R. § 372.30(b). In computing the amount of any toxic chemical used at their facilities, owners and operators may rely on information provided to them, in accordance with the EPCRA regulations, by product manufacturers or distributors. *Id.* § 372.30(b), .45(a). To facilitate EPCRA reporting, the manufacturers or distributors must compile, and supply to their customers, written notices that: (1) indicate a product contains a toxic chemical (or chemicals) that must be reported in accordance with EPCRA section 313; (2) specify the name of the toxic chemical and its Chemical Abstracts Service registry number; and (3) provide the percent by weight of each toxic chemical in the product. *Id.* § 372.45(a)–(b). Facility owners and operators can use these percentage weight figures to determine whether the section 313 reporting threshold is exceeded (and thus reporting is required). *See id.* § 372.30(b)(3).

Failure to file a Form R in accordance with EPCRA section 313 may subject a violator to civil penalties of up to $25,000 for each day a violation continues.[3] EPCRA § 325(c)(1), (3), 42 U.S.C. § 11045(c)(1), (3).

B. *Factual Background*

Clarksburg manufactures hardwood burial caskets and finishes them using a wide variety of wood stains, lacquers, glazes, sealants, thinners, and related products. During 1991 to 1993, Clarksburg purchased multiple gallons of wood-finishing products from two suppliers: The Lawrence McFadden Company and Chemical Coatings, Inc. *See* Respondent's Prehearing Exchange exs. 1–8 (Jan. 16, 1997); Complainant's

[1] A "mixture" is, among other things, "any combination of two or more chemicals, if the combination is not, in whole or in part, the result of a chemical reaction." 40 C.F.R. § 372.3.

[2] A "trade name product" is "a chemical or mixture of chemicals that is distributed to other persons and that incorporates a toxic chemical component that is not identified by the applicable chemical name or Chemical Abstracts Service Registry number listed in § 372.65." 40 C.F.R. § 372.3.

[3] Subsequent to the violations at issue in this case, Congress enacted the Debt Collection Improvement Act of 1996. The Act directs EPA (and other federal agencies) to adjust maximum civil penalties on a periodic basis to reflect inflation. *See* 61 Fed. Reg. 69,360 (Dec. 31, 1996). In accordance with the statute, EPA promulgated inflation-adjusted maximum penalties that apply to violations occurring after January 30, 1997. *See* 40 C.F.R. pt. 19.

Supplemental Memorandum of Law in Support of Motion for Accelerated Decision at 3–6, exs. A–C (Mar. 14, 1997). Many of the products Clarksburg purchased contain toluene and xylene, which are toxic chemicals included on EPA's EPCRA section 313 reporting list. *See* 40 C.F.R. § 372.65.

On May 8, 1995, Donald Stanton of Region III conducted an EPCRA inspection of Clarksburg. Using data for 1993 supplied by Clarksburg employees, Inspector Stanton determined that Clarksburg had exceeded the section 313 reporting threshold (i.e., 10,000 pounds) for toluene and xylene during 1993. Hearing Transcript at 31–32, 50–51, 63–64, 113, 149–52 [hereinafter Tr.]; Hearing Exhibits 1–3 [hereinafter Exs.]. Clarksburg did not provide Inspector Stanton with usage figures for 1991–1992, so the inspector extrapolated from the 1993 data and from 1991–1992 sales volumes provided by Clarksburg to estimate toluene and xylene usage for those years. Tr. at 31–32, 50–51, 125–28. Inspector Stanton determined that Clarksburg had exceeded the section 313 threshold for the two chemicals in 1991 and 1992 as well as in 1993. Exs. 1–2.

Clarksburg had not filed Form Rs for either toluene or xylene by July 1 of the years following calendar years 1991, 1992, or 1993. Joint Stipulation ¶ 2 (Feb. 24, 1998); Joint Set of Stipulated Facts, Exhibits and Testimony ¶ 10 (July 18, 1997).

C. *Procedural Background*

On September 12, 1995, Region III filed an administrative complaint charging Clarksburg with six violations of EPCRA section 313 for its failure to file Form Rs detailing its use of toluene and xylene in 1991, 1992, and 1993. *See* Complaint ¶¶ 1–37. In its answer, among other matters, Clarksburg denied the accuracy of Inspector Stanton's calculations (upon which the complaint was premised) that these chemicals were used at Clarksburg in excess of the reporting threshold. Respondent's Answer ¶¶ 13, 17, 22, 26, 31, 35. On November 1, 1996, Region III filed a motion for accelerated decision as to Clarksburg's liability on the six counts. *See* Complainant's Motion for Accelerated Decision; Complainant's Memorandum of Law in Support of Motion for Accelerated Decision. Clarksburg opposed the motion, claiming that genuine issues of material fact existed as to the calculation of its toluene and xylene usage in 1991–1993, thereby precluding the entry of an accelerated decision. *See* Respondent's Memorandum of Law in Opposition to USEPA's Motion for Accelerated Decision at 2–6 (Nov. 13, 1996).

In response to these and other filings, the Presiding Officer directed Region III to explain to Clarksburg the methodology it had used to calculate toluene and xylene quantities, ordered Clarksburg to supply Region III with documentation of its use of toluene and xylene in the targeted years, and established a supplemental briefing schedule. *See* Order Concerning Motion for Accelerated Decision (ALJ, Dec. 17, 1996). The Presiding Officer subsequently ordered Clarksburg to provide to Region III material safety data sheets ("MSDSs")[4] and invoices regarding its wood-finishing product purchases. *See* Order Concerning Motion for Accelerated Decision (ALJ, Jan. 29, 1997).

On June 6, 1997, after receiving the parties' supplemental briefs and other materials provided pursuant to the two orders, the Presiding Officer issued an interlocutory order granting Region III's motion. *See* Order Granting Motion for Accelerated Decision [hereinafter Acc. Dec.]. The Region then filed a motion for an accelerated decision as to the penalty, which the Presiding Officer denied. *See* Order Denying Motion for Accelerated Decision on Penalty (ALJ, Dec. 17, 1997). Instead, she held a hearing on the penalty issue on February 10, 1998. On June 25, 1998, the Presiding Officer issued an Initial Decision in this case, in which she adopted the penalty recommendations of Region III and imposed a $96,900 penalty. *See* Initial Decision [hereinafter Init. Dec.]. This appeal followed.

II. *DISCUSSION*

Clarksburg appeals both the Initial Decision and the Presiding Officer's underlying order granting Region III's motion for accelerated decision as to liability. After carefully reviewing these rulings, the administrative record, and the parties' appellate briefs, we affirm the Presiding Officer's conclusions. Her analysis is thorough and her reasoning sound; we find no fault therein. Accordingly, in this opinion we will not, for the most part, repeat her extended analysis. Rather, we write principally to express our agreement that no genuine issue of material fact existed at

[4] Under the Occupational Safety & Health Act and its implementing regulations, chemical manufacturers must prepare MSDSs for hazardous chemicals (including chemical mixtures) they produce. *See* 29 U.S.C. § 655; 29 C.F.R. § 1910.1200(g). MSDSs must be in English and must specify, among other things, chemical and common names, physical hazards (such as potential for fire, explosion, and reactivity), health hazards (including signs and symptoms of exposure), permissible exposure limits, any precautions for safe handling and use (such as appropriate hygienic practices, protective measures, clean-up procedures), and emergency and first aid procedures. 29 C.F.R. § 1910.1200(g)(2). Chemical manufacturers must provide their customers with copies of the MSDSs for their reference. *Id.* § 1910.1200(g)(6).

the time the Presiding Officer granted Region III's motion for accelerated decision, and to affirm the Presiding Officer's Enforcement Response Policy-based approach to the penalty calculus.

A. *No Genuine Issue of Material Fact Existed at the Time the Presiding Officer Decided the Motion for Accelerated Decision*

1. *Clarksburg's Argument*

Clarksburg contends that the Presiding Officer erred in granting Region III's motion for accelerated decision because she failed to view the facts at that stage in the proceedings in the light most favorable to Clarksburg, the nonmoving party. Respondent's Appellate Brief at 16 [hereinafter Appeal Brief]. This argument springs from the Presiding Officer's selection of a method by which to convert toluene and xylene *volume* (in gallons) to *weight* (in pounds) to determine whether the reporting threshold of 10,000 pounds had been exceeded for the years in question. As mentioned in Part I.A above, chemical suppliers are required to provide their customers with written notices identifying toxic chemicals in their products and specifying the weight percentage of each such chemical. 40 C.F.R. § 372.45(a)–(b). Clarksburg takes the position that the weight percentages so provided are percentages of the total weight of volatile organic compounds ("VOCs") in a product, rather than percentages of the total weight of the entire product.[5] Appeal Brief at 4–7, 15, 18–21. The Region, however, argued successfully before the Presiding Officer that the weight percentages constitute percentages of a product's total weight. *See* Acc. Dec. at 7–13. On appeal, Clarksburg contends that the evidence it presented to support its method of calculating toxic chemical weight was "equally viable" to that submitted by the Region and sanctioned by the Presiding Officer. Appeal Brief at 21. In such a case, Clarksburg argues, it should have been granted the benefit of the doubt and the motion should have been denied.

2. *The Legal Standard*

Under the Consolidated Rules of Practice, accelerated decision is appropriate "if no genuine issue of material fact exists and a party is enti-

[5] If resolved in Clarksburg's favor, this dispute would affect Clarksburg's liability for two of the six counts of the complaint—i.e., toluene usage in 1991 and 1992. Under Clarksburg's methodology, its usage of toluene would fall under the 10,000-pound threshold for these two years, rather than over the threshold as the Region contends. With respect to the four other counts, Clarksburg's liability would be unaffected. *See* Respondent's Notice of Appeal at 3, 7; Appeal Brief at 17–18.

tled to judgment as a matter of law." 40 C.F.R. § 22.20(a). This standard is similar to the summary judgment standard set forth in Rule 56 of the Federal Rules of Civil Procedure. *In re Green Thumb Nursery, Inc.,* 6 E.A.D. 782, 793 (EAB 1997). We have defined the salient features of the standard as follows:

> A factual dispute is *material* where, under the governing law, it might affect the outcome of the proceeding. * * *
>
> A factual dispute is *genuine* if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor. * * * If so, summary judgment is inappropriate and the issue must be resolved by a finder of fact. If, on the other hand, the evidence, viewed in a light most favorable to the non-moving party, is such that no reasonable decisionmaker could find for the nonmoving party, summary judgment is appropriate.

In re Mayaguez Reg'l Sewage Treatment Plant, 4 E.A.D. 772, 781 (EAB 1993) (emphasis added, citations omitted), *aff'd sub nom. Puerto Rico Aqueduct & Sewer Auth. v. EPA,* 35 F.3d 600 (1st Cir. 1994), *cert. denied,* 513 U.S. 1148 (1995).

The Board has held, in accordance with these precepts, that a party opposing summary disposition must "raise an issue of material fact" and demonstrate that the issue is "'genuine' by referencing probative evidence in the record, or by producing such evidence." *Green Thumb,* 6 E.A.D. at 793; *see In re Dos Republicas Res. Co.,* 6 E.A.D. 643, 669–70 (EAB 1996); *Mayaguez,* 4 E.A.D. at 782. Here, Clarksburg contends that the actual weights of toluene and xylene are "contested" issues of fact and were such at the time the Presiding Officer decided the motion. Appeal Brief at 16–17. As set forth below, notwithstanding its arguments, Clarksburg has not referenced probative evidence in the record or produced sufficient evidence to demonstrate that there is a genuine issue for trial.

3. *The Regulations and Guidance Specify That Chemical Manufacturers Must Provide the Percentage Weight of Each Toxic Chemical in Their Products*

In designing the EPCRA regulatory scheme, EPA was very concerned that users of chemical mixtures and trade name products be able easily to identify and determine the weight of toxic chemicals in those mixtures and products, so that they could properly report their usage of such chemicals. *See* 53 Fed. Reg. 4,500, 4,509–10 (Feb. 16, 1988) (preamble to

final EPCRA regulations); 52 Fed. Reg. 21,152, 21,155–57 (June 4, 1987) (preamble to proposed EPCRA regulations). EPA decided the most efficient way to achieve this end was to require that chemical suppliers provide their customers with information about toxic chemicals in the products they purchased.[6] 53 Fed. Reg. at 4,510; 52 Fed. Reg. at 21,156. Therefore, among other things, EPA mandated that suppliers "shall include" in the notification to their customers written notice of "[t]he percent by weight of each toxic chemical *in the mixture or trade name product.*"[7] 40 C.F.R. § 372.45(b)(3) (emphasis added). In other words, suppliers were to provide the "percent composition [of each toxic chemical] *in the product.*"[8] 53 Fed. Reg. at 4,510 (emphasis added).

The plain language of this regulation, backed up by the regulatory history of the rule, indicates, as the Presiding Officer found, that EPA intended for and required suppliers to report weight percentages of the *entire* mixture or product, not simply of the *VOCs* in the mixture or product. This conclusion is bolstered by EPA's explanation in the preamble to the proposed rule of the formula for calculating toxic chemical weight: "If the supplier provides the percentage by weight information requested, the user should first determine whether the quantity of the chemical meets the threshold for reporting that particular listed chemical *(i.e., multiply that percentage by the total annual pounds of the product used).*" 52 Fed. Reg. at 21,156 (emphasis added). This formula is echoed in EPA's Form R instruction manuals, as recognized by the Presiding Officer:

> The example given in the manual[s] calls for the specific concentration (i.e., percentage) of the toxic chemical in the *mixture* to be multiplied by the *"total weight or pounds" of the mixture. See,* EPA, *Toxic Chemical Release Inventory Reporting Package for 1989,* (EPA Pub. no. 560/4–90–001) (1989 ed.), pp. 11–13 (Section B.4.b and Figure C) and EPA, *Toxic Chemical Release Reporting*

[6] EPA noted that many suppliers already were required, under the Occupational Health & Safety Act and its implementing regulations, to prepare MSDSs for their products, and that it would not be unduly burdensome for those suppliers to add these additional data to those MSDSs. 53 Fed. Reg. at 4,509.

[7] If a supplier's notification does not accurately present the percent by weight of each toxic chemical in a mixture or trade name product, that supplier must provide its customers with a revised notification form within 30 days of discovering the error. 40 C.F.R. § 372.45(c)(4).

[8] EPA provided certain exceptions to this requirement, which are not relevant here. *See,* e.g., 40 C.F.R. § 372.45(f) (manufacturers claiming trade secret protection for percent-by-weight composition of a toxic chemical may specify a maximum concentration level for that chemical, which users would then use in place of the precise weight percentage).

> *Form R and Instructions,* (EPA Pub. no. 745–K–96–001) (1995 ed.), pp. 14–15 (Section B.4.b and Example 5).

Acc. Dec. at 11.

Finally, this construction of the regulation squares with common sense and is reasonably designed to promote the purpose of these rules. The regulatory history clearly reveals EPA's desire to make reporting as burden-free as possible.[9] Clarksburg provides no rationale whatsoever to suggest why the Agency would create a notification requirement, to be relied upon by chemical users, in which those users must work with a percentage of VOCs (i.e., a percentage of a percentage) to compute their toxic chemical usage. Indeed, as the Presiding Officer pointed out, Clarksburg failed to cite "any statutory or regulatory provision suggesting that the weight of the [VOCs] in the mixture is the correct conversion factor to be used, rather than the conversion factor for the total mixture." Acc. Dec. at 11; *see also* Complainant's Reply Brief at 15 [hereinafter Reply Brief] (noting same). Had EPA intended the result Clarksburg advocates, the regulations or guidance surely would have so suggested. Notably, they do not.

Accordingly, we hold that the applicable regulation clearly requires the toxic chemical percentage to state the percentage that each toxic chemical constitutes of a product's total weight. Furthermore, we conclude that the Region's methodology is consistent with and indeed contemplated by these requirements. The law being clear, the only question that remains is whether, as a matter of fact, the suppliers of Clarksburg's chemicals provided information in a manner inconsistent with the regulations, such that application of the methodology intended by the regulations would result in overstating the amount of chemical usage in this case.

4. *Clarksburg's Evidence in Opposition to Motion*

Inexplicably, Clarksburg did not offer any direct evidence, such as an affidavit or other documentation from its suppliers Chemical Coatings, Inc. or The Lawrence McFadden Company, to support its argument that the weight percentages in these companies' MSDSs in fact represent the percent of toluene or xylene in a product's VOCs. Although it is of course theoretically possible that the suppliers could have made a mistake in

[9] For example, EPA fully expected that, in cases where a user knows the specific concentration of a chemical, "determining the weight of the chemical is straightforward." 53 Fed. Reg. at 4511.

preparing some or all of their MSDSs according to the requirements of 40 C.F.R. § 372.45(b)(3), Clarksburg similarly fails to offer any direct proof of this.[10]

Instead, to support its position, Clarksburg largely falls back on circumstantial evidence.[11] Clarksburg argues that its approach is the correct one based on a single example of an MSDS for a lacquer sealer product supplied by Chemical Coatings, Inc.[12] Clarksburg sums the percentage weights of what the MSDS terms "reportable components,"[13] reaching a figure of 93 percent, and notes that VOCs are specified as comprising not 93 but 76 percent of the product weight. *Id.* at 6–7; *see* Ex. 3. According to Clarksburg, the discrepancy between 93 and 76 percent can only mean

[10] As mentioned above, suppliers are under a continuing obligation to provide new notifications if the weight percentage figures are not accurate. *See* 40 C.F.R. § 372.45(c)(4); *supra* note 7. No such revised notifications appear to be part of the record in this case.

[11] Clarksburg also notes in passing that it relied below on its witness, Teresa Bush, to support this argument. Appeal Brief at 15. Ms. Bush, however, was not offered as an expert in EPCRA reporting, and her affidavit reflects nothing more than a conclusory opinion, unsupported by any facts relevant to the point at issue here, that Inspector Stanton miscalculated Clarksburg's toxic chemical usage. *See* Respondent's Memorandum of Law in Opposition to USEPA's Motion for Accelerated Decision ex. 1 ¶ 13 (Nov. 13, 1996) (affidavit of Teresa Bush) ("We have now reviewed Inspector Stanton's calculations and the chemical usages for calendar years 1991, 1992, and 1993, and believe that Inspector Stanton's calculations are in error.").

Ms. Bush does contend that certain products factored into Inspector Stanton's initial 1993 calculations were actually not purchased by Clarksburg in that year. *Id.* ex. 1 ¶ 20. This point, even if true, is not relevant to the question of what the weight percentage figures represent. (Moreover, at the time the Presiding Officer decided Region III's motion, this point was no longer in dispute, having been resolved by Clarksburg's subsequent provision of invoices and other information documenting its purchases in 1991–1993. These data showed that irrespective of the calculation method used, Clarksburg exceeded the 10,000-pound reporting threshold for both toluene and xylene in 1993. *See supra* note 5.)

Ms. Bush's affidavit does not address the calculation methodology and thus carries no weight; as the Presiding Officer noted, "[u]nsupported allegations or affidavits with ultimate or conclusory facts and conclusions of law are insufficient to defeat a properly supported motion for summary judgment." Acc. Dec. at 7 (citing *Galindo v. Precision Am. Corp.,* 754 F.2d 1212, 1216 (5th Cir. 1985); *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 888 (1990); *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990)).

[12] The MSDS is for a product called "THAG Lacquer Sealer," known by product code "L47C0217THAG." *See* Ex. 3 (sampling of Chemical Coatings MSDSs, the first of which is the THAG Lacquer Sealer MSDS).

[13] "Reportable components" are listed under Section II of the MSDS, which is titled "Hazardous Ingredients/SARA III Information." *See* Ex. 3. Clarksburg neither offered a definition of "reportable components" nor provided evidence from the manufacturer as to what the term means.

that the weight percentage figures provided in accordance with the regulation are percentages of VOC, not total product, weight.[14] Appeal Brief at 6–7, 15.

Neither the Region nor Clarksburg included this lacquer sealer MSDS (for product "THAG Lacquer Sealer," product code "L47C0217THAG," see *supra* note 12)—upon which Clarksburg places so much weight—in the final data set used to compute Clarksburg's toxic chemical usage in conjunction with the motion for accelerated decision.[15] *See* Complainant's Supplemental Memorandum of Law in Support of Motion for Accelerated Decision at 3–6, ex. B (Mar. 14, 1997) (in chemical usage calculations, omitting any reference to L47C0217THAG); Respondent's Prehearing Exchange exs. 4–5, 7–8 (Jan. 16, 1997) (in purchase records and chemical usage calculations, omitting any reference to L47C0217THAG); Respondent's Response to Complainant's Supplemental Memorandum of Law in Support of Its Motion for Accelerated Decision at 9–10, ex. 1 (Mar. 31, 1997) (referencing prehearing submittal of data). In fact, Clarksburg did not purchase that product in any of the three years in question. *See* Respondent's Prehearing Exchange exs. 4–5, 7–8. Thus, the principal evidence on which Clarksburg predicates its argument about the correct methodology was not even used by either party when calculating whether Clarksburg exceeded the 10,000-pound threshold.

Clarksburg also argues that Inspector Stanton treated the percentage figures as percentages of VOC weight, not total weight, in the initial calculations he performed during his inspection of Clarksburg. Clarksburg maintains that this equates to an admission by EPA that Clarksburg's

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[14] In particular, Clarksburg explains:

> [Clarksburg] believes that Chemical Coatings' MSDS list[s] in Section II the weight percentage only for VOC components of the products. Therefore, the correct weight conversion factor for converting gallons to pounds is the VOC weight and not the total product weight. * * * [Clarksburg] bases this conclusion upon the fact that the Section II weight percentages total in excess of 76%. As the VOC weight in Section II is 5.77 lb/gal, and the total weight is 7.57 lb/gal, roughly 24% of the product is non-VOC. The Section II total percentages for VOC's, however, exceed 76% [and in fact add up to 93%]. Therefore, the Respondent believes that the VOC percentages in Section II of the MSDS Sheets are the percentages of VOC and not the percentage of all components of the materials. For this reason, the VOC weight is the correct conversion to use with the VOC percentages set forth in Section II.

Appeal Brief at 6–7.

[15] This final data set followed the parties' exchange of information pursuant to the Presiding Officer's two orders. *See supra* Part I.C.

approach is the correct one. Appeal Brief at 15, 18–19. It is plain from the parties' prehearing stipulation as to toluene and xylene quantities that Region III did not ultimately adhere to Inspector Stanton's initial alleged "choice" of calculation method. *See* Joint Stipulation on Volumes (Feb. 10, 1998). Thus, even taken in the light most favorable to Clarksburg, the evidence on this point would tend to prove that Inspector Stanton personally believed, at one time at least, the VOC method to be the correct one, but that Region III as a whole overruled his initial calculations and adhered to the percent-of-total-weight method.[16]

It is well established that on a motion for summary judgment, a court must "'draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion.'" *Sylvia Dev. Corp. v. Calvert County,* 48 F.3d 810, 817–18 (4th Cir. 1995) (quoting *Tuck v. Henkel Corp.,* 973 F.2d 371, 374 (4th Cir.), *amended,* No. 91–2591 (4th Cir. Sept. 3, 1992), *cert. denied,* 507 U.S. 918 (1993)). However, in order for an inference to be permissible it must be reasonable. *Id.* at 818. "Whether an inference is reasonable cannot be decided in a vacuum; it must be considered 'in light of the competing inferences' to the contrary." *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 588 (1986)). Here, the contrary competing inferences—and, moreover, legal conclusions—overwhelm the inferences urged by Clarksburg.

As we have stated, we conclude from a reading of the regulations, regulatory history, and guidance documents that, as a matter of law, the weight percentage represents a percentage of a product's total weight, not VOC weight. *See supra* Part II.A.3. To accept Clarksburg's approach would, in essence, require us to conclude that two chemical suppliers, who prepared MSDSs to comply with the EPCRA regulations, prepared them in a manner that did not comport with the regulations and failed to correct them despite a continuing legal obligation to do so. Such a result is not supported by the limited, circumstantial evidence proffered by Clarksburg.

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[16] Although this point is not argued by Clarksburg, Inspector Stanton, EPA's agent, cannot in any event bind Region III to an interpretation of the regulations that is contrary to the actual meaning of those regulations. "[I]t is impossible * * * for an agent to have authority to bind the Government * * * contrary to law." *United States v. Certain Parcels of Land,* 131 F. Supp. 65, 73 (S.D. Cal. 1955) (citing, e.g.*, Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384 (1947)); *Utah Power & Light Co. v. United States,* 243 U.S. 389, 409 (1917)); *accord Heckler v. Community Health Servs.,* 467 U.S. 51, 63 (1984); *Washington Tour Guides Ass'n v. National Park Serv.,* 808 F. Supp. 877, 881–82 (D.D.C. 1992). Thus, Inspector Stanton's initial calculations cannot alter the law, which clearly requires manufacturers to report the percent a toxic chemical constitutes of the total weight of a product.

Merely because certain numbers in one MSDS do not sum as Clarksburg expects does not mean, without more, that we may reasonably infer that the weight percentages in all other MSDSs represent percent of VOC weight. This is particularly true where, as here, the sole MSDS relied on does not even represent a product purchased by Clarksburg in the relevant years and was not even included in the final set of calculations.[17] Viewing all competing factual inferences and legal conclusions together, we do not believe we can permissibly deduce from this single MSDS and from Inspector Stanton's initial calculations the inferences advanced by Clarksburg as to the other MSDSs as a whole and the correct methodology.[18] *See,* e.g.*, Sylvia Dev.,* 48 F.3d at 817–18, 821–24; *Talbot v. Robert Matthews Distrib. Co.,* 961 F.2d 654, 664 (7th Cir. 1992); *Herman v. Secretary,* No. C–92–2755–DLJ, 1994 U.S. Dist. LEXIS 13159, at *16–17 (N.D. Cal. Sept. 14, 1994).

In our view, no reasonable decisionmaker could find, in light of the applicable law and the factual evidence in the record, in Clarksburg's behalf. Even if Clarksburg is correct that the single MSDS to which it points is based on percent of VOC weight, the MSDS evidence proffered

[17] In contrast to Clarksburg's MSDS example, the Region introduced, and the Presiding Officer analyzed, an MSDS example involving a natural poplar stain supplied to Clarksburg by The Lawrence McFadden Company in each of years 1991, 1992, and 1993. In that example, the Presiding Officer found that solids comprised 8.9 percent of the stain and VOCs 91.1 percent, for a total of 100 percent. Acc. Dec. at 12. Notably, the MSDSs provided to Clarksburg by The Lawrence McFadden Company specifically list the weight of solids in a product, whereas the MSDSs provided by Chemical Coatings do not. *Compare* Complainant's Supplemental Memorandum of Law in Support of Motion for Accelerated Decision ex. C (Mar. 14, 1997) (McFadden MSDSs) *with id.* ex. B *and* Ex. 3 (Chemical Coatings MSDSs). Clarksburg, however, chose, as its sole example of the proposition it seeks to prove, a single Chemical Coatings MSDS, which does not specify percent solids. *See* Ex. 3. Thus, while we can parse through the Presiding Officer's MSDS example and verify her conclusions, we cannot do the same with Clarksburg's example, which is lacking information about percent solids (information that could well account for the alleged discrepancy identified by Clarksburg). Clarksburg introduced no evidence or argument challenging the Presiding Officer's more complete MSDS example, nor did Clarksburg choose, as it easily might have, a Lawrence McFadden MSDS from the applicable years to use as its own example.

[18] Although Inspector Stanton's initial, on-the-fly calculations can be construed to reflect usage of Clarksburg's VOC method, this does not establish as a matter of fact that this is the method these suppliers used in their MSDSs. As it is the chemical manufacturers or suppliers who prepared the notifications, Inspector Stanton's calculations are not in any event probative of whether the suppliers in this case provided information in a manner contrary to the regulations. *See Sylvia Dev.,* 48 F.3d at 824 (local activist's personal beliefs about out-of-county developers are not probative of Board of Commissioners' motivations). Furthermore, Clarksburg made no showing that Inspector Stanton had any personal knowledge of how these notifications were prepared.

would produce no change in the final usage numbers, as it was not included in those numbers. *See supra* text accompanying notes 12–17. If Clarksburg intended to show that all MSDSs other than the one relied on were likewise flawed and prepared contrary to law, something substantially more with respect to these other MSDSs was required. Nor do we believe that Clarksburg's arguments about Inspector Stanton's initial calculations would enable a reasonable decisionmaker to rule in Clarksburg's favor—the correct methodology is a question of law and Inspector Stanton's calculations are not probative of what the manufacturers actually did in this case. We therefore hold that Clarksburg failed to raise a genuine issue for resolution at trial. *See In re City of Port St. Joe,* 7 E.A.D. 275, 309 (EAB 1997) (by failing to challenge validity of U.S. Fish & Wildlife Service data showing presence of dioxins and furans in St. Joseph River and linking dioxins and furans to pulp and paper mill effluent, petitioners failed to proffer evidence creating a genuine factual dispute); *Mayaguez,* 4 E.A.D. at 781–82, 784–85 ("in deciding whether a genuine factual issue exists, the judge must consider whether the quantum and quality [of] evidence is such that a finder of fact could reasonably find for the party producing that evidence under the applicable standard of proof") (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 254–55 (1985)); *see also Imperial News Co. v. P–I–E Nationwide, Inc.,* 727 F. Supp. 86, 88 (E.D.N.Y. 1989) (statement of opinion by company vice president regarding reasonable time for delivery is not sufficient to overcome court's determination of that time as a matter of law; no reasonable jury could find in favor of company on evidence presented), *aff'd,* 905 F.2d 641 (2d Cir. 1990).

5. *Summary*

We thus conclude, as the Presiding Officer did, that the law clearly indicates that the weight percentages provided by chemical suppliers must represent the percentage of total product weight, not simply of VOC weight. Moreover, we agree, as explained above, that Clarksburg failed to adduce sufficient evidence to create a genuine factual issue that would forestall a motion for accelerated decision. Based on our review of the regulations, regulatory history, guidance documents, case law, and evidence in the record, we hold that no reasonable finder of fact could return a verdict in Clarksburg's favor, even viewing the evidence in a light most favorable to Clarksburg. *See Mayaguez,* 4 E.A.D. at 781. Thus, the Presiding Officer did not err or abuse her discretion in granting Region III's motion for accelerated decision as to liability.

B. *Penalty Issues*

1. *Environmental Appeals Board Standard*

Clarksburg also raises several challenges to the penalty assessment contained in the Initial Decision. As we recently emphasized, in cases where, as here, "the Presiding Officer assesses a penalty that falls within the range of penalties provided in the penalty guidelines, the Board generally will not substitute its judgment for that of the Presiding Officer absent a showing that the Presiding Officer has committed an abuse of discretion or a clear error in assessing the penalty." *In re SchoolCraft Constr., Inc.,* 8 E.A.D. 476, 492 (EAB 1999) (citing *In re Pacific Ref. Co.,* 5 E.A.D. 607, 612 (EAB 1994); *In re Ray Birnbaum Scrap Yard,* 5 E.A.D. 120, 124 (EAB 1994)). With this principle in mind, we turn to Clarksburg's penalty arguments.

2. *The Presiding Officer Did Not Err in Relying on the EPCRA Enforcement Response Policy to Assess an Appropriate Penalty*

First, Clarksburg argues that the EPCRA Enforcement Response Policy ("ERP"),[19] on which the Region relied in recommending a penalty, is inherently arbitrary in certain aspects. In particular, Clarksburg contends that the ERP arbitrarily recommends the same monetary penalty for a violation of only 700 pounds over the 10,000-pound reporting threshold as for a violation of 89,999 pounds over the threshold.[20] Clarksburg argues that the Presiding Officer erred by relying on this allegedly arbitrary component of the ERP in assessing the penalty.[21] Appeal Brief at 2–3, 7–9.

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[19] *See* U.S. EPA Office of Compliance Monitoring, Office of Prevention, Pesticides, and Toxic Substances, *Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990)* (Aug. 10, 1992) (Ex. 14).

[20] For an explanation of how application of the ERP leads to this result, *see infra* notes 22–23.

[21] Clarksburg also repeatedly claims that Region III's EPCRA Compliance Officer, Craig Yussen, "admitted" during the hearing that the ERP penalty matrix is or may to an extent be arbitrary as applied in this case. *See,* e.g.*,* Appeal Brief at 3, 8. The relevant portion of the hearing transcript reads as follows:

> MR. LAWRENCE (CLARKSBURG'S COUNSEL): So, under your policy, under the ERP policy, your application, the same penalty applies for an exceedance of 726 pounds as would for an exceedance of 89,999 pounds?

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As support for its argument, Clarksburg cites the decision of Administrative Law Judge Andrew S. Pearlstein in *In re Hall Signs, Inc.*, Dkt. No. 5–EPCRA–96–026 (ALJ, Oct. 30, 1997). In that case, the size of Hall Signs' business exceeded by eight percent an ERP criterion relating to size of business, thereby precluding the company from being included in a category reflecting smaller business size. Accordingly, under the penalty policy the Region proposed a penalty of $17,000 per violation rather than the $5,000 per violation that would have been applicable had Hall Signs' size not exceeded the criterion in question.[22] Judge Pearlstein noted:

> There is nothing in EPCRA that indicates that the size of the business of the violator should be a significant penalty factor. * * * I find the ERP's automatic consideration of

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MR. YUSSEN: According to the policy, yes.

MR. LAWRENCE: Wouldn't you agree with me, sir, that that is an arbitrary determination? It is not realistically designed to enforce, or at least embody the goal of this policy, which is to make the penalty consistent and related to the amount of the exceedance?

MR. BYRD (REGION III'S COUNSEL): I object, Your Honor. That calls for a bundle of conclusions about the ultimate issue.

JUDGE BIRO: But, he's the EPCRA Compliance Coordinator for Region III. It seems to me that he could make a distinction and grant his opinion, whatever that's worth.

MR. BYRD: If you think—you may think it's arbitrary—

JUDGE BIRO: Well, thank you, Mr. Byrd. Go ahead. Please answer.

MR. YUSSEN: Maybe to an extent, but—maybe to an extent, it does have—may have a little bit of an effect, but still, all and all, you're over the threshold.

Tr. at 90–91. As the Region notes, the Presiding Officer, who observed this testimony, "did not deem it worth mentioning in her analysis of the facts, issues and controlling law in the Initial Decision." Reply Brief at 28 n.13. The equivocal nature of Mr. Yussen's statement, and the fact that it is an expression of his personal opinion, lead us to discount this purported "admission" on EPA's part, as the Presiding Officer appears to have done. Accordingly, we give Mr. Yussen's statement little weight and further find it of little value in resolving the issues raised on appeal.

[22] In a quest for some nationwide consistency in EPCRA penalty assessment, the ERP, like many penalty policies, establishes suggested penalty levels for violations in accordance with certain objective factors. Suggested penalties in the ERP representing the gravity of the violation are determined by two factors: (1) the circumstances of the violation (i.e., its

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> the size of a violator's business as a major factor in determining the violation's extent level and gravity-based penalty, as applied in this case, arbitrary and unauthorized by the statute, EPCRA.

Id. at 7–8. Therefore, instead of applying the penalties suggested by the ERP, Judge Pearlstein chose a $5,000 base penalty per violation and added $1,000 for each 10,000 pounds of toxic chemical used but not reported. *Id.* at 8.

Clarksburg argues that "Judge Pearlstein premised his decision on a finding that the ERP penalty matrix resulted in an arbitrary penalty not consistent with the ERP's stated policy of considering chemical quantity and company size." Appeal Brief at 14. Clarksburg then suggests we adopt a penalty of $2,000 per violation to take into account the "insignificant" quantities of toxic chemicals involved herein in excess of the reporting threshold.[23] *Id.* at 14–15.

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seriousness); and (2) the extent of the violation. ERP at 8–12. First, the circumstances factor is broken into six "circumstance levels"—1 through 6. Second, the extent factor is broken into three "extent levels"—A, B, and C—and is evaluated on the basis of total corporate entity sales, number of employees, and usage of section 313 chemicals in excess of the relevant section 313 reporting threshold (in this case 10,000 pounds). The ERP penalty matrix incorporates the extent and circumstance levels as follows:

	Extent Level A	Extent Level B	Extent Level C
Circumstance Level 1	$25,000	$17,000	$5,000
Circumstance Level 2	$20,000	$13,000	$3,000
Circumstance Level 3	$15,000	$10,000	$1,500
Circumstance Level 4	$10,000	$6,000	$1,000
Circumstance Level 5	$5,000	$3,000	$500
Circumstance Level 6	$2,000	$1,300	$200

Id. at 11.

[23] Clarksburg used the following quantities of toluene and xylene in the relevant years:

	1991	1992	1993
Toluene (gallons)	10,726	11,631	21,125
Xylene (gallons)	13,424	15,499	17,452

Accordingly, Clarksburg's exceedences of the 10,000-pound reporting threshold ranged from a low of 726 pounds to a high of 10,125 pounds.

The ERP criteria segregate facilities into, among other things, two categories based on the quantity of their chemical use: (1) facilities that use 10 times or more of the reporting threshold of a section 313 chemical, and (2) facilities that use *less than 10 times* the reporting threshold. *See* ERP at 9. In this case (which involves reporting thresholds of 10,000

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The Presiding Officer dealt thoroughly with the issue Clarksburg raises, stating that she did not "find the rationale for deviating from the penalty set forth in *Hall Signs* to be persuasive or relevant to this case." Init. Dec. at 14. The Presiding Officer noted that the size of Clarksburg's business is significantly above the applicable business size criteria dividing ERP penalties and concluded that business size therefore was of no consequence in this case.[24] *Id.* at 15. As regards Clarksburg's suggestion that it receive a penalty reduction because of the allegedly nominal extent of its violations, the Presiding Officer soundly rejected the argument:

> [T]he focus of EPCRA is to require users, processors and manufacturers of certain toxic chemicals over certain levels to publish the usage of these chemicals, thereby placing communities on notice as to these chemicals and facilitating local planning. Non-filing, even as to a nominal amount over the threshold, is inconsistent with this focus. Thus, it is reasonable for a non-filing violation [that] is slightly over the threshold amount to be assessed a significant penalty.

Id. at 15–16; *accord In re Woodcrest Mfg., Inc.,* 7 E.A.D. 757, 780 (EAB 1998) ("Congress determined that failure to comply with the reporting requirements of section 313 alone is sufficient for liability and assessment of a civil penalty"; thus, "it is appropriate that substantial penalties be imposed even if [a respondent] could prove that there was no actual harm"; moreover, "the failure to report under the EPCRA deprives local communities, states and the federal government of information needed to inform citizens and the local community about the toxic chemicals used by the violator").

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pounds), these categories translate into: (1) facilities that use 100,000 pounds or more of a toxic chemical, and (2) facilities that use 99,999 pounds or less of a toxic chemical. Thus, facilities using two pounds over the threshold and facilities using 89,999 pounds over the threshold will both fall into the second grouping.

Clarksburg falls into Circumstance Level 1 of the EPCRA penalty matrix, *see supra* note 22, because it failed to file section 313 reports in a timely manner. *See* ERP at 12. Moreover, Clarksburg falls into Extent Level B because it used less than 10 times the 10,000-reporting threshold for toluene and xylene, and because it had, in the relevant years, 50 employees or more and $10 million or more in sales. *See id.* at 9; *infra* note 24.

[24] In 1991–1993 and 1995, Clarksburg had between 185 and 200 employees and gross annual sales of $14.5 million to $15 million. Joint Stipulation ¶ 1 (Feb. 24, 1998). The relevant ERP criteria are for facilities with more or less than 50 employees and $10 million in sales; Clarksburg was well in excess of both criteria during the applicable years. *See id.*

The Presiding Officer took pains to distinguish *Hall Signs* on several different grounds. *See* Init. Dec. at 14–16. She concluded, as the Board later did in an unpublished opinion when addressing *Hall Signs* on appeal, that Judge Pearlstein's opinion was limited to the facts of that case. *See id.* at 14–15; *In re Hall Signs, Inc.,* EPCRA Appeal No. 97–6, slip op. at 9–10 (EAB, Dec. 16, 1998) ("[a]t each place in the Initial Decision where the Presiding Officer stated that the ERP is arbitrary, he also limited his holding 'to the facts of this case,' 'on this record' and 'as applied in this case'"; moreover, "[t]hese limitations and the Presiding Officer's detailed analysis are sufficient to assure that the Presiding Officer's rationale will not establish an erroneous precedent applicable to the facts or record of other cases"). Finally, the Presiding Officer raised questions about the sliding scale methodology advocated by Judge Pearlstein. The Presiding Officer stated:

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

Init. Dec. at 16 n.15.

We agree with the sentiments expressed in the Presiding Officer's footnote and reject Clarksburg's proffered sliding scale. It would produce a disproportionately low penalty of $12,000 for the six violations in this case. Moreover, we emphasize what we said in *Hall Signs:* "[T]he Presiding Officer's rationale in this case does not limit a complainant's ability to support the rationale of the ERP on the record in other cases if

that rationale were specifically challenged by a respondent." *Hall Signs,* slip op. at 10. We find the framework of the penalty policy fully appropriate for addressing the circumstances of these violations and assuring the violations are dealt with in a fair and consistent manner. *See In re Employers Ins. of Wausau,* 6 E.A.D. 735, 760–62 (EAB 1997). We thus find no clear error or abuse of discretion in the Presiding Officer's opinion that would warrant our reversal of her findings.[25]

3. *The Presiding Officer Did Not Err in Applying the Penalty Adjustment Factors Available Under EPCRA and the ERP*

Second, Clarksburg argues that the Presiding Officer did not properly apply the penalty adjustment factors available under EPCRA and the ERP. Clarksburg believes the penalty should be reduced to reflect its purported (1) cooperation, (2) lack of culpability, and (3) voluntary disclosure of reporting information. *See* Appeal Brief at 9–13. Clarksburg also contends, in a variation on the theme raised in the previous section, that the penalty should be decreased because its violations were "borderline" violations—i.e., only slightly over the 10,000-pound reporting threshold—and thus warranted a penalty reduction under the ERP.[26] *See id.* at 13–15.

The Presiding Officer ably dealt with these issues in her order denying accelerated decision as to penalty and in her Initial Decision.

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[25] If anything, the Presiding Officer gave far greater weight to *Hall Signs* than might normally have been expected. However, we recognize that the Presiding Officer issued her Initial Decision prior to the Board's release of its own opinion in *Hall Signs,* and thus a full treatment of the case was prudent.

[26] Clarksburg also asserts that it received from the Presiding Officer "an undisputed positive rating" for the facts that it had no prior history of EPCRA violations and earned no economic benefit from its violations. Appeal Brief at 10. Accordingly, Clarksburg believes that its penalty should have been adjusted downward to reflect its "positive rating" on these factors. *Id.*

While it is true that the Presiding Officer acknowledged the parties' agreement that Clarksburg had no history of prior violations and gained no economic benefit from the violations at issue in this case, *see* Order Denying Motion for Accelerated Decision on Penalty at 4 (ALJ, Dec. 17, 1997), Clarksburg's request for a penalty reduction on these grounds is unfounded. EPA's EPCRA penalty policy provides only for upward, not downward, penalty adjustments for the first factor. ERP at 16–17. Moreover, lack of economic benefit is not a reason for reducing a penalty but for increasing the penalty in order to deter violations and assure that economic benefit has been recovered. *See,* e.g., EPA General Enforcement Policy #GM–21, *Policy on Civil Penalties* 3 (Feb. 16, 1984) (to deter violations of environmental laws, "it is Agency policy that penalties generally should, *at a minimum,* remove any significant economic benefits resulting from failure to comply with the law"); EPA

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See Order Denying Motion for Accelerated Decision on Penalty at 4–7 (ALJ, Dec. 17, 1997); Init. Dec. at 11, 16–19. We find no clear error or abuse of discretion in her treatment of these issues and therefore adopt her reasoning as our own.[27]

III. *CONCLUSION*

After a careful review of the administrative record and the parties' briefs on appeal, we find no clear error or abuse of discretion on the Presiding Officer's part that would warrant our overturning her rulings. We therefore affirm the Presiding Officer's Order Granting Accelerated Decision as to Liability and the Initial Decision.

For the reasons expressed above, an administrative penalty of $96,900 is assessed against Clarksburg. Payment of the penalty shall be made within sixty (60) days of receipt of this final order, by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

EPA-Region III
Regional Hearing Clerk
Post Office Box 360515
Pittsburgh, Pennsylvania 15251–6515

So ordered.

General Enforcement Policy #GM–22, *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* 6–13 (Feb. 16, 1984) (explaining economic benefit calculation); *In re B.J. Carney Indus., Inc.,* 7 E.A.D. 171, 207–08, (EAB 1997) (discussing the importance of economic benefit).

[27] The Presiding Officer's treatment of these penalty-adjustment factors is consistent with the Board's treatment in its own EPCRA cases. *See,* e.g., *In re Woodcrest Mfg., Inc.,* 7 E.A.D. 757, 775–79 (EAB 1998) (attitude (cooperation and compliance), history of prior violations); *In re Pacific Ref. Co.,* 5 E.A.D. 607, 615–20 (EAB 1994) (voluntary disclosure, history of prior violations, attitude (cooperation and compliance), other factors as justice may require).