IN RE WOODCREST MANUFACTURING, INC.

EPCRA Appeal No. 97-2

FINAL DECISION

Decided July 23, 1998

Syllabus

This is an appeal by Woodcrest Manufacturing, Inc. ("Woodcrest") from an Accelerated Decision arising out of an administrative enforcement action by the United States Environmental Protection Agency Region V (the "Region") against Woodcrest for violations of the Emergency Planning and Community Right-to-Know Act ("EPCRA").

EPCRA § 313 requires certain facilities to submit annually a Toxic Chemical Release Inventory Reporting Form ("Form R") for each toxic chemical listed under 40 C.F.R. § 372.65 that was used by the facility during the preceding calendar year. During calendar year 1990, Woodcrest used three toxic chemicals that are subject to the reporting requirements of EPCRA, but failed to file the requisite Form Rs by the due date. The Region filed a complaint (the "Complaint") against Woodcrest seeking a $27,000 civil penalty and alleging that Woodcrest had committed three separate violations of EPCRA § 313 by failing to submit Form Rs reporting Woodcrest's use of the three toxic chemicals in 1990. Woodcrest's answer admitted almost every allegation in the Complaint.

On May 8, 1997, the Region filed a Motion for Accelerated Decision, arguing that no genuine issues of material fact existed either as to Woodcrest's liability for the three violations or as to the appropriate penalty. The Region did acknowledge that a modest reduction in the requested penalty might be appropriate on account of Woodcrest's cooperation. Woodcrest's only response to the Motion for Accelerated Decision was a letter, which did not state any substantive objections.

On May 27, 1997, the Presiding Officer held an "off-the-record" conference regarding Woodcrest's request for a continuance of the evidentiary hearing scheduled to begin on May 28, 1997. On appeal, Woodcrest contends that the Presiding Officer exhibited bias against Woodcrest during the May 27 conference. Also, on May 27, 1997, the Presiding Officer entered an order granting a continuance and stating that he would not rule on the Motion for Accelerated Decision until June 10, 1997, in order to give the parties another opportunity to settle. The parties did not settle the case prior to June 10, 1997. Instead, Woodcrest filed a motion seeking disqualification of the Presiding Officer and a Motion for Production of Documents. On June 13, 1997, the Presiding Officer entered an order denying the Motion to Disqualify Presiding Officer, and he entered the Accelerated Decision finding Woodcrest liable for three violations of EPCRA § 313, and assessing civil penalties in the aggregate amount of $27,000. The Accelerated Decision also denied Woodcrest's Motion for Production of Documents as moot.

On appeal, Woodcrest argues that the Presiding Officer should not have granted the Region's Motion for Accelerated Decision because: (a) the Presiding Officer was biased, and (b) Woodcrest was entitled to discovery. With respect to the central issue of liability, Woodcrest does

not contest that it violated EPCRA § 313, but it contends that its conduct constituted only one, not three violations. Woodcrest also argues that the circumstances of this case do not warrant the size of penalty assessed by the Presiding Officer and raises several issues on appeal that were not raised below.

HELD: Woodcrest is assessed a penalty of $24,840.

(1) With respect to the issues of alleged bias, the Presiding Officer was authorized as the Administrator's delegate to rule on the Motion to Disqualify Presiding Officer, and Woodcrest has failed to show that the Presiding Officer held any impermissible bias against it.

(2) There also was no error in the Presiding Officer's determination that the document request is moot and, because Woodcrest's Motion for Production of Documents was not filed until more than two weeks after the due date for responses to the Motion for Accelerated Decision, Woodcrest's document request was not timely as an opposition.

(3) There was no error in the Presiding Officer's legal determination that each failure to submit a separate Form R for each toxic chemical used in a particular year constitutes an independent violation of EPCRA § 313. Thus, the Presiding Officer was correct in finding that Woodcrest committed three violations of EPCRA § 313 in this case.

(4) Woodcrest is granted a modest penalty reduction of 8% because Woodcrest should be rewarded for the cooperation it did exhibit as acknowledged by the Region.

(5) Woodcrest's argument that the penalty should be reduced on the grounds that the violations did not cause harm is rejected because it was not adequately raised below and because Congress determined that substantial penalties may be imposed for violations of the EPCRA without the necessity of proving any actual harm.

(6) Woodcrest has failed to show that the civil penalty assessed in this case violates the "excessive fines" provision of the Eighth Amendment of the U.S. Constitution.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge Stein:

This is an appeal by Woodcrest Manufacturing, Inc. ("Woodcrest") from an Accelerated Decision by Administrative Law Judge Edward J. Kuhlmann (the "Presiding Officer"). The Accelerated Decision arose out of an administrative enforcement action by the United States Environmental Protection Agency Region V (the "Region") against Woodcrest for three alleged violations of section 313 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11023. By the Accelerated Decision, the Presiding Officer determined that Woodcrest is liable for three violations of the reporting requirements of EPCRA § 313, and the Presiding Officer assessed an aggregate civil penalty of $27,000 for these violations. The Region has not appealed from the Accelerated Decision.

Woodcrest seeks to establish numerous alleged errors in, or underlying, the Accelerated Decision. Its arguments generally fall into

three categories: (1) procedural issues underlying the entire decision; (2) one issue as to the finding of liability; and (3) issues as to the amount of the penalty. The procedural issues assert that the Presiding Officer should not have granted the Region's Motion for Accelerated Decision because: (a) the Presiding Officer was biased, (b) the Motion for Accelerated Decision had already been "*de facto*" denied, and (c) Woodcrest was entitled to certain discovery. However, with respect to the central issue of liability, it is significant that "Woodcrest has never contested that it violated EPCRA § 313." Appeal Brief of Woodcrest ("Woodcrest's Brief") at 11. Nevertheless, it contends that its conduct constituted only one, not three violations. The issues regarding the amount of the penalty primarily go to whether the circumstances of this case warrant the size of penalty assessed by the Presiding Officer. The Region has opposed each of Woodcrest's arguments. *See* Reply Brief of Complainant ("Region's Brief").

Woodcrest has also filed a motion requesting that the Board strike a portion of the Region's Brief and Attachment D to the Region's Brief on the grounds that such material was not in the record before the Presiding Officer. *See* Woodcrest's Motion for Leave to File Motion to Strike, *with attached* Woodcrest's Motion to Strike (the "Motion to Strike"); *see also* Order Granting Leave to File Motion to Strike (EAB, Sept. 11, 1997). Because we do not normally consider arguments made for the first time on appeal or information not contained in the record, we grant Woodcrest's Motion to Strike as discussed more fully below. However, most of Woodcrest's arguments also were not raised before the Presiding Officer. For these and the other reasons more fully discussed below, we generally reject Woodcrest's arguments in this case. However, we have decided to assess an aggregate penalty of $24,840, reflecting an 8% penalty reduction on account of Woodcrest's cooperative attitude.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

EPCRA § 313 requires certain facilities to "submit annually, no later than July 1 of each year, a Toxic Chemical Release Inventory Reporting Form ("Form R") for each toxic chemical listed under 40 C.F.R. § 372.65 that was manufactured, imported, processed, or otherwise used during the preceding calendar year in quantities exceeding established chemical thresholds." *In re K.O. Manufacturing, Inc.*, 5 E.A.D. 798, 800 (EAB 1995). The relevant reporting threshold with respect to this case is 10,000 pounds for each toxic chemical used at a facility in a calendar year. EPCRA § 313(f)(1)(A), 42 U.S.C. § 11023

(f)(1)(A). EPA has the authority to enforce the reporting requirements of section 313 and, at the time of the violations at issue in this case, was authorized to impose civil penalties of up to $25,000[1] for each failure to file a Form R for each day that the violation continued. EPCRA § 325(c), 42 U.S.C. § 11045(c).

B. *Factual and Procedural Background*

Woodcrest is an Indiana corporation with a place of business located at 217 East Canal Street, Peru, Indiana (the "Facility"). Joint Stipulations of Fact for Hearing ¶ 1 (the "Stipulations"). During calendar year 1990, Woodcrest used at the Facility three toxic chemicals that are subject to the reporting requirements of EPCRA. Woodcrest used the following three chemicals in the respective quantities: (a) at least 21,878 pounds of n-butyl alcohol (Chemical Abstracts Services, or CAS, No. 71-36-3), *Id.* ¶ 7; (b) at least 136,491 pounds of toluene (CAS No. 108-88-3), *Id.* ¶ 11; and (c) at least 40,803 pounds of xylene (CAS No. 1330-20-7), *Id.* ¶ 15. On June 17, 1992, a representative of the Region conducted an inspection of the Facility and determined that Woodcrest had failed to submit to EPA the toxic chemical reporting form, known as "Form R," as required by EPCRA § 313, and 40 C.F.R. part 372, for toxic chemicals used in 1988, 1989 and 1990.

In January 1996, the Region filed its complaint (the "Complaint") against Woodcrest alleging that Woodcrest had committed three separate violations of EPCRA § 313 by failing to submit Form Rs reporting Woodcrest's use of more than the reporting threshold amount of n-butyl alcohol, toluene and xylene in calendar year 1990. The Complaint also requested that an aggregate civil penalty of $27,000 be imposed for the alleged violations. The Complaint did not allege violations or seek penalties with respect to toxic chemicals used in 1988 and 1989.

In February 1996, Woodcrest filed its answer to the Complaint (the "Answer") admitting every general and specific allegation in the Complaint, with one exception. (Woodcrest's only factual dispute, which was later resolved by stipulation, related to the amount of toluene allegedly used by Woodcrest in 1990.) Woodcrest did not raise any affirmative defenses to the alleged violations and it stated that

[1] Subsequent to the violations at issue in this case, the Debt Collection Improvement Act of 1996 was enacted directing the EPA to make periodic adjustments of maximum civil penalties to take into account inflation. *See* 31 U.S.C. § 3701. The EPA has published inflation adjusted maximum penalties, *see* 40 C.F.R. §§ 19.1 *et seq.*, which apply to violations occurring after January 30, 1997.

"Respondent does not request a hearing [to] contest any material fact contained in [the] Complaint; however, [it] does contest the appropriateness of the amount of the proposed penalty." Answer ¶ 6. Woodcrest stated further that "[a]lthough no hearing is requested in accordance with Administrative Procedure Act, 5 U.S.C. [§] 551 *et seq.*, Respondent does request an informal conference in order to discuss the facts of this case and to arrive at a settlement." *Id*.

Woodcrest also stated in its answer that "Respondent understands that nothing contained in a settlement of this case will satisfy the obligation to file a complete and accurate Toxic Chemical Release Inventory Reporting Form, Form R * * * for each toxic chemical identified in the Complaint." *Id*. ¶ 7. Woodcrest also admitted in its answer that it had not filed the requisite Form Rs as of the commencement of this action. Answer ¶¶ 1, 4, 5; Complaint ¶¶ 20, 27, 34. Woodcrest later stipulated that it completed the required Form Rs for 1990 for the toxic chemicals identified in the Complaint on January 30, 1997 and subsequently submitted those Form Rs to the EPA. Stipulations ¶¶ 10, 14 and 18.

During January and February 1997, the parties made their prehearing exchanges. Woodcrest's prehearing exchange identified two witnesses and three documents. The three documents were copies of Woodcrest's Form Rs for n-butyl alcohol, toluene, and xylene used in 1990, which Form Rs were dated January 30, 1997. Woodcrest identified its first witness as David Woodhams, who was to testify "that at no time did Mr. Skubnik [the EPA inspector] indicate that a Form R for 1988, 1989, or 1990 was requested." Respondent's Prehearing Exchange at 1. Woodcrest identified its second witness as Howard Holdsclaw, who was to testify "that he prepared the Form R for 1990 as requested and that Jacqueline Kline [the Region's counsel] stated that no Form R for 1988 or 1989 would be required." *Id*. Subsequently, the Region filed its reply to Woodcrest's prehearing exchange objecting to the identified testimony of Howard Holdsclaw and identifying the Region's counsel, Jacqueline Kline, as a potential rebuttal witness.

In March 1997, notice was served on both parties scheduling an evidentiary hearing to begin on May 28, 1997. In April 1997, the parties filed their Stipulations, and on May 8, 1997, the Region filed its Motion for Accelerated Decision and its Memorandum in Support of Complainant's Motion for Accelerated Decision (respectively, the "Motion for Accelerated Decision" and the "Accelerated Decision Brief"). The Region argued in its Motion for Accelerated Decision that no genuine issues of material fact existed either as to Woodcrest's liability for the three alleged violations of EPCRA § 313 or as to the

appropriate penalty for the alleged violations. On May 9, 1997, the Region filed a Motion in Limine seeking to bar the testimony of Howard Holdsclaw.

Woodcrest did not file a pleading expressly objecting to either the Motion in Limine or the Motion for Accelerated Decision. However, it did file a letter dated May 21, 1997, which was captioned "Response to Motions" (the "May 21 Letter"). In the May 21 Letter, Woodcrest described some aspects of the status of settlement discussions and stated that "[i]n the unlikely event that we cannot come to an agreement we would still want to call on Howard Holdsclaw as a witness as referred to in the Complaint's [sic] Motion in Limine and Complaint's [sic] Motion for Accelerated Decision." Woodcrest did not address the Region's request for accelerated decision or the request to bar the testimony of Mr. Holdsclaw in any other manner. Woodcrest also did not expressly state any opposition or response to the Motion for Accelerated Decision in any other written document filed with the Presiding Officer.

On May 22, 1997, the Presiding Officer held an "off-the-record" conference with the parties regarding the status of the case and regarding the evidentiary hearing scheduled to begin during the following week on May 28, 1997. Although there does not appear to be any material disagreement as to what was said during that conference, there is, however, disagreement as to the legal consequences. The parties appear to agree (a) that the Presiding Officer confirmed that there would be an evidentiary hearing on May 28, 1997, (b) that he would not rule on the Motion for Accelerated Decision prior to the evidentiary hearing, (c) that he stated that the case should be settled, and (d) that he stated he would not delay the hearing because his calendar was full for many months. *See* Woodcrest's Motion to Disqualify Presiding Officer ¶¶ 4, 12.

On appeal, Woodcrest argues that the Presiding Officer's "ruling May 22, 1997, that Woodcrest was entitled to a hearing and that the hearing would take place May 28th, was *de facto* a denial of EPA's Motion for Accelerated Judgment." Woodcrest's Motion to Disqualify Presiding Officer ¶ 13, *incorporated by reference in* Woodcrest's Brief at 12; *see also* Woodcrest's Notice of Appeal ¶ 73. The Region disagrees and contends that the Presiding Officer did not deny the Motion for Accelerated Decision on May 22, 1997, and that the Presiding Officer properly granted the motion on June 13, 1997. Region's Brief at 11.

After the conclusion of the conference on May 22, 1997, Woodcrest retained counsel for the first time to represent it in this matter.

Woodcrest's Motion for Continuance ¶ 1. Woodcrest's newly retained counsel promptly called the Presiding Officer requesting a continuance and stating that a motion would be filed shortly. *Id*. ¶¶ 4-5.

On May 27, 1997, the Presiding Officer held another "off-the-record" conference among the parties regarding Woodcrest's request for a continuance. This off-the-record conference has also generated considerable dispute in this case. The parties are in general agreement that the Presiding Officer stated that (1) he would grant the Motion for Continuance and (2) he intended to rule on the Motion for Accelerated Decision, but would delay that ruling until June 10, 1997, to afford the parties additional time to settle the case. Woodcrest's Notice of Appeal ¶ 55; Region's Brief at 13. Woodcrest, however, contends that the manner in which the Presiding Officer spoke to Woodcrest's counsel during the May 27, 1997 conference showed that the Presiding Officer was biased against Woodcrest. *See* Motion to Disqualify Presiding Officer (June 3, 1997); Woodcrest's Notice of Appeal ¶¶ 72-77.

On May 27, 1997, the Presiding Officer entered a formal order granting a continuance of the evidentiary hearing, stating that he would not rule on the Motion for Accelerated Decision until June 10, 1997, in order to give the parties another opportunity to settle. Order (ALJ, May 27, 1997). The parties did not settle the case prior to June 10, 1997. On May 27, 1997, Woodcrest's newly retained counsel filed a motion to disqualify the Region's counsel on the grounds that the Region had identified its counsel as a possible rebuttal witness with respect to Mr. Holdsclaw's testimony. Respondent's Motion to Disqualify [Region's Counsel] ¶ 7. Later, on June 3, 1997, Woodcrest filed a motion seeking disqualification of the Presiding Officer on the grounds that the Presiding Officer was allegedly biased against Woodcrest. *See* Woodcrest's Motion to Disqualify Presiding Officer. Finally, on June 10, 1997, Woodcrest filed a Motion for Production of Documents identifying ten broad categories of documents sought by Woodcrest.

On June 13, 1997, the Presiding Officer entered two separate orders. First, the Presiding Officer entered an order denying the Motion to Disqualify Presiding Officer. *See* Order Denying Motion for Disqualification (ALJ, June 13, 1997). Second, the Presiding Officer also entered the Accelerated Decision finding Woodcrest liable for three violations of the reporting requirements of EPCRA § 313, and assessing civil penalties for the three violations in the aggregate amount of $27,000. The Accelerated Decision also denied Woodcrest's Motion for Production of Documents and Woodcrest's Motion to Disqualify Region's Counsel on the grounds that those motions were moot.

II. *DISCUSSION*

A. *Woodcrest's Motion to Strike*

Woodcrest has filed its Motion to Strike arguing that Appendix D to the Region's Brief and the related arguments in the Region's Brief should not be considered by the Board because "argument must be based on evidence of record." Motion to Strike at 2. The Region's Appendix D to its Appeal Brief contains copies of computer generated reports allegedly showing that Woodcrest's Form Rs for years subsequent to 1990 have not been timely filed. In its Response to Motion to Strike, the Region notes that it only sought to submit this new information in an effort to refute Woodcrest's argument made for the first time in its Notice of Appeal and Brief to the effect that it has fully complied with its reporting requirements for the years subsequent to 1990.

We hold that neither Woodcrest's arguments as to its subsequent compliance nor Appendix D and related arguments submitted by the Region should be considered by us. We generally do not consider arguments raised for the first time on appeal. *In re James C. Lin and Lin Cubing,* Inc., 5 E.A.D. 595, 598 (EAB 1994); *In re Genicom Corp.*, 4 E.A.D. 426, 440 (EAB 1992)(rejecting respondent's contention that an issue had been raised below). The Consolidated Rules of Practice, 40 C.F.R. § 22.30(a), permit adverse rulings or orders of the presiding officer to be appealed. "Because the Presiding Officer cannot issue an adverse order or ruling on an issue that was never raised during the proceedings below, it follows that section 22.30(a) does not contemplate appeals of such issues." *Lin,* 5 E.A.D. at 598. Thus, arguments made by Woodcrest for the first time on appeal are deemed to have been waived[2] and we will not consider the Region's Appendix D to its Brief or the related arguments contained in the Brief.

B. *Procedural Matters Underlying the Propriety of the Accelerated Decision*

1. *Disqualification of Presiding Officer*

Woodcrest argues that the manner in which the Presiding Officer spoke to Woodcrest's counsel during the off-the-record conference of May 27, 1997, including alleged accusations regarding Woodcrest's responsibility for failure to reach a settlement, showed that the

[2] We will identify throughout our following discussion the arguments which are denied on this ground.

Presiding Officer was biased against Woodcrest. *See* Woodcrest's Motion to Disqualify Presiding Officer; Woodcrest's Notice of Appeal ¶¶ 74-77. Woodcrest originally made this argument in its motion to disqualify the Presiding Officer, which was denied by the Presiding Officer on June 13, 1997. Now, on appeal, Woodcrest argues that (1) the Presiding Officer should not have ruled on the motion to disqualify because that motion was made to the Administrator pursuant to 40 C.F.R. § 22.04(d), and (2) the Presiding Officer should have been disqualified. Woodcrest's Brief at 12. We reject both of these arguments.

Although Woodcrest asserts in its Brief that its Motion to Disqualify Presiding Officer was "made to the Administrator," Woodcrest's Brief at 12, there is no indication on its face that the Motion to Disqualify Presiding Officer was made any differently than any other motion filed by Woodcrest in this case. Specifically, the Motion to Disqualify Presiding Officer had the same caption used by Woodcrest on its Motion for Continuance, its Motion to Disqualify Region's Counsel and its Motion for Production of Documents. In addition, Woodcrest did not state anywhere in its motion that it expected the Administrator to personally rule on the Motion to Disqualify Presiding Officer. The only basis we have been able to discern for Woodcrest's argument that it "made" the motion to the Administrator is that the certificate of service shows that Woodcrest served a copy of the motion on "Carol Browner, Administrator" and also on the "Honorable Spencer Nissen, Acting Chief Administrative Law Judge." However, absent any clear indication by Woodcrest that it specifically intended the Administrator to rule on the disqualification motion (as opposed to the Presiding Officer or even the Acting Chief Administrative Law Judge), it is unreasonable of Woodcrest to fault the Presiding Officer for ruling on the motion — which, as explained, is otherwise indistinguishable from any other motion filed in the proceeding — and thereafter charge that his action in ruling on the motion amounts to reversible error.

Moreover, we believe that the Presiding Officer did have the authority to rule on the Motion to Disqualify Presiding Officer, although the regulations are not a model of clarity on this issue. Woodcrest correctly notes that the Consolidated Rules of Practice, 40 C.F.R. § 22.04(d)(1), specify that a motion to disqualify a presiding officer shall be made to the "Administrator." The term "Administrator," however, is defined at section 22.03(a) to mean "the Administrator of the U.S. Environmental Protection Agency *or [her] delegate*." 40 C.F.R. § 22.03(a)(emphasis added). Thus, the Administrator is not required to act personally on disqualification issues, but may instead delegate this authority to other individuals within the EPA.

The Administrator's delegation of authority to other persons within the EPA may be set forth either in applicable regulations or in the EPA's Delegations Manual, or both. Section 22.16(c) of the Consolidated Rules of Practice, 40 C.F.R. § 22.16(c), provides that the Presiding Officer shall rule on "all other motions," *i.e.*, those not delegated to other persons by the preceding sentences of section 22.16(c). As the motion at issue here is not covered by the preceding sentences, section 22.16(c) would appear to authorize the Presiding Officer to rule on the Motion to Disqualify Presiding Officer in this case.[3]

This reading of the relevant regulations is supported by the delegations contained in the EPA's Delegations Manual. Delegation 1-37 provides that the administrative law judges shall "hold hearings and perform related duties which the Administrator is required by law to perform in proceedings subject to 5 U.S.C. §§ 556 and 557." Delegations Manual, 1-37 Hearings (1200 TN 91)(Nov. 1, 1983). In addition, delegation 22-3-C issued under the EPCRA provides that administrative law judges shall "hold and preside over hearings, assess penalties, perform all applicable functions set forth in 40 C.F.R. part 22, and perform all related duties which the Administrator is authorized to perform under section 325(b), (c), (d), and (f) of the [EPCRA]." Delegations Manual, 22-3-C Administrative Hearings: 40 C.F.R. Part 22 (1200 TN 281) (Jan. 24, 1992). These broad delegations of authority to perform all applicable functions of the Administrator under the Consolidated Rules of Practice confirm that the Presiding Officer was authorized as the Administrator's delegate to rule on the Motion to Disqualify Presiding Officer.

As to the substance of Woodcrest's allegations, Woodcrest has failed to show that the Presiding Officer held any impermissible bias against it. Disqualification is required if a presiding officer has a finan-

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[3] The language and syntax of these regulations, however, are not entirely clear. In particular, we note that the first sentence of section 22.16(c) makes express reference to the disqualification rule, thereby raising the possibility of some limitation on the authority delegated in that sentence. However, because the sentence containing the delegation to the Presiding Officer to decide "all other motions" does not contain the same cross-reference, we believe that it would be inappropriate for the Presiding Officer's delegation to be deemed limited in any way by the cross-reference in the earlier sentence. Moreover, the Board has authority to independently decide questions that are not resolved in our rules of practice. 40 C.F.R. § 22.01(c); *see also In re Zaclon, Inc.*, 7 E.A.D. 482, 490 n.7 (EAB 1998). Accordingly, we hold that it was proper for the Presiding Officer to rule in the first instance on the Motion to Disqualify Presiding Officer.

cial interest, or if he has any relationship with a party or with the subject matter that would make it inappropriate for him to act. 40 C.F.R. § 22.04(d)(1); *see also* 5 U.S.C. § 556(a)(requiring impartial and unbiased decisions). A presiding officer, however, may form judgments of the actors in a proceeding based on official dealings in the case with the party or based on evidence submitted in the case. *In re Shell Oil Co.*, FIFRA Docket Nos. 401 *et al.* (Adm'r, Apr. 7, 1980)("If the judge does not form judgments of the actors in * * * trials, he could never render decisions")(quoting *In re J.T. Linahan, Inc.*, 138 F.2d 650, 653-654 (2d Cir. 1943)); *In re Central Paint and Body Shop,* 2 E.A.D. 309, 310-311 and n.2 (CJO 1987)(same).

As the Supreme Court has recently explained regarding the more stringent statutory standard[4] applicable to Article III judges to remain unbiased and impartial, "[n]ot establishing bias or partiality * * * are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration — even a stern and short-tempered judge's ordinary efforts at courtroom administration — remain immune." *Liteky v. United States*, 510 U.S. 540, 555-556 (1994).

The Presiding Officer's remarks regarding settlement of this case do not evidence that the Presiding Officer was biased. Instead, the Presiding Officer's remarks appear to be routine trial administration efforts directed at encouraging settlement. The regulations specifically authorize the presiding officer to conduct prehearing conferences to consider settlement, 40 C.F.R. § 22.19(a)(1), and accordingly it is appropriate for a presiding officer to provide comments regarding the status of settlement discussions. Moreover, here, where Woodcrest had stipulated to every fact establishing its liability and Woodcrest had not disputed the Region's proposed penalty calculation in any written opposition to the Motion for Accelerated Decision, the Presiding Officer's comments, which were directed to Woodcrest rather than to the Region's representatives, are not sufficient to show bias or partiality.

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[4] The Fifth Circuit has observed that the statutory disqualification standard applicable to Article III judges is more "demanding" or "stringent" than required by due process. *Marine Shale Processors, Inc., v. EPA,* 81 F.3d 1371, 1386 (5th Cir. 1996).

In addition, there is no suggestion that the Presiding Officer has an improper financial interest in this case or prior unofficial relationship with either party. Indeed, the Presiding Officer noted in his order that "[u]ntil this case was assigned to the presiding officer he had no knowledge of the allegations in the complaint and has never met or had appear before him counsel for the respondent, complainant or respondent's representative." Order Denying Motion for Disqualification at 2 (ALJ, June 13, 1997). Thus, we conclude that Woodcrest has not shown that the Presiding Officer held any impermissible bias against Woodcrest.

Finally, there can be no question that the Administrator has delegated authority to the Environmental Appeals Board "[t]o serve as the final decision maker in all administrative proceedings under the * * * Emergency Planning and Community Right-to-Know Act." Delegations Manual, 1-38 Administrative Proceedings (1200 TN 91)(Jan. 24, 1992). Thus, we serve as EPA's final decision maker in this matter. The Board's involvement in this case, including our independent review of the merits of the Accelerated Decision, as discussed below, assures that the proceedings in this case fully satisfy the due process requirement of an unbiased decision maker. *See, e.g.*, *In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 794-795 (EAB 1995) (holding that, because of the Board's involvement in reviewing a denial of a RCRA permit application, the applicant could not contend that the final Agency decision was made by a biased decision maker). Accordingly, we hold that Woodcrest's arguments regarding the alleged bias of the Presiding Officer do not warrant reversal or remand of the Accelerated Decision.

2. *Issue of "De Facto" Denial of Accelerated Decision*

Woodcrest also argues that the granting of the Accelerated Decision on June 13, 1997, was improper because, according to Woodcrest, the effect of the Presiding Officer's comments during the off-the-record conference of May 22, 1997, "was *de facto* a denial of EPA's Motion for Accelerated Judgment." Woodcrest's Motion to Disqualify Presiding Officer ¶ 13, *incorporated by reference in* Woodcrest's Brief at 12; *see also* Woodcrest's Notice of Appeal ¶ 73. Woodcrest further argues that "the motion, once denied, should not have been granted." Woodcrest's Brief at 12.

As noted above, we generally do not consider arguments raised for the first time on appeal. *Supra* part II.A. Here, Woodcrest did not raise its denial argument to the Presiding Officer as a reason for denial of the Region's Motion for Accelerated Decision. Indeed, Woodcrest

did not file any formal opposition to the Motion for Accelerated Decision.[5] Therefore, this contention does not provide a basis for reversal or remand of the Accelerated Decision.[6]

3. *Woodcrest's Motion for Production of Documents*

Woodcrest's arguments regarding its Motion for Production of Documents also cannot serve as grounds for challenging the propriety of the entire Accelerated Decision. The Accelerated Decision held that the Motion for Production of Documents was dismissed as moot. Accelerated Decision at 8. Now, Woodcrest argues on appeal that its Motion for Production of Documents should have been granted. Woodcrest's Brief at 12-13.

None of Woodcrest's arguments, however, discuss the Presiding Officer's holding that the document request is moot. Because the document request would serve no further purpose in the event that the balance of the Accelerated Decision is upheld by the Board, we find no error in the Presiding Officer's determination that the document request should be denied as moot.[7]

Moreover, the Motion for Production of Documents cannot be construed as a timely opposition to the Motion for Accelerated Decision. The Accelerated Decision "is governed by an administrative summary judgment standard, requiring the *timely* presentation of a genuine and material factual dispute, similar to judicial summary judgment under Rule 56, Fed. R. Civ. P." *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 (EAB 1997) (emphasis added).

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[5] The only document filed by Woodcrest that made direct reference to the Motion for Accelerated Decision was the May 21 Letter, which consisted of only two paragraphs and did not raise the denial argument.

[6] In any event, the Presiding Officer had authority to enter an accelerated decision *sua sponte*, even if an earlier motion had been denied. The Consolidated Rules of Practice provide that "[t]he Presiding Officer * * * *sua sponte*[] may *at any time* render an accelerated decision in favor of the complainant * * * as to all or any part of the proceeding." 40 C.F.R. § 22.20(a) (emphasis added).

[7] Had the document request not been rendered moot by the entry of the Accelerated Decision, Woodcrest would have been required to show "(i) that such discovery will not in any way unreasonably delay the proceeding; (ii) that the information to be obtained is not otherwise obtainable; and (iii) that such information has significant probative value." 40 C.F.R. § 22.19(f). Such issues would become germane only if we were to reverse the Accelerated Decision, which mooted further consideration of the document request by determining both liability and the amount of the penalty.

Woodcrest's Motion for Production of Documents was filed after the due date for any opposition to the Motion for Accelerated Decision and on the day the Presiding Officer indicated he would likely rule on the Motion for Accelerated Decision. Any response by Woodcrest was due no later than May 23, 1997. *See* 40 C.F.R. §§ 22.07(b) and 22.16(b).[8] Because Woodcrest's Motion for Production of Documents was not filed until June 10, 1997,[9] Woodcrest's document request was not timely as an opposition to the Accelerated Decision.

C. *The Issue of Liability for Three Violations*

The Region's complaint alleged that Woodcrest committed three violations of EPCRA § 313, and the Presiding Officer held that the parties' "stipulations establish liability for each of the three counts stated in the complaint." Accelerated Decision at 4. Woodcrest states that it "has never contested that it violated EPCRA § 313," but it argues that "[t]he failure to file multiple Form Rs for a given location for the same year constitutes a single violation." Woodcrest's Brief at 11. We reject Woodcrest's contention for two reasons.

First, Woodcrest did not raise at any stage of the proceedings below the issue of whether it should be held liable for only one, rather than three, violations of EPCRA § 313. Accordingly, this argument is not available to Woodcrest on appeal. *Supra* part II.A. Second, there is no error in the Presiding Officer's legal determination that each failure to submit a separate Form R for each toxic chemical used in a particular year constitutes an independent violation of EPCRA § 313. *See In re Pacific Ref. Co.*, 5 E.A.D. 607, 620-621 (EAB 1994) (imposing penalties for multiple violations of the Form R reporting requirements in the same year).

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[8] Pursuant to 40 C.F.R. § 22.16(b), "a party's response to any written motion must be filed within ten (10) days after service of such motion," and, pursuant to 40 C.F.R. § 22.07(c), when a document is served by mail "five (5) days shall be added to the time allowed by these rules for the filing of a responsive pleading or document." The Motion for Accelerated Decision was served by mail on May 8, 1997.

[9] Although we generally accord more lenient standards of competence and compliance to *pro se* litigants, Woodcrest is not entitled to any lenience here because "a litigant who elects to appear *pro se* takes upon himself or herself the responsibility for complying with the procedural rules and may suffer adverse consequences in the event of noncompliance," *In re Rybond, Inc.*, 6 E.A.D. 614, 627 (EAB 1996), and because, after Woodcrest retained counsel, Woodcrest's counsel was given adequate notice that the Presiding Officer intended to rule on the Motion for Accelerated Decision on or after June 10, 1997. *See* Woodcrest's Notice of Appeal ¶ 55; *see also* Order (ALJ, May 27, 1997).

Generally, whether alleged acts or omissions give rise to a single or, alternatively, multiple violations of a single statutory provision is a question of statutory construction. *In re McLaughlin Gormley King Co.*, 6 E.A.D. 339, 344-346 and n.6 (EAB 1996). The text of the statute at issue here specifically authorizes assessment of separate penalties for each failure to submit the requisite Form R for each separate toxic chemical used in a given year. The civil administrative enforcement section of EPCRA provides that a person "who violates any requirement of [EPCRA §§ 312 and 313] shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation." EPCRA § 325(c), 42 U.S.C. § 11045(c). In addition, the plain language of EPCRA § 313(a) provides that a Form R must be submitted for each toxic chemical used at a facility each year:

> The owner or operator of a facility * * * shall complete a toxic chemical release form [Form R] * * * for *each* toxic chemical * * * that was manufactured, processed, or otherwise used * * * during the preceding calendar year at such facility.

EPCRA § 313(a), 42 U.S.C. § 11023(a) (emphasis added). Thus, since a Form R is required pursuant to section 313(a) for each toxic chemical and since section 325(c) authorizes the assessment of a civil penalty for a violation of "any requirement" of section 313, each failure to submit a Form R for each toxic chemical used in a given year constitutes a separate violation and is grounds for the assessment of a separate penalty. This plain meaning of the statutory language is further supported by the regulations, which require that "[f]or each toxic chemical * * * used in excess of an applicable threshold quantity * * * for a calendar year, the owner or operator must submit to the EPA * * * a completed EPA Form R." 40 C.F.R. § 372.30(a).

In this case, Woodcrest admitted in its answer and in the stipulations that it used three separate toxic chemicals at the Facility in 1990 in amounts exceeding the reporting threshold of 10,000 pounds, and it admitted that it did not timely file any of the requisite Form Rs. Accordingly, the Presiding Officer was correct in finding that Woodcrest committed three violations of EPCRA § 313 in this case.

D. *Penalty Issues*

In moving for an accelerated decision, the Region requested that a penalty of $27,000 be imposed for Woodcrest's three violations of EPCRA § 313. Accelerated Decision Brief at 5. However, the Region also acknowledged that a minimal downward adjustment may be

appropriate. *Id*. at 19. Thus, the Region in effect stated both that a penalty of $27,000, and that a minor downward adjustment from a $27,000 base penalty, would be appropriate alternative penalties for assessment by accelerated decision in this case. Noting that no material opposition had been filed, the Presiding Officer chose to assess a penalty of $27,000. Now, on appeal, Woodcrest argues that "[n]o civil penalty should be imposed due to the totality of circumstances in this case," Woodcrest's Brief at 9, and that "the imposition of civil penalties would violate the excessive fines provision of the Eighth Amendment." *Id*. at 10.

Woodcrest further argues that the following "circumstances in this case" warrant a substantial reduction or elimination of the penalty:

> [T]he lack of any environmental harm; Woodcrest's lack of other violations of EPA regulations; its track record of compliance with EPCRA Form R reporting requirements once it learned of them; its cooperation with EPA before, during and after EPA's inspection of Woodcrest's facility on June 17, 1992; the fact that Woodcrest, apart from EPCRA, has acted responsibly in making the local fire department and the State aware of the chemicals it uses at its facility; its good faith efforts to attempt to settle the dispute; EPA's lack of good faith efforts to settle the dispute; the EPA ALJ's bias against Woodcrest and inconsistent rulings; the length of time that elapsed between the violation and commencement of the enforcement action; the lack of any deterrent purpose to be accomplished by the imposition of civil penalties; the lack of adequate consideration in EPA's Enforcement Response Policy and its implementation of the Policy as to the size of the penalty vis a vis the size of the company and the timeliness of an enforcement action; and the lack of any harm to the integrity of the Form R reporting program given EPA's actions that demonstrate its lack of concern for the integrity of the Form R reporting program.

Id. Most of these issues were not raised by Woodcrest before the Presiding Officer and, therefore, do not merit consideration under our general rule that we will not consider arguments raised for the first time on appeal. *Supra* part II.A. Nevertheless, we have fully reviewed Woodcrest's contentions and have determined that they generally do not warrant reduction or elimination of the penalty proposed by the Region. However, in reviewing the penalty determination,

we have decided to reduce the amount of the penalty by 8% as discussed below.

1. *General Standards For Accelerated Penalty Assessment Under EPCRA § 325(c)*

Penalties of up to $25,000 for each violation of EPCRA § 313 are authorized by the statute. EPCRA § 325(c), 42 U.S.C. § 11045(c).[10] The statute further provides that each day that the failure to report continues is a separate violation. *Id.* Thus, noting that Woodcrest was in continuous violation from the date its Form Rs for 1990 first became due on July 1, 1991, through January 1997 when Woodcrest ultimately filed the requisite Form Rs, the Region stated that "[r]ather than seek the assessment of a penalty of millions of dollars, however Complainant seeks the assessment of a mere $27,000 penalty." Motion for Accelerated Decision at 13.

The applicable regulations provide that the Region, as the complainant, has "the burden of going forward with and proving * * * that the proposed civil penalty * * * is appropriate." 40 C.F.R. § 22.24. In our prior decisions, we have analyzed the complainant's burden of "going forward" and its burden of proof in the context of statutes that specifically identify factors to be taken into account in the penalty analysis. *See, e.g., In re B.J. Carney*, 7 E.A.D. 171 (EAB 1997); *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 756 (EAB 1997)(considering TSCA); *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994)(same). In these opinions, we have held that the complainant must "come forward with evidence that it considered each factor," *New Waterbury*, 5 E.A.D. at 538, but that "this does not mean that there is any specific burden of proof with respect to any individual factor." *Id.* at 539. Thus, our prior decisions have established that the complainant's burden focuses on the overall *appropriateness* of the proposed penalty in light of all the statutory factors, rather than any particular quantum of proof for individual statutory factors.

EPCRA § 325(c), however, does not provide a list of factors to be taken into account in assessing civil penalties. *Compare* EPCRA § 325(c) *with* EPCRA § 325(b)(1)(C). Nevertheless, the complainant still must come forward with evidence, and ultimately prove, that the

[10] As discussed *supra* note 1, subsequent to the violations at issue in this case, EPA has published inflation adjusted maximum penalties.

penalty is *appropriate* in light of the particular facts and circumstances of the case.[11]

The applicable regulations governing the administrative assessment of civil penalties specify that the presiding officer must consider any civil penalty guidelines or policies issued by the EPA. 40 C.F.R. § 22.27(b). The EPA has prepared a penalty policy to guide the administrative assessment of civil penalties for violations of EPCRA § 313. *See* Enforcement Response Policy for Section 313 of the Emergency Planning and Community-Right-to-Know Act and Section 6607 of the Pollution Prevention Act (Aug. 10, 1992) (the "1992 ERP").[12] We have held that "proof of adherence to a penalty policy can legitimately form a part of the complainant's *prima facie* penalty case. * * * And * * * proof of adherence to the policy is some evidence of consistency and fairness in enforcement suggesting that, in that sense at least, the proposed penalty is an 'appropriate' one." *Employers Ins. of Wausau*, 6 E.A.D. at 760. "[A] presiding officer may properly refer to [a penalty policy] as a means of explaining how he arrived at his penalty determination," *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 374 (EAB 1994), and such reference to the penalty policy may satisfy the presiding officer's duty of articulating the basis for a penalty by explaining how the facts fit the policy. *In re Sandoz, Inc.*, 3 E.A.D. 324, 328 n.11 (CJO 1987).

Where the complainant has come forward with evidence showing that the proposed penalty is appropriate, and the respondent did not raise before the presiding officer a single genuine issue of material fact, the respondent is not entitled to an oral evidentiary hearing and the presiding officer may enter an accelerated decision as to both the respondent's liability and the amount of the penalty. *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 792-794 (EAB 1997).

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[11] The Region has suggested that the statutory penalty factors under either EPCRA § 325(b)(1)(C) or EPCRA § 325(b)(2) be applied as guidance under EPCRA § 325(c). Region's Brief at 4 n.3. While the absence of "statutory" factors provides the Administrator greater discretion under section 325(c) than under section 325(b)(1)(C) or (2), the Administrator or her delegate may exercise this discretion by looking to the factors listed in such other sections as guidance in specific cases as suggested by the Region.

[12] In general, the applicability of the 1992 ERP has not been disputed in this case. We have considered the guidance of the 1992 ERP in prior cases. *See In re Spang & Co.*, 6 E.A.D. 226, 242 n.19 (EAB 1995); *see also In re Pacific Ref. Co.*, 5 E.A.D. 607, 608 and n.2 (EAB 1994). By its terms, the 1992 ERP became applicable to all administrative actions concerning EPCRA § 313 commenced after August 10, 1992, regardless of the date of the violation. 1992 ERP at 1.

Here, the Region produced evidence and analysis in its Motion for Accelerated Decision showing that a penalty ranging between $27,000 in the aggregate for the three violations and an 8% reduction from that amount would be an appropriate penalty in this case. The Region's analysis was based on, and fully in accordance with, the 1992 ERP. Woodcrest's only response to the Motion for Accelerated Decision was the May 21 Letter, which did not raise a single genuine issue of material fact and, accordingly, summary disposition of this case was appropriate. The Presiding Officer chose to assess a penalty in the full amount of $27,000.

2. *Woodcrest's Arguments for Reduction of the Penalty*

Woodcrest has raised a variety of issues on appeal in its effort to show that the Presiding Officer erred in assessing an aggregate penalty of $27,000. These arguments are discussed below.

a. *The Question of Cooperation and Good Faith*

Woodcrest contends that it cooperated with the "EPA before, during and after EPA's inspection of Woodcrest's facility on June 17, 1992," and that such cooperation warrants a reduction in the amount of the penalty. Woodcrest's Brief at 9-10.[13] Woodcrest also contends that "its good faith efforts to attempt to settle the dispute; [and] EPA's lack of good faith efforts to settle the dispute" should be considered. *Id*.

Under the guidance of the 1992 ERP, administrative civil penalties are calculated in accordance with a two-step process. 1992 ERP at 7. First, a gravity-based penalty is determined taking into account the characteristics of the violation, and second, upward or downward adjustments may be made to take into account factors reflecting characteristics of the violator. *Id*. Woodcrest's arguments regarding its good faith and the alleged bad faith of the Region do not challenge the Region's proposed calculation of a base gravity penalty of $27,000 for the three violations, but instead are potentially cognizable as an adjustment under the second step of the 1992 ERP's guidelines.

The guidelines of the 1992 ERP provide that a downward adjustment of up to 30% of the base gravity penalty may be made on

[13] Woodcrest cites the Region's Accelerated Decision Brief in support of its contention that it cooperated "before, during and after" the June 1992 inspection. *See* Woodcrest's Notice of Appeal ¶ 31. The Region, however, only acknowledged that Woodcrest cooperated "during" the inspection. Region's Accelerated Decision Brief at 21.

account of the violator's "attitude," with up to 15% of the adjustment based upon the violator's "cooperation" and up to 15% based upon the violator's "compliance." 1992 ERP at 18. Although the Region requested that the Presiding Officer enter an accelerated decision assessing an aggregate penalty of $27,000, Accelerated Decision Brief at 5, the Region acknowledged that a discretionary downward adjustment to the amount of the gravity-based penalty may be appropriate. *Id*. at 19. The Region candidly acknowledged that Woodcrest cooperated during the original inspection and that such cooperation might warrant a minimal downward adjustment in the penalty in an amount not exceeding 8% of the base gravity penalty. *Id*. at 20-21.[14] The Region also contended, however, that Woodcrest's cooperation during settlement "has not been exemplary." Accelerated Decision Brief at 21.

Upon review of the Accelerated Decision and the Region's motion, we reject Woodcrest's argument that the penalty should be reduced based on Woodcrest's alleged good faith, and the alleged bad faith of the Region regarding settlement. Woodcrest did not raise such issues before the Presiding Officer. In particular, Woodcrest did not expressly or implicitly, insofar as we can tell, dispute the Region's statement that any reduction on the grounds of cooperation should be limited to only 8%. Woodcrest also did not comment in any way whatsoever on the choice between the two appropriate penalties identified by the Region in its Motion for Accelerated Decision. Thus, Woodcrest did not timely raise a single genuine issue of material fact. Accordingly, it was appropriate for the Presiding Officer to issue an accelerated decision assessing a penalty in this case, *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 792-794 (EAB 1997), and any evidence regarding Woodcrest's alleged good faith or the alleged bad faith of the Region cannot be submitted now for the first time on appeal. *Supra* part II.A.[15]

The question of whether Woodcrest should be granted a penalty reduction on account of its cooperation during the Region's inspection of Woodcrest's Facility, nevertheless, is appropriate for us to con-

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[14] Specifically, the Region stated "[f]or purposes of the Motion for Accelerated Decision, Complainant is willing to recognize that during the 1992 inspection Respondent was cooperative." Accelerated Decision Brief at 21.

[15] For this reason, we need not consider the various letters Woodcrest has attached to its Notice of Appeal, which were exchanged between itself, or its consultant, and various representatives of the EPA. *See* Notice of Appeal ¶ 45 and documents attached thereto. Such material was not made a part of the record before the Presiding Officer and will not be considered on appeal. *Supra* part II.A.

sider on appeal as the Region acknowledged that a minimal adjustment may be appropriate. *See In re Pacific Ref. Co.,* 5 E.A.D. 607, 615 n.9 (EAB 1994) ("the Board has independent authority to make penalty adjustments in appropriate cases, and to consider arguments respecting adjustments on appeal").

Based upon our review of the ERP's guidelines and the facts of this case, we grant Woodcrest an 8% reduction in the base gravity penalty. In assessing the violator's cooperative attitude, the ERP guidelines provide for consideration of the violator's behavior during "the inspection, * * * after the inspection, and [its] *cooperation and preparedness during the settlement process*." 1992 ERP at 18 (emphasis added).

The Presiding Officer decided not to reduce the penalty on the grounds of cooperation because he observed that Woodcrest was not cooperative in settlement. Accelerated Decision at 7. Specifically, the Presiding Officer stated that the Region's contention that Woodcrest had not been "diligent in pursuing settlement discussions * * * is supported by the observations of the presiding officer." *Id*. The Presiding Officer's reliance on his personal observations of Woodcrest's attitude exhibited during the course of the case and, in particular, during the off-the-record conferences is not grounds for reversal or remand. As noted above, it is appropriate for a presiding officer to form judgments regarding the parties based on the presiding officer's official dealings with the parties in the case. *Supra* part II.B.1 ; *see In re Shell Oil Co.*, FIFRA Docket Nos. 401 *et al.* (Adm'r, April 7, 1980); *In re Central Paint and Body Shop*, 2 E.A.D. 309, 310-311 and n.2 (CJO 1987). The off-the-record conferences conducted by the Presiding Officer in this case were authorized by the Consolidated Rules of Practice, 40 C.F.R. § 22.19, and therefore it was appropriate for the Presiding Officer to form his judgment regarding Woodcrest's attitude based on his communications with Woodcrest's representatives during those official communications.

Nevertheless, we have decided to substitute an 8% penalty reduction for the Presiding Officer's determination that no adjustment would be granted. We grant Woodcrest a modest penalty reduction because we believe that Woodcrest should be rewarded for the cooperation it did exhibit during the original inspection as acknowledged by the Region and because Woodcrest further exhibited cooperation during the course of this case by, among other things, entering into the Stipulations. We limit the penalty reduction to only 8% because that is the amount proposed by the Region and Woodcrest has not offered any other more reasonable basis for calculating the amount of

any reduction on account of such cooperation.[16] Accordingly, the $27,000 gravity-based penalty shall be reduced by 8%, or $2,160, on account of Woodcrest's cooperation in the inspection of its Facility.

b. *Issues of Compliance: Woodcrest's Alleged Compliance in June 1992*

On appeal, Woodcrest argues that its submission of information to the Region in response to requests made by the Region during the June 1992 inspection constituted compliance with the Form R reporting requirements. Woodcrest's Brief at 2-3. This contention is rejected for two reasons.

First, Woodcrest's only statement that touched on any aspect of this argument before the Presiding Officer was a vague statement that one of its witnesses would testify that the EPA inspector had not requested the filing of Form Rs. *See* Woodcrest's Prehearing Exchange at II.1. That reference was not of sufficient detail to apprise the Presiding Officer that Woodcrest contended that it came into compliance in June 1992 and it was not sufficient to obtain a ruling from the Presiding Officer on this issue as part of the Accelerated Decision. Accordingly, it cannot be raised now on appeal. *Supra* part II.A.

Second, Woodcrest's contention that it had complied in June 1992 is belied by its admissions in its answer. Woodcrest admitted in its answer that it had not filed the requisite Form Rs prior to the filing of the complaint and it acknowledged that it had a duty to file the Form Rs. Complaint ¶¶ 20, 27, 34; Answer ¶¶ 1, 4, 5, 7. Specifically, Woodcrest acknowledged in its answer filed on February 13, 1996, that:

> Respondent understands that nothing contained in a settlement of this case will satisfy the obligation to file a complete and accurate * * * Form R * * * for each toxic chemical identified in [the] Complaint.

Woodcrest's Answer ¶ 7. Notwithstanding its clear acknowledgment on February 13, 1996 of its obligation to file Form Rs for the chemicals identified in the complaint, Woodcrest stipulated that it completed those Form Rs one year later on January 30, 1997. Stipulations ¶¶ 10, 14, 18.

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[16] We question whether it is advisable for a presiding officer, in the context of a litigated resolution of a dispute, to be required to form judgments of the cooperation or non-cooperation of a party with respect to settlement, as is suggested by the 1992 ERP. However, since we do not rely on Woodcrest's conduct during the settlement process in arriving at the 8% reduction, consideration of this issue is not required in this case.

Under the 1992 ERP, the guidelines for assessing the violator's "compliance" provide that consideration should be given to the violator's "good faith efforts to comply with EPCRA, and the *speed and completeness* with which it comes into compliance." 1992 ERP at 18 (emphasis added). Woodcrest's stipulation that it completed the required Form Rs for 1990 on January 30, 1997, which was one year after it admitted in its answer that it had a duty to file the Form Rs, and its stipulation that it subsequently submitted those Form Rs to the EPA, Stipulations ¶¶ 10, 14 and 18, is evidence that Woodcrest did not speedily come into compliance. Thus, we reject Woodcrest's contention that it is entitled to a penalty reduction on this ground.

c. *History of Violations, Submissions to State Authorities, and Deterrence*

Woodcrest also argues that the penalty should have been reduced because Woodcrest does not have a history of violating EPA regulations and because Woodcrest allegedly has a track record of compliance with EPCRA Form R reporting requirements once it learned of them. Woodcrest Brief at 9. Woodcrest also contends that it substantially complied with the requirements of EPCRA by "making the local fire department and the State aware of the chemicals it uses at its facility." Woodcrest argues that the amount of the penalty should be reduced because, according to Woodcrest, there is a "lack of any deterrent purpose to be accomplished by the imposition of civil penalties." Woodcrest's Brief at 10. Woodcrest also argues that the 1992 ERP is "flawed and do[es] not produce a rational penalty" because it does not distinguish between "enforcement actions promptly commenced upon the occurrence of the violation and enforcement actions commenced after a lengthy delay." Woodcrest's Notice of Appeal ¶ 70(b). Woodcrest did not raise these arguments before the Presiding Officer in any manner and, therefore, we will not consider them on appeal. *Supra* part II.A.[17]

[17] Even if Woodcrest had raised these issues below, its arguments would not have resulted in any penalty reduction. First, under the guidelines of the 1992 ERP, a history of prior violations may be grounds for increasing a gravity-based penalty, but a history of no violations is not grounds for any reduction of the gravity component of the penalty. 1992 ERP at 16-17. A reduction is not appropriate because the 1992 ERP penalty matrix is intended to apply to "first offenders" and repeat offenders should be punished more harshly by an increase in the penalty sought. *Id.* This approach is consistent with our treatment of the issue of prior violations and compliance history in other cases. *See, e.g., In re Pacific Ref. Co.,* 5 E.A.D. 607, 616 (1994); *In re Mobil Oil Corp.,* 5 E.A.D. 490, 519 (EAB 1994); *In re Port of Oakland,* 4 E.A.D. 170, 183 (EAB 1992). Second, we have previously held that supplying information to local or state officials regarding toxic chemicals used, but not reported to the EPA, does not constitute a defense to liability, or a basis for mitigation of a penalty under EPCRA § 313. *Pacific Ref.,* 5 E.A.D. at 622 n.19 (citing *Mobil Oil,* 5 E.A.D. 490).

d. *The Question of Harm*

Woodcrest also challenges the Presiding Officer's penalty determination by arguing that its violation of the Form R reporting requirements did not cause any harm to the environment and did not cause "any harm to the integrity of the Form R reporting program given EPA's actions that demonstrate its lack of concern for the integrity of the Form R reporting program." Woodcrest's Brief at 10. Woodcrest's arguments regarding the alleged lack of harm to the environment or the Form R reporting program do not raise any genuine factual issues and, accordingly, do not warrant any adjustment to the penalty or reversal or remand of the Accelerated Decision.

First, Woodcrest's only statement that touched on any aspect of this argument before the Presiding Officer was a vague statement that one of its witnesses would testify that "he prepared the Form R for 1990 as requested and that Jacqueline Kline stated that no Form R for 1988 or 1989 would be required." Woodcrest's Prehearing Exchange at II.2. That reference was not of sufficient detail to raise and obtain a ruling from the Presiding Officer on the issue of alleged lack of harm and, accordingly, cannot be raised now on appeal. *Supra* part II.A.

Second, any lack of actual harm to the environment resulting from a respondent's violation of the EPCRA § 313 reporting requirements is not grounds for reducing the penalty for such violation in any event. EPCRA was enacted "to encourage and support emergency planning efforts at the State and local level and provide residents and local governments with information concerning potential chemical hazards present in their communities." Emergency Planning and Community Right to Know Programs, Interim Final Rule, 51 Fed. Reg. 41,570 (Nov. 17, 1986). The reporting requirements of EPCRA § 313 are the means determined by Congress to provide residents and local governments with information regarding hazardous chemicals present in the locality. "This information is critical for effective local contingency planning." *Id*.

Congress determined that failure to comply with the reporting requirements of section 313 alone is sufficient for liability and assessment of a civil penalty under section 325(c), without the necessity of proving any actual harm to the environment or the EPCRA program. Thus, it is appropriate that substantial penalties be imposed even if Woodcrest could prove that there was no actual harm.

Third, Woodcrest's arguments are not sufficient to show that there is a genuine issue in any event. Woodcrest argues that the Region's fil-

ing of the complaint several years after the violations occurred is evidence of lack of harm to the program. Woodcrest's reasoning apparently is that, if the violation caused significant harm, then the Region would have more aggressively pursued Woodcrest. Woodcrest's reasoning is erroneous. Lack of harm is not the only possible reason for the Region's delayed enforcement[18] and, therefore, by simple deductive reasoning, proof of delayed enforcement is not sufficient to show a lack of harm.

In addition, we have consistently held that failure to comply with the reporting or registration requirements of environmental statutes can cause significant harm to the applicable regulatory scheme and may be grounds for imposition of a substantial penalty. *See In re Predex,* 7 E.A.D. 591 (EAB 1998) (failure to register under FIFRA § 3(a) causes significant harm to FIFRA program even when evidence showed that the product does not have potential to harm the environment); *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 800 (EAB 1997) (failure to register under FIFRA § 3(a) is harmful to FIFRA program); *In re Everwood Treatment Co.,* 6 E.A.D. 589, 606-607 (EAB 1996) (RCRA regulatory program is harmed by failure to comply with permitting and disposal regulations even where no harm to the environment has resulted); *In re Sav-Mart, Inc.,* 4 E.A.D. 732, 738 (EAB 1995) (failure to register under FIFRA § 3(a) is harmful to FIFRA program).

Our conclusion in the cited cases arising under FIFRA and RCRA that there is significant harm to the applicable program even if there is no actual harm to the environment is equally applicable in the present case under EPCRA. Here, 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. That deprivation is inherently harmful. *Predex,* 7 E.A.D. 591, 602 (EAB 1997). Accordingly, we reject Woodcrest's contention that its failure to file the requisite Form Rs in the present case did not cause harm to the EPCRA program.

e. *The Issue of "Excessive Penalties"*

Woodcrest has argued that the civil penalties imposed in this case of $27,000 for Woodcrest's three violations of EPCRA § 313 "would violate the excessive fines provision of the Eighth

[18] For example, the Region's delayed enforcement may have been due to a lack of resources for prompt enforcement action in all cases.

Amendment." Woodcrest's Brief at 10. Woodcrest has not explained its reasoning in this regard and has cited only one case as support: *Gossner Foods, Inc. v. EPA*, 918 F.Supp. 359, 363 n.2 (D. Utah 1996). The *Gossner Foods* citation, however, does not provide any further explanation of Woodcrest's reasoning. The Magistrate Judge in *Gossner Foods* merely noted in a footnote that the issue had not been raised in that case. *Id*.

Although we do not decide whether the excessive fines provision of the Eighth Amendment to the U.S. Constitution applies to the civil penalty at issue here, it is sufficient to note that Woodcrest has failed to show the degree of disproportionality required by applicable case law. A party seeking to challenge a penalty on the grounds that the penalty allegedly violates the excessive fines provision of the Eighth Amendment to the U.S. Constitution has the burden of establishing that the penalty is grossly disproportionate to the violation at issue. *See, e.g., United States v. Bajakajian*, __ U.S. __, 1998 U.S. LEXIS 4172, *25-*30 (June 22, 1998); *United States v. Gordon*, 943 F.2d 721, 728 (7th Cir. 1991). It is not sufficient for the issue of disproportionality to merely be suggested. *Gordon*, 943 F.2d at 728. In the present case, Woodcrest has only raised the issue of disproportionality by suggestion — it has not provided the requisite analysis and statement of facts that show disproportionality. Moreover, as the Region accurately noted in its Motion for Accelerated Decision, because the statute authorizes imposition of a penalty for each day that Woodcrest failed to file the requisite Form Rs, a penalty of "millions of dollars" is authorized in this case. Motion for Accelerated Decision at 13. With an authorization to assess a penalty of "millions of dollars" in this case, the actual penalty assessed of $27,000 for three violations is not "disproportionately" large. In addition, the penalty assessed against Woodcrest is not disproportionately large compared with other penalties assessed by the Board for violations of the Form R reporting requirements. *See In re Pacific Ref. Co.*, 5 E.A.D. 607 (EAB 1994) (assessing a civil penalty of $111,762 for ten violations of the Form R reporting requirements). Accordingly, Woodcrest has failed to show that the civil penalty assessed in this case violates the Eighth Amendment of the U.S. Constitution.

III. *CONCLUSION*

For the foregoing reasons, we grant Woodcrest's Motion to Strike, we also uphold the Presiding Officer's finding that Woodcrest committed three violations of EPCRA § 313, and we assess a penalty against Woodcrest in the aggregate amount of $24,840 for the three violations. We also deny Woodcrest's request for an award of attor-

neys' fees.[19] Woodcrest shall pay the full amount of the civil penalty within sixty (60) days of receipt of this final order, unless otherwise agreed by the parties. Payment shall be made by forwarding a cashier's check or certified check in the full amount payable to the Treasurer, United States of America at the following address:

EPA - Region V
Regional Hearing Clerk
P.O. Box 70753
Chicago, IL 60673

So ordered.

[19] Such request would need to be made pursuant to the requirements of the Equal Access to Justice Act ("EAJA"). 5 U.S.C. § 504; 40 C.F.R. part 17. The EAJA provides that certain parties who prevail against the federal government in certain types of litigation may apply to recover attorneys' fees and other expenses unless the government can demonstrate that its position was substantially justified. *See In re Hoosier Spline Broach Corp.*, EAJA 7 E.A.D. 665, 679, 680 (EAB 1998). Woodcrest's request for fees is denied without prejudice to its filing of a claim under the EAJA.