IN RE CATALINA YACHTS, INC.

EPCRA Appeal Nos. 98–2 & 98–5

FINAL DECISION

Decided March 24, 1999

Syllabus

The United States Environmental Protection Agency Region IX ("the Region") and Catalina Yachts, Inc. ("Catalina") both appeal the civil penalty assessed by Administrative Law Judge Spencer T. Nissen ("the Presiding Officer") in his Initial Decision dated February 2, 1998, for Catalina's violations of section 313 of the Emergency Planning and Community Right-To-Know Act ("EPCRA"), 42 U.S.C. § 11023. The Presiding Officer found that Catalina had committed seven violations of EPCRA § 313 reporting requirements for acetone used and styrene processed between 1988 and 1992 and, after an evidentiary hearing, imposed a civil penalty in the amount of $39,792. The Presiding Officer's penalty was substantially lower than the $175,000 penalty sought by the Region. The assessed penalty reflects the Presiding Officer's decision to award Catalina reductions to the gravity-based penalty for the "attitude" and "other matters as justice may require" penalty adjustment factors provided under the Agency's EPCRA section 313 penalty policy.

On appeal, Catalina contends that the Presiding Officer's penalty calculation was error because he: 1) rigidly adhered to the Agency's penalty policy; 2) did not take full account of the statutory penalty factors; and 3) inappropriately limited credit for environmentally beneficial projects. Catalina proposes that a nominal or zero penalty is appropriate.

In its appeal, the Region argues that the Presiding Officer's penalty calculation was error because: 1) there was inadequate factual support for making downward adjustments for the "cooperation" and "compliance" components of the "attitude" factor; and 2) the penalty adjustments for environmentally beneficial projects are not factually supported in the record and are inconsistent with this Board's standard for applying the "other matters as justice may require" factor as articulated in *In re Spang & Co.*, 6 E.A.D. 226, 250–52 (EAB 1995). The Region proposes a penalty of $160,774.

Held: The Presiding Officer's Initial Decision is reversed in part, and Catalina is ordered to pay a penalty in the amount of $108,792.

There is no merit to Catalina's contentions that the Presiding Officer rigidly adhered to the section 313 penalty policy or did not consider statutory penalty factors. The Initial Decision contains ample analysis to support the Presiding Officer's gravity-based penalty determination grounded in the penalty policy matrix. Furthermore, the record clearly demonstrates that the Presiding Officer considered statutory penalty factors in making adjustments not specifically contemplated by the penalty policy.

As to some of the specific alleged deficiencies in the penalty analysis cited by Catalina, the fact that Catalina supplied information to state and local agencies regarding toxic chemicals not reported to the Region does not alter the extent of the violation for purposes of the gravity-based penalty assessment under EPCRA § 313. Catalina's proposal to apply Small Business Administration standards to determine appropriate "extent" levels for a gravity-based penalty calculation was not raised before the Presiding Officer and will not be considered by the Board on appeal. Finally, the Presiding Officer's decision not to adjust the penalty downward for Catalina's "lack of culpability" is not error where the penalty policy contemplates that baseline penalty assessments are based on an assumption that a respondent may not have had actual knowledge of the requirements of section 313 of EPCRA and actual knowledge under the policy can serve as a basis for increasing the baseline penalty.

The Presiding Officer did not commit error in applying the "attitude" factor. The evidence in the record, including the testimony of Regional officials, establishes a basis for reducing the penalty in light of Catalina's cooperation. In addition, Catalina's testimony regarding the complexity of its efforts to complete the Form Rs and the conditions associated with a major earthquake that disrupted Catalina's operations adequately supports the Presiding Officer's conclusion that a reduction for "compliance" was warranted.

The Presiding Officer committed error in applying the "such other matters as justice may require" penalty adjustment factor ("justice factor"). The justice factor comes into play only where the other adjustment factors have not resulted in a fair and just penalty. More particularly, a reduction for environmentally beneficial expenditures should be considered only when "the circumstances are such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice." *Spang,* 6 E.A.D. at 250. If, and only if, despite application of the other adjustment factors, an assessed penalty is so disproportionate to the violations at issue as to be manifestly unjust should a presiding officer apply the justice factor to recognize environmentally beneficial projects. Here, where Catalina is getting the full benefit of a 30% overall downward adjustment for "attitude," as well as a 25% downward adjustment to the two acetone violations for the delisting of acetone, the resulting penalty of $108,792 for Catalina's seven violations of section 313 reporting requirements is "fair and just." Therefore, no reduction under the justice factor is warranted.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

The United States Environmental Protection Agency Region IX ("the Region") and Catalina Yachts, Inc. ("Catalina") both appeal the Initial Decision of Administrative Law Judge Spencer T. Nissen ("the Presiding Officer") dated February 2, 1998, assessing a civil penalty against Catalina for violations of section 313 of the Emergency Planning and Community Right-To-Know Act ("EPCRA"), 42 U.S.C. § 11023.[1] The Presiding Officer

[1] The Region filed a notice of appeal with the Board on March 26, 1998, which was assigned EPCRA Appeal No. 98–2 ("App. No. 98–2"). Catalina's notice of appeal was filed on the same date and assigned EPCRA Appeal No. 98–5 ("App. No. 98–5"). We cite to the parties' briefs filed with the Board by reference to their assigned appeal numbers (*e.g.,* "App. Brief 98–2" (the Region's appeal brief); "Rep. Brief 98–2" (the Region's reply brief); "App. Brief 98–5" (Catalina's appeal brief); "Rep. Brief 98–5" (Catalina's reply brief)).

found that Catalina had committed seven violations of section 313 reporting requirements[2] and, after an evidentiary hearing, imposed a civil penalty in the amount of $39,792. Initial Decision at 28, 40.

For the reasons discussed below, we conclude that the Presiding Officer's penalty was error, reverse the Initial Decision in part, and order Catalina to pay a penalty of $108,792.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

EPCRA § 313 requires certain facilities[3] to submit annually, no later than July 1 of each year, a Toxic Chemical Release Inventory 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. *See In re Spang & Co.,* 6 E.A.D. 226, 228 (EAB 1995), citing *In re K.O. Mfg., Inc.,* 5 E.A.D. 798, 799–800 (EAB 1995). The first reporting year was 1987, and Form Rs for 1987 were due by July 1, 1988. EPCRA § 313(a), 42 U.S.C. § 11023(a); 40 C.F.R. § 372.30(d). Form Rs include information on the maximum amount of the toxic chemical present at the facility during the calendar year, the methods for disposing of the toxic chemical, and the annual quantity of toxic chemical disposed of by each method. EPCRA § 313(g), 42 U.S.C. § 11023(g). The statute authorizes penalties of up to $25,000 for each violation of section 313. EPCRA § 325(c)(1), 42 U.S.C. § 11045(c).[4]

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[2] The Presiding Officer found Catalina liable upon consideration of the Region's Motion for Accelerated Decision on January 10, 1995. *See In re Catalina Yachts, Inc.,* Dkt. No. EPCRA–09–94–0015 (ALJ, Jan. 10, 1995). Catalina's liability is not at issue before the Board.

[3] The reporting requirements apply to "owners and operators of facilities that have 10 or more full-time employees and that are in Standard Industrial Classification Codes 20 through 39 (as in effect on July 1, 1985) and that manufactured, processed or otherwise used a toxic chemical listed under subsection (c) of this section in excess of the quantity of that toxic chemical established under subsection (f) of this section during the calendar year for which a release form is required under this section." EPCRA § 313(b)(1)(A), 42 U.S.C. § 11023(b)(1)(A); *see also* 40 C.F.R. § 372.22.

[4] The Debt Collection Improvement Act of 1996 directs the Agency to make periodic adjustments of maximum civil penalties to take into account inflation. *See* 31 U.S.C. § 3701. Inflation adjusted penalty amounts have been published at 40 C.F.R. § 19.1 *et seq.,* and apply to violations occurring after January 30, 1997.

B. *Factual and Procedural Background*

Catalina is a California corporation that manufactures recreational sail boats ranging from eight-foot dinghies to 30–foot cruising boats.[5] Catalina's manufacturing facility is located in Woodland Hills, California. Catalina's facility has 10 or more full-time employees and is classified under Standard Industrial Classification Code 3732—Boat and Boat Building.

In November 1993, the Region sent Mr. William Deviny, a Toxic Release Inventory Specialist, to inspect the Catalina facility and other facilities in the area. *See* Inspection Report at 1 (May 26, 1994). Mr. Deviny met with Mr. Gerald B. Douglas, Vice President and Chief Engineer for Catalina, and informed him of Catalina's potential responsibilities under section 313 of EPCRA. *Id.* Mr. Douglas was unfamiliar with the Form R reporting requirements. *Id.* Subsequent to the November 1993 inspection, Mr. Douglas immediately retained Mr. David Wright, an environmental consultant, to assist in the filing of Catalina's Form Rs. Hearing Transcript ("Tr.") at 91. This required identification of all chemicals onsite and evaluating whether they exceeded threshold levels for 1988 to 1992. *Id.* Approximately two months later, on January 17, 1994, an earthquake, centered in Northridge, California, caused a fire at the Catalina facility. *Id.* at 93. The fire shut down the facility for four months. *Id.* The earthquake also caused Catalina's files to be dumped "all over the floor" and delayed Catalina's completion of the Form Rs.[6] *Id.* at 94. Approximately six months after Mr. Deviny's inspection, in May 1994, Catalina filed its Form Rs for 1988 through 1992 with the Region. Initial Decision at 22.

Catalina used 38,168 pounds of acetone during the 1988 calendar year, 101,665 pounds during the 1989 calendar year, 1,089 pounds in 1990, 321 pounds in 1991, and 1,802 pounds in 1992. Acetone was listed as a toxic chemical reportable under EPCRA § 313 in 40 C.F.R. § 372.65 during this period, but was subsequently proposed for delisting, 59 Fed. Reg. 49,888 (Sept. 30, 1994), and delisted effective June 16, 1995, 60 Fed. Reg. 31,643 (June 16, 1995). Catalina also processed 1,784,078 pounds of styrene in the 1988 calendar year, 2,691,348 pounds in 1989, 898,416 pounds in 1990, 624,441 in 1991, and 660,778 pounds

[5] Statements of fact herein are based on the record before the Board. We note that Catalina's Web site at http://www.catalinayachts.com lists sailboats ranging from 22 to 50 feet in length.

[6] We note that while production at Catalina's plant was suspended for four months, the Region has asserted (and Catalina has not disputed) that the business office was closed for only "a few days of the period." App. Brief 98–2 at 21 n.15.

in 1992. Styrene is listed as a toxic chemical reportable under EPCRA § 313. *See* 40 C.F.R. § 372.65.

On June 20, 1994, the Region filed a complaint against Catalina for seven alleged failures to timely file Form Rs, including calendar years 1988 and 1989 for acetone, and calendar years 1988 through 1992 for styrene. The Region sought civil penalties totaling $175,000, the maximum $25,000 penalty authorized by statute for each violation without any downward adjustments. The Region moved for an accelerated decision with regard to liability, which the Presiding Officer granted on January 10, 1995. Following an evidentiary hearing as to the appropriate penalty, held on January 27, 1997, the Presiding Officer assessed a total penalty against Catalina of $39,792.

The Region, in calculating its recommended penalty, utilized an enforcement and penalty policy developed specifically to address 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 ("ERP") (Aug. 10, 1992). The ERP states that its purpose is to:

> ensure that enforcement actions for violations of EPCRA § 313 * * * are arrived at in a fair, uniform and consistent manner; that the enforcement response is appropriate for the violation committed; and that persons will be deterred from committing EPCRA § 313 violations * * * .

ERP at 1.

The ERP sets forth a two-step process for calculating penalties. *Id.* at 7. First, a gravity-based penalty reflecting characteristics of the violation is determined utilizing a penalty matrix. *Id.* at 8. Second, the gravity-based penalty may be adjusted upward or downward taking into account factors reflecting characteristics of the violator. *Id.*

The ERP provides that adjustments to the gravity-based penalty may be based upon consideration of the following characteristics of the violator: (a) any voluntary disclosure of the violation by the violator; (b) the violator's history of prior violations; (c) whether the toxic chemical has been delisted subsequent to the violation; (d) the violator's attitude; (e) "other factors as justice may require"; and (f) ability to pay. ERP at 14–20.

The Presiding Officer applied both the ERP and the statutory factors set forth in section 16 of the Toxic Substances Control Act ("TSCA"),

15 U.S.C. § 2615, in calculating the penalty imposed. *See* Initial Decision 28–40.[7] First, the Presiding Officer calculated a gravity-based penalty based on the matrix in the ERP. *Id.* at 29–30. The Region had determined that all seven violations were extent level A, circumstance level 1, and Category I violations. The Presiding Officer's calculation of the gravity-based penalty differed from the Region's in only one respect. The Presiding Officer found that Count VII, involving Catalina's failure to file a Form R for styrene processed in 1992, should have been considered a Category II violation and that the penalty for that count should have been calculated on a per day basis.[8] Thus, the Presiding Officer found the total gravity-based penalty for the seven violations to be $173,274. *Id.*

The Presiding Officer then turned to the adjustment factors set forth in TSCA § 16, 15 U.S.C. § 2615, and those listed in the ERP. Initial Decision at 30–31. TSCA section 16 provides in pertinent part:

> In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations, and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

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[7] EPCRA § 325(c), 42 U.S.C. § 11045(c), does not set forth factors to be considered in determining penalties for reporting violations under section 313. The Region argued that the statutory factors set forth in section 16 of TSCA, 15, U.S.C. § 2615 should be applied, citing EPCRA § 325(b)(2), 42 U.S.C. § 11045(b)(2), which provides: "Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected under section 2615 of Title 15." While section 325(b)(2) does not explicitly reference violations under section 313 (as it does the emergency notification violations under section 304), the Presiding Officer found the Region's position to be "reasonable" and accepted it. Initial Decision at 29 n.11. We do not disturb the Presiding Officer's decision to apply the TSCA factors. *See In re Woodcrest Mfg., Inc.,* 7 E.A.D. 757, 774 n.11 (EAB 1998) (a presiding officer "may exercise [discretion] by looking to the factors listed in such other sections as guidance in specific cases as suggested by the Region."). Furthermore, Catalina concedes that the appropriate statutory penalty factors are set forth in TSCA § 16, 15 U.S.C. § 2615. App. Brief 98–5 at 3.

[8] Category II violations involve Form Rs submitted less than one year after the due date. ERP at 4. For Count VII, the Form R was due on July 1, 1993, but was submitted on May 20, 1994, only 324 days late. The formula for calculating this Category II, extent level 1 violation is:

$$((324 \text{ days late} - 1) \times (\$25{,}000))/365$$

Id. at 14. Hence, the gravity-based penalty for Count VII is $23,274. The Region does not dispute the Presiding Officer's penalty calculation for Count VII.

TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B). The Presiding Officer found that Catalina had waived "ability to pay" and "effect on ability to continue to do business" as bases for adjusting the penalty.[9] Initial Decision at 26–27, 31. Then, in accordance with the ERP, the Presiding Officer reduced the penalty for each of the acetone violations by 25% to reflect that acetone had been delisted. Initial Decision at 33. The penalty reduction for the acetone delisting is $12,500.[10]

The Presiding Officer also analyzed whether the gravity-based penalty should be reduced under the "attitude" adjustment factor set forth in the ERP. *Id.* at 33–35. The "attitude" factor consists of two components: "cooperation" and "compliance," with a 15% reduction allowed for each, or a total maximum "attitude" reduction of 30%. ERP at 18. The Presiding Officer found that both components of the factor, "cooperation" and "compliance" were demonstrably satisfied by the record. The Presiding Officer found the testimony of Ms. Pam Tsai, the Region's sole witness, demonstrated Catalina's cooperation and applied the maximum 15% reduction for "cooperation" to the gravity-based penalty. Initial Decision at 33. Catalina was also granted the maximum 15% reduction for compliance based on its immediate retention of Mr. Wright, the complexity of the work involved in completing the Form Rs, and Catalina's "record of being a good corporate citizen as demonstrated by its having no prior violations." *Id.* at 34–35. Thus, the Presiding Officer reduced the gravity-based penalty by 30% for the "attitude" factor.

Finally, the Presiding Officer applied the adjustment factor of "such other matters as justice may require" specified by TSCA § 16(a)(2)(B), 42 U.S.C. § 2615(a)(2)(B), and the ERP. Citing the Board's decision in *In re Spang & Co.,* 6 E.A.D. 226 (EAB 1995), for the proposition that environmentally beneficial expenditures may be considered under the "justice" factor, the Presiding Officer reduced the gravity-based penalty by $69,000. Initial Decision at 36, 39. He awarded Catalina a downward adjustment for the following three environmentally beneficial initiatives: 1) substitution of DBE for acetone in Catalina's cleaning processes; 2) elimination of anti-fouling paints on boat bottoms; and 3) utilization of a brushable gel coat program, rather than using spray application. *Id.* at 36. The Presiding Officer found that the costs of effectuating these measures

[9] We do not review the Presiding Officer's determination with respect to Catalina's waiver of these issues because neither Catalina nor the Region raised them on appeal.

[10] The Region specifically agrees with the Presiding Officer's application of the 25% downward adjustment for each of the acetone violations. App. Brief 98–2 at 9–10.

was $230,000 and calculated the reduction based on 30% of these costs. *Id.* at 39. Thus, Catalina's penalty was calculated as follows:

Gravity-based penalty	$173,274
Less: 30% attitude adjustment	$ 51,982
Acetone delisting	$ 12,500
Environmentally beneficial activities (30% of $230,000)	$ 69,000
Total Penalty	$ 39,792

Id.

The Region contends on appeal that the Presiding Officer's penalty calculation was error because: 1) there was inadequate factual support for making downward adjustments for the "attitude" factor; and 2) the penalty adjustments for environmentally beneficial projects are not factually supported in the record and are inconsistent with this Board's standard for applying the "other matters as justice may require" factor as articulated in *In re Spang & Co.,* 6 E.A.D. 226, 250–52 (EAB 1995). The Region proposes a penalty of $160,774.[11]

Catalina argues in its appeal that the Presiding Officer's penalty calculation was error because he: 1) rigidly adhered to the Agency's penalty policy; 2) did not take full account of the statutory penalty factors; and 3) inappropriately limited credit for environmentally beneficial projects. Catalina proposes that a nominal or zero penalty is appropriate.

For the reasons provided below, we reverse in part, the Presiding Officer's penalty assessment. First, we reject Catalina's contention that the Presiding Officer committed reversible error by rigidly adhering to the ERP in this case. We then review, in turn, Catalina's arguments concerning the gravity-based penalty calculation, and both parties' issues with the Presiding Officer's application of the ERP and statutory penalty adjustment factors, and conclude that a penalty in the amount of $108,792 is warranted in this case. In particular, we reverse the Presiding Officer's penalty adjustment for the "other matters as justice may require" factor.

[11] The Region's proposed penalty is based on the Presiding Officer's gravity-based penalty amount ($173,274) reduced by $12,500 for the delisting adjustment factor of the ERP.

II. *DISCUSSION*

The Presiding Officer is afforded significant discretion under the regulations governing this matter "to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, [so long as he or she] set[s] forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b). The Presiding Officer also "must consider" appropriate penalty guidelines, but is not bound by them. *Id.; see also In re Woodcrest Mfg., Inc.,* 7 E.A.D. 757, 774 (EAB 1998); *In re DIC Americas, Inc.,* 6 E.A.D. 174, 189 (EAB 1995). The duty to consider appropriate penalty guidelines "carries with it no obligation to adhere to the penalty policy in a particular instance. Nor does it suggest that a presiding officer errs in the slightest respect if he or she decides not to deviate from the penalty policy." *DIC Americas,* 6 E.A.D. at 190.

On many occasions, the Board has affirmed the proposition that penalty policies serve to facilitate the application of statutory penalty criteria, and that Presiding Officers and the Board may utilize applicable penalty policies in determining civil penalty amounts. *See Woodcrest Mfg.*, 7 E.A.D. at 774; *DIC Americas,* 6 E.A.D. at 189 (citing *In re Great Lakes Div. of Nat'l Steel Corp.,* 5 E.A.D. 355, 374 (EAB 1994)); *In re Pacific Ref. Co.,* 5 E.A.D. 607, 613 (EAB 1994)(also citing *Great Lakes*).

This Board generally will not substitute its judgment for that of a Presiding Officer when the penalty assessed falls within the range of penalties provided in the penalty guidelines, absent a showing that the Presiding Officer has committed an abuse of discretion or a clear error in assessing the penalty. *See Pacific Ref.,* 5 E.A.D. at 613 (EPCRA § 313 penalty policy); *see also In re Employers Ins. of Wausau,* 6 E.A.D. 735, 757 (EAB 1997) (reviewing application of Polychlorinated Biphenyls ("PCB") penalty policy); *In re Ray Birnbaum Scrap Yard,* 5 E.A.D. 120 (EAB 1994) (involving PCB penalty policy).

A. *Strict Adherence to the ERP*

As a preliminary matter, we review Catalina's argument that the Presiding Officer inappropriately adhered strictly to the ERP in determining an appropriate penalty. *See* App. Brief 98–5 at 2 (citing *Pacific Ref.,* 5 E.A.D. at 613). Catalina's argument appears to be based in the principle that an agency cannot, consistent with the Administrative Procedure Act, 5 U.S.C. § 551, utilize a policy as if it were a "rule" issued in accordance with rulemaking procedures.

We agree that the Agency's presiding officers must refrain from treating policies, including the ERP, as rules, and "must be prepared 'to reexamine the basic propositions' on which the Policy is based." *Wausau*, 6 E.A.D. at 761. However, the record before the Board simply does not support Catalina's contention of rigid adherence. Here, the Presiding Officer cannot properly be characterized as having inflexibly applied the ERP.[12] In fact, he made it clear in his Initial Decision that he was utilizing both the ERP and the statutory factors of TSCA § 16. *See* Initial Decision at 14 n.6, 30–31 (stating "The matters at issue thus turn on application of the adjustment factors * * * set forth in TSCA § 16."), 33, 35. For example, in discussing the culpability factor under the ERP, the Presiding Officer stated:

> The ERP states that the penalty matrix is intended to apply to "first offenders" and thus implies that the absence of prior EPCRA violations affords no basis for a downward adjustment in the penalty [ERP at 16, 17]. This policy is also unexceptionable and no issue can or should be taken therewith. It is concluded, however, that the penalty adjustment factors in TSCA § 16 may not be compartmentalized and that the absence of prior violations is a factor to be considered in determining whether a respondent is a good corporate citizen and thus entitled to favorable consideration as to other aspects of the penalty calculation.

Id. at 32–33. This analysis demonstrates that the Presiding Officer clearly was considering the statutory penalty factors in making adjustments not specifically contemplated by the ERP. Thus, we decline to disturb the Presiding Officer's determination on the ground that he rigidly applied the ERP in calculating the penalty in this matter.

B. *Application of the Statutory Penalty Factors*

We now turn to the parties' contention that the Presiding Officer failed to properly apply the statutory factors for calculating the appropriate penalty. We address each argument in turn.

[12] We note that the Board has previously addressed and dismissed a similar contention in another EPCRA penalty case. *See Great Lakes,* 5 E.A.D. at 374 (holding no error in penalty analysis where presiding officer adequately considers the statutory penalty factors).

1. *Gravity-based Penalty Calculation*

First, Catalina takes issue with the Presiding Officer's calculation of the gravity-based penalty of $173,274. Catalina contends that it was error for the Presiding Officer to conclude "without supporting analysis" that the ERP provided a rational basis for calculating this amount. App. Brief 98–5 at 3. We disagree.

The ERP "reasonably implements the statutory criteria, with a range of penalties to reflect differing circumstances." *See In re Genicom Corp.,* 4 E.A.D. 426, 431 (EAB 1992). The Presiding Officer's reference to the ERP penalty matrix and application of the matrix to each violation satisfies his duty of articulating the basis for the penalty. *See In re Sandoz, Inc.,* 2 E.A.D. 324, 328 n.11 (CJO 1987) (discussing presiding officer's duty to explain how the facts fit the policy). The Initial Decision in this case contains ample analysis to support the Presiding Officer's gravity-based penalty determination grounded in the ERP and statutory factors. The Presiding Officer reviewed and analyzed the pertinent facts for each alleged violation, and assigned the appropriate category, extent levels, and circumstance levels outlined in the ERP matrix.[13] *See* Initial Decision 29–30. Therefore, the Presiding Officer properly referred to the ERP and adequately explained how he arrived at the gravity-based penalty amount.

Catalina also argues that the Presiding Officer "did not take into account the fact that Catalina had submitted data on chemical use emissions to various local agencies" in assessing the "circumstances" factor for calculating a gravity-based penalty. App. Brief 98–5 at 4. Catalina points out that it "filed annually reports on its use of acetone and styrene with the local fire department and annually filed reports on its air emissions with the South Coast Air Quality Management District." *Id.* Catalina also asserts that consideration of its self-described "multiple and meaningful community outreach programs" should have been given weight with respect to this aspect of the Presiding Officer's gravity-based penalty calculation.

We have previously held that supplying information to state and local agencies regarding toxic chemicals not reported to EPA, "does not mitigate [a] failure to comply with § 313 with respect to Form Rs," and we see no reason to find otherwise here. *See In re Pacific Ref. Co.,* 5 E.A.D. 607, 622 n.19 (EAB 1995). The Presiding Officer noted that the information Catalina filed with the South Coast Air Quality Management District

[13] In fact, the Presiding Officer's review of the Region's use of the ERP uncovered an error with respect to Count VII. *See supra* note 8.

and the local fire department was not available in the same form or manner as required by the Form R reports. He noted further that "preparation of Form Rs involved more than the simple transposing of information from reports to the SCAQMD." Initial Decision at 34. Likewise, to the extent that Catalina believes its public outreach activities constitute a consideration for calculating the gravity-based penalty, we find nothing in the statute or ERP that would compel a presiding officer to give such consideration in determining the gravity-based penalty. We decline to find his decision not to include this consideration to be clear error, particularly since Catalina's overall conduct and "lack of culpability" were subsequently used to mitigate the gravity-based penalty.

Catalina's appeal also appears to take issue with the amount of the Presiding Officer's penalty reduction to account for the acetone delisting. Catalina seeks an 80% reduction as part of the gravity-based penalty calculation for the acetone violations to obtain a $10,000 base penalty for the acetone violations.[14] Because we see no clear error by the Presiding Officer with respect to the delisting adjustment and can find no basis or precedent for Catalina's proposed 80% reduction, we affirm this aspect of the penalty calculation.

Next, Catalina relies on *In re Hall Signs,* Dkt. No. 5 EPCRA–026–96 (ALJ, Oct. 30, 1997), to question the Presiding Officer's application of the ERP guideline's "extent" factor in calculating the gravity-based penalty. As an alternative, Catalina proposes the application of the Small Business Administration standards to determine appropriate "extent" levels. App. Brief 98–5 at 5–6. Our review of the record indicates that Catalina did not raise these issues before the Presiding Officer, and therefore we will not consider them in this appeal. *See Woodcrest Mfg., Inc.,* 7 E.A.D. 757, 764 (EAB 1998).

2. *Application of Adjustment Factors*

a. *History of Prior Violations*

Catalina argues that the Presiding Officer should have applied a 25% downward adjustment because it had no prior violations of EPCRA section

[14] The ERP provides for a fixed reduction of 25% for violations involving chemicals that have been delisted "before or during the pendency of the enforcement action." ERP at 18. The Presiding Officer applied the reduction to the gravity-based penalty for the two acetone violations for a reduction of $12,500 (25% of $50,000). Catalina suggests, without further explanation, that delisting should result in a base penalty for the two acetone violations that is 20% of $50,000, or $10,000. *See* App. Brief 98–5 at 6–7. In other words, Catalina seeks an 80% reduction for delisting.

313. The Presiding Officer noted that the ERP's "penalty matrix is intended to apply to 'first [time] offenders'." Initial Decision at 32. The Presiding Officer properly declined to provide a reduction, since as the Region points out in its Reply, it would be "duplicative" to give Catalina credit as a "first time offender" when that is assumed by the penalty matrix. Rep. Brief 98–2 at 12. We believe that the Presiding Officer properly exercised his discretion in applying this adjustment factor and decline to reduce the penalty as Catalina suggests.

b. *Degree of Culpability*

Catalina also contends that the Presiding Officer should have reduced the penalty another 25% for its lack of "culpability." Catalina correctly characterizes the record as containing "no evidence that Catalina was aware of its obligation to file Form R reports." App. Brief 98–5 at 7. We do not disagree that in some situations, a person's lack of actual knowledge of a regulatory requirement might appropriately be considered in mitigation of a penalty. However, in this case, the ERP states:

> Lack of knowledge does not reduce culpability since the Agency has no intention of encouraging ignorance of EPCRA and its requirements and because the statute only requires facilities to report information which is readily available.

ERP at 14. The ERP further states that if a violation is knowing or willful, the Agency may assess per day penalties, under section 325(c) of EPCRA, or take other enforcement action as appropriate. *Id.* Thus, penalty assessments under the ERP are based on an assumption that a respondent may not have had actual knowledge of the requirements of section 313 of EPCRA. Accordingly, the Presiding Officer's decision not to adjust the penalty downward for Catalina's lack of culpability was not error. Therefore, Catalina's request for a reduction on this basis is denied.[15]

c. *Attitude*

Both Catalina and the Region take issue with the Presiding Officer's application of the "attitude" factor of the ERP and TSCA section

[15] While the Presiding Officer appropriately rejected a reduction based on lack of culpability, he explicitly noted that Catalina was "a good corporate citizen as demonstrated by its having no prior violations" and stated that this "tips the scale" in favor of receiving a reduction to the penalty for "compliance". Initial Decision at 35. Thus Catalina did benefit from its prior compliance history.

16(a)(2)(B). Neither party disputes the Presiding Officer's authority to consider this factor in calculating the penalty; rather, they challenge how the factor was applied to the facts of this case. As previously noted, *supra* section I.B., the "attitude" factor is composed of both a "cooperation" and a "compliance" component, and an adjustment of up to 15% can be made for each component. *See also* ERP at 18. "Cooperation" is evaluated in light of the violator's behavior during the compliance evaluation and enforcement process, and includes:

> degree of cooperation and preparedness during the inspection, allowing access to records, responsiveness and expeditious provision of supporting documentation requested by EPA during or after the inspection, and cooperation and preparedness during the settlement process.

Id. Under the "compliance" component "the Agency may [adjust] the gravity-based penalty [downward] in consideration of the facility's good faith efforts to comply with EPCRA, and the speed and completeness with which it comes into compliance." *Id.*

We have addressed the application of the "attitude" factor under the ERP in *In re Pacific Ref. Co.*, 5 E.A.D. 607, 616 (EAB 1994). There, we found that the Presiding Officer "cited numerous factors supporting his conclusion that 'Pacific at all times acted in a cooperative and compliant manner in its handling of this matter.'" *Id.* We were unwilling to disturb the Presiding Officer's findings and conclusions with respect to the "attitude" factor in the absence of the Region providing record cites or additional arguments to persuade us to give less weight to this adjustment factor.

Here, we are presented with several arguments by Catalina and the Region that warrant discussion. First, Catalina argues for an additional 25% downward "attitude" adjustment based on Catalina's "'knowledge of the requirement' or lack thereof." App. Brief 98–5 at 7. These facts were considered by the Presiding Officer in the context of the "prior history of violations" issue and we see no basis in the statute, the EPCRA regulations, or the ERP to further adjust the penalty in this case as proposed by Catalina.

The Region argues that the Presiding Officer's reduction of the penalty by 30% under the "attitude" factor was error because it is unsupported by the record. App. Brief 98–2 at 18–22. The Region points out that the Presiding Officer granted the maximum 15% reduction for "cooperation" based only on the fact that Catalina allowed the inspection and responded to information requests. *Id.* at 18. The Region also argues that

the "cooperation" reduction is only appropriate in rare or unusual circumstances, except in the settlement context. *Id.* at 19.

We find the Region's arguments to be unpersuasive. First, there is no evidence in the record to indicate that Catalina was uncooperative at any stage of the enforcement process. What evidence that exists in the record is consistent with the Presiding Officer's finding that Catalina was cooperative and entitled to a penalty reduction for "cooperation." In fact, the Region's own witness conceded that Catalina was cooperative.

> Q: * * * Have you investigated yourself in any way whether or not Catalina Yachts cooperated during the investigation?
>
> A: My understanding [sic] they were.

Tr. at 39.

Furthermore, testimonial evidence presented by Catalina's witness, Mr. Douglas, illuminates Catalina's cooperation at the time of the Region's on-site inspection, as well as during a follow-up phone call from the inspector, Mr. Deviny. Tr. at 90, 84–95.

Although the Region's witness testified that Catalina was cooperative, she did not consider adjusting the penalty for this component in setting the penalty in the complaint. *Id.* at 39. Her verified statement submitted at the hearing explained that it was the Region's policy to allow a reduction for "attitude" only in the context of settlement. *See id.* Exhibit A, Declaration of Pi-Yun "Pam" Tsai, ¶ 12.; *see also* Initial Decision at 29. The Presiding Officer rejected the Region's position as arbitrary, and the Region has not raised this issue on appeal.[16]

We note that the "cooperation" component as defined in the ERP is concerned with a number of aspects of the enforcement process in addition to settlement. This includes the "degree of cooperation and

[16] We reject the Region's argument that the Presiding Officer's decision on the "cooperation" component was improper in light of the Board's decision in *In re Harmon Electronics, Inc.,* 7 E.A.D. 1, 46–47 (EAB 1997) (holding that penalty adjustments under a new self-policing, self-reporting policy intended for use only in settlements should not be applied in fully contested and adjudicated cases). *See* App. Brief 98–2 at 18. *Harmon* is distinguishable from this case since the policy considered there was, by its terms, expressly limited to the settlement context. In contrast, the Region here concedes that "the Judge has discretion under Section 16(a)(2)(B) of TSCA to adjust a penalty on the bases cited by Judge Nissen." App. Brief 98–2 at 1–2.

preparedness during the inspection, allowing access to records, responsiveness and expeditious provision of supporting documentation requested by EPA during the inspection * * * ." ERP at 18. The Region does not argue, and the record does not support, any contention that Catalina did not cooperate in any of these respects. While the ERP's reference to "cooperation and preparedness during the settlement process" supports the proposition that a full 15% downward adjustment may be more appropriate in the settlement context than in a contested case, we view cooperation during settlement as just one of the aspects of a respondent's conduct that should be considered collectively in determining whether, and to what extent, a reduction for cooperation should be granted. While the Presiding Officer could well have granted less than a 15% reduction for "cooperation," we do not find his decision to give the full reduction clearly erroneous.

Next, we turn to the Region's contentions regarding the compliance component of the attitude factor. As noted, *supra,* the ERP provides that compliance includes "consideration of the facility's good faith efforts to comply with EPCRA, and the speed and completeness with which it comes into compliance." ERP at 18. Our review of the record and the Initial Decision indicates that the Presiding Officer's determination was amply supported by the record.

The Presiding Officer found that Catalina's immediate retention of Mr. David Wright to assist in the preparation and submission of the Form Rs demonstrated good faith efforts to come into compliance. The Presiding Officer also analyzed the speed of Catalina's compliance, and found that the six-month duration that passed before the Form Rs were filed with EPA demonstrated compliance in light of the fact that the Northridge earthquake caused a fire in the production plant shutting down operations for four months. The Presiding Officer also considered testimony regarding the complexity of identifying, collecting, analyzing and transposing the chemical use data from several years into the Form Rs from Catalina's records and reports filed with state and local agencies. Initial Decision at 34–35. While the Region points out that the record shows that Catalina's business offices were only closed for a few days due to the earthquake, Catalina asserts that the earthquake disrupted its files. Rep. Brief 98–5 at 5. On balance, we are sympathetic to the unforeseen delays and unexpected disruption that an act of God, of the magnitude of the Northridge earthquake, can inflict on those with even the best of intentions. We find no abuse of discretion in the Presiding

Officer's decision in this regard.[17] Accordingly, we do not disturb the Presiding Officer's compliance determination and application of a 15% reduction to the gravity-based penalty for this component of the "attitude" factor. Thus, we uphold the 30% downward adjustment to the gravity-based penalty for the "attitude" factor.

d. *Other Matters as Justice May Require*

Catalina and the Region also appeal the Presiding Officer's application of the "other matters as justice may require" penalty adjustment factor ("justice factor"). Both rely on our decision in *In re Spang & Co.,* 6 E.A.D. 226 (EAB 1995), where we held that a presiding officer could legitimately consider "environmentally beneficial projects" and expenses associated with their implementation under the justice factor.[18] *Id.* at 249. In *Spang,* we identified the conflicting policy objectives of the Agency that the case presented on the issue of whether to consider environmental good deeds under the justice factor; namely the desire to look favorably upon and encourage those good deeds, but also a need to uphold the deterrent effect of the Agency's enforcement efforts. We stated:

> to strike the proper balance between these conflicting forces, we are of the view that the evidence of environmental good deeds *must be clear and unequivocal,* and the circumstances *must be such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice.*

Spang, 6 E.A.D. at 250 (emphasis added). In addition we expressed the opinion that "no project, however close the nexus [between the project and the violation at issue], should be credited unless the penalty which would otherwise be assessed would work an injustice." *Id.* at 250–51. In

[17] We note that there is nothing in the record indicating that the Region had conveyed any sense of urgency to Catalina for filing the late Form Rs, nor did the Region set or convey any earlier deadlines for Catalina's submission of the Form Rs. Had there been evidence of such admonitions, it might have weighed against finding Catalina's satisfaction of the compliance component.

[18] Catalina erroneously asserts in its brief that, based on our holding in *Spang,* the Board would have "allowed a penalty reduction of 71%" for this factor. App. Brief at 8. While the presiding officer in *Spang* did reduce the penalty by 71% using the justice factor, we remanded his decision to "determine whether Spang has made a valid claim for having the $173,700 gravity-based penalty lowered based upon [the justice factor], and if so, how much of a downward adjustment is required to achieve justice." *Spang & Co.* at 252. We find Catalina's analysis unpersuasive and thus deny the requested 70% reduction.

light of our pronouncements in *Spang,* we do not believe a reduction for the justice factor is appropriate in this case.

As we stated in *Spang,* the justice factor "vests the Agency with broad discretion to reduce the penalty *when the other adjustment factors prove insufficient or inappropriate to achieve justice." Id.* at 249 (emphasis in original). We also stated that "use of the justice factor should be far from routine, since application of the other adjustment factors normally produces a penalty that is fair and just." *Id.* at 250–51. Thus, it is clear that the justice factor comes into play only where application of the other adjustment factors has not resulted in a "fair and just" penalty. If, and only if, despite application of the other adjustment factors, an assessed penalty is so disproportionate to the violations at issue as to be manifestly unjust, should a presiding officer apply the justice factor to recognize environmentally beneficial projects.

Here, we are affirming the Presiding Officer's decision to grant Catalina the full benefit of the "cooperation component" of the "attitude" factor over the objection of the Region. We also are affirming the decision to give Catalina the full benefit of the "compliance" component reduction, again over the Region's objection, and which even the Presiding Officer viewed as "more problematic." *See* Initial Decision at 33. Having given Catalina the full benefit of the "attitude" adjustment factor, as well as a 25% downward adjustment for the delisting of acetone, we believe that the resulting penalty of $108,792 is "fair and just" for Catalina's seven violations of section 313 reporting requirements. Based upon our review of the penalty that would be imposed in the absence of applying the justice factor, the evidence in the record, and the serious nature of the violations, we do not find that "the circumstances are such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice." *See Spang,* 6 E.A.D. at 250. Accordingly, we reverse the Presiding Officer's decision to adjust the penalty downward $69,000 for "such other matters as justice may require."[19]

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[19] The record before us reflects that Catalina presented, and the Presiding Officer considered, three allegedly "environmentally beneficial projects" as the bases for applying the justice factor. Catalina claimed that the substitution of DBE for acetone in cleaning processes, the elimination of anti-fouling paint, and the adoption of brushable gel coat procedures were environmentally beneficial projects warranting penalty reductions under the justice factor.

Although we find that applying the justice factor here is not warranted since the penalty is fair and just in the absence of a downward adjustment for this factor, we

Continued

III. *CONCLUSION*

For the foregoing reasons, we reverse, in part, the Initial Decision and order Catalina to pay a penalty of $108,792 by mailing or delivering a certified or cashier's check payable to the Treasurer of the United States to the following address within 60 days of the date of receipt of this order:

Regional Hearing Clerk
U.S. EPA, Region IX
Office of Regional Counsel, RC–2–1
P.O. Box 360863
Pittsburgh, PA 15251–6863

So ordered.

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nonetheless point out that there are real questions as to the extent to which the elimination of anti-fouling paint and the adoption of brushable gel coating even merit consideration as environmentally beneficial projects under *Spang*.

For example, with respect to the elimination of anti-fouling paint use, Mr. Douglas conceded that unspecified chemicals in the paint were below threshold levels triggering section 313 reporting requirements. The Presiding Officer, in attempting to find a nexus between Catalina's proffered project and the violations at issue, noted that, "[t]hese activities directly relate to the chemicals involved in the violations, a fact emphasized in *Spang*." Initial Decision at 37. We question this conclusion with respect to the anti-fouling bottom paint since there is no evidence in the record that the paint contained either acetone or styrene—the chemicals triggering the violations in this case.

As for the brushable gel coating activities, the record is not clear with respect to the extent and duration of Catalina's program. As we stated in *Spang,* "what is relevant is a respondent's *past* acts and expenditures." *Spang,* 6 E.A.D. at 250 (emphasis in original). Here, the costs and benefits of the project are largely speculative and described as future costs and benefits. For example, Mr. Douglas testified, "I think we'll look at an annual reduction in styrene emissions *over the coming year* of between 15 to 20 percent." *See* Tr. at 115 (emphasis added). Spang also instructs that, "if an incomplete project is sufficiently underway, such that its ability to produce environmental benefits is not speculative, there may be sufficient ground for considering the expenditures made on a project *to that point." Spang,* 6 E.A.D. at 250–51 (emphasis added). Here, however, the Presiding Officer improperly considered the speculative and prospective costs and benefits of a brushable gel coating program that, at the time of the hearing, had been in place for only four months and covered only 30% of Catalina's gel coating activities. *See* Tr. at 115.