IN RE COAST WOOD PRESERVING, INC.

EPCRA Appeal No. 02-01

FINAL DECISION

Decided May 6, 2003

Syllabus

Coast Wood Preserving, Inc. ("CWPI") appeals an Initial Decision issued by Administrative Law Judge Barbara A. Gunning ("ALJ") on February 20, 2002, assessing a civil penalty of $23,375 against CWPI for violations of section 313 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11023.

CWPI conducts business on the same site as a related corporation, Cal Coast Lumber ("CCL"). In the proceedings below, the U.S. Environmental Protection Agency Region IX ("Region") charged CWPI with six violations of EPCRA § 313, 42 U.S.C. § 11023, and implementing regulations at 40 C.F.R. part 372. Although the Region did not charge CCL with EPCRA violations, it treated CCL and CWPI as a single "facility" within the meaning of EPCRA and its implementing regulations. The statute defines "facility" in relevant part as "all buildings * * * located on a single site * * * and which are owned or operated by the same person (or by any person * * * under common control with, such person)." EPCRA § 329(4), 42 U.S.C. § 11049(4). After an evidentiary hearing, the ALJ concluded that the two corporations operated on the same site and were under "common control," and thus constituted a "facility" under EPCRA. Accordingly, the ALJ found that CWPI had committed five violations of EPCRA section 313 reporting requirements for failing to submit Toxic Chemical Release Inventory Forms ("Form Rs") for processing chromium and arsenic compounds in 1996 and 1997 (Counts II-V), and copper compounds in 1997 (Count VI).

On appeal, CWPI challenges the ALJ's application of the definition of "facility" under EPCRA section 329(4), 42 U.S.C. § 11029(4). CWPI argues that the ALJ's interpretation of "facility" impermissibly creates a new standard for corporate veil piercing in order to establish CWPI's liability under EPCRA. CWPI also disagrees with the ALJ's aggregation of the CWPI and CCL employees to satisfy the statutory ten full-time employee threshold. CWPI asserts that the Supreme Court's decision in *United States v. Bestfoods*, 524 U.S. 51 (1998), is controlling with respect to application of the statutory definition of "facility." It thus argues that the ALJ should have applied traditional corporate veil-piercing standards when interpreting the term "facility."

CWPI also asserts that it did not have fair notice of the Region's interpretation of the multi-establishment complex regulation at 40 C.F.R. § 372.22(b)(3). That regulation provides instructions on how to determine whether a facility satisfies the Standard Industrial Classification ("SIC") code criterion of the regulations when the "facility" is comprised of two or more establishments with different SIC codes. In brief, the regulation provides methodologies for determining the predominant SIC code by examining the "value of ser-

vices provided and/or products shipped and/or produced" by each of the establishments making up the facility. CWPI argues that the regulation does not provide adequate notice to the regulated community of how to compute the "value of services and/or products shipped or produced" and thus does not restrict the range of available comparative valuation methodologies to the value-added method advanced by the Region. Furthermore, CWPI claims that the Agency failed to provide adequate guidance in this case as to how to calculate the "sum of services provided and/or products shipped" by CWPI, and that the Agency's available guidance documentation on this issue is ambiguous.

Held: (1) The site in Ukiah, California, on which both CWPI and CCL conduct business is a "facility" as that term is defined in EPCRA section 329 and its implementing regulations. The Environmental Appeals Board ("Board") rejects CWPI's arguments that such a result is at odds with the U.S. Supreme Court's holding in *United States v. Bestfoods*, 524 U.S. 51. Veil-piercing standards are not applicable to the facts of this case where neither corporation is a shareholder of the other, and, accordingly, the Region did not seek to impose derivative liability on CCL for the acts of CWPI. Moreover, the term "facility" under EPCRA enjoys a clear and detailed definition, unlike the term "owner and operator" at issue in *Bestfoods*. The plain language of EPCRA provides that where both common control and site proximity are present, two or more corporations may be deemed to be operating a single facility. Thus, the ALJ appropriately concluded that CWPI and CCL constitute a single facility.

(2) The ALJ did not commit error in concluding that the facility satisfies the statutory threshold for number of employees by totaling the number of CCL's employees and CWPI's employees, all of whom indisputably work at the facility. Through this approach, the ALJ has not abrogated fundamental principles of limited liability for corporations, and her conclusion is fully supported by the statutory language.

(3) CWPI did not have fair notice of the Region's interpretation of 40 C.F.R. § 372.22(b)(3) because the regulations are susceptible to more than one interpretation, leaving considerable ambiguity or uncertainty as to how the regulations were to be applied to these facts, and because the value-added methodology the Region used in this case was not reasonably ascertainable from the regulations and other publicly available guidance documents during the relevant time frame.

Accordingly, the Board reverses the finding of liability and vacates the civil penalty assessed by the ALJ.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein.

Opinion of the Board by Judge Stein:

Coast Wood Preserving, Inc. ("CWPI") appeals an Initial Decision issued by Administrative Law Judge Barbara A. Gunning ("ALJ") on February 20, 2002, assessing a civil penalty against CWPI for violations of section 313 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C.

§ 11023.[1] The ALJ found that CWPI had committed five violations of EPCRA section 313 reporting requirements and, after an evidentiary hearing, imposed a civil penalty in the amount of $23,375. *See* Initial Decision at 35-36.

For the reasons detailed below, we conclude that the site in Ukiah, California, on which both CWPI and a related corporation, Cal Coast Lumber ("CCL"),[2] conduct business is a "facility" as that term is defined in EPCRA section 329 and its implementing regulations. In this regard, we reject CWPI's arguments that such a result is at odds with the U.S. Supreme Court's holding in *United States v. Best Foods*, 524 U.S. 51 (1998). We further conclude that the facility satisfies the statutory threshold for number of employees. However, because CWPI did not have fair notice of the U.S. Environmental Protection Agency, Region IX's ("Region") interpretation of 40 C.F.R. § 372.22(b)(3), which lays out the methodologies for determining whether a multi-establishment facility[3] meets the Standard Industrial Classification ("SIC") code requirement of EPCRA section 313, we reverse the finding of liability and vacate the civil penalty assessed by the ALJ.[4]

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

EPCRA section 313 requires the owner or operator[5] of certain facilities to submit annually, by 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 Steeltech, Ltd.*, 8 E.A.D. 577, 578 (EAB 1999) (quoting *In re Catalina Yachts, Inc.*, 8 E.A.D. 199, 201 (EAB 1999), *aff'd*, No. CV 99-07357 GHK (VAPx) (C.D. Cal. Feb. 18, 2000) (unpublished)).

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[1] CWPI filed its notice of appeal with the Board on March 28, 2002. *See* Notice of Appeal; Coast Wood Preserving, Inc.'s Appellate Brief ("CWPI Br.") at 1.

[2] In Part II.A.2 below, we explain in detail the basis for our conclusion that the corporations are related within the meaning of EPCRA.

[3] A multi-establishment facility is one in which there is more than one economic unit on the same or contiguous sites. *See infra* Part I.A.

[4] While the ALJ found liability and imposed a corresponding civil penalty, CWPI has not challenged on appeal the amount of the penalty. It has, however, challenged the finding of liability and asked that the enforcement action against CWPI be dismissed. *See* CWPI's Br. at 28.

[5] Neither EPCRA nor its implementing regulations define "owner" or "operator."

The starting point for analyzing whether an owner or operator must report under EPCRA section 313 is a determination of what constitutes the facility. A facility is defined, in relevant part, as:

> [A]ll buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person[6] (or by any person which controls, is controlled by, or under common control with, such person).

EPCRA § 329(4), 42 U.S.C. § 11049(4). As will be discussed *infra*, the issue of common control in the statutory definition of "facility" is central to the issues in this case.

The EPCRA section 313 reporting regulation includes the statutory definition of "facility," but also provides that "a facility may contain more than one establishment." 40 C.F.R. § 372.3. An "establishment" is defined in turn as "an economic unit, generally at a single physical location, where business is conducted or where services or industrial operations are performed." *Id.*

Once the foregoing elements are satisfied, a facility must also meet the following additional criteria in order for owners and operators to become subject to the EPCRA section 313 reporting requirements:

> [H]ave 10 or more full-time employees and * * * [be] in Standard Industrial Classification [SIC] Codes 20 through 39 (as in effect on July 1, 1985) and * * * [have] manufactured, processed or otherwise used a toxic chemical * * * in excess of the [threshold] quantity of that toxic chemical * * * during the calendar year for which a release form is required * * * .

EPCRA § 313(b)(1)(A), 42 U.S.C. § 11023(b)(1)(A); *see also* 40 C.F.R. § 372.22(a)-(c). EPA has interpreted "in Standard Industrial Classification Codes

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[6] A person is defined as:

> [A]ny individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, state, municipality, commission, political subdivision of a state, or interstate body.

EPCRA § 329(7), 42 U.S.C. § 11049(7).

20 through 39" to relate to the primary SIC code of the facility.[7] *See* 53 Fed. Reg. 4500, 4501 (Feb. 16, 1988).

For multi-establishment facilities (i.e., those that have more than one economic unit on the same or contiguous sites) in which the establishments have different SIC codes, the controlling SIC code for EPCRA section 313 purposes is determined by one of two methodologies that identify the facility as a whole for SIC code purposes.[8] *See* 40 C.F.R. § 372.22(b)(3). The first method determines whether the "sum of the value of services provided and/or products shipped from and/or produced" by those establishments with a primary SIC code listed in 40 C.F.R. § 372.22(b) is greater than fifty percent of the "total value of services provided and/or products shipped and/or produced by all establishments at the facility." *Id.* § 372.22(b)(3)(i). If the establishment with a primary SIC Code listed in 40 C.F.R. § 372.22(b) contributes more than fifty percent to the total value, the multi-establishment facility satisfies the EPCRA section 313 SIC code requirement and is a covered facility for reporting purposes.

The second method evaluates one establishment with a primary SIC code listed in 40 C.F.R. § 372.22(b) against "any other establishment within the facility" to determine if it "contributes more in terms of value of services provided and/or products shipped from and/or produced at the facility." 40 C.F.R. § 372.22(b)(3)(ii). Again, if the establishment with a primary SIC code listed in 40 C.F.R. § 372.22(b) contributes more "value" than any other establishment, the multi-establishment facility satisfies the EPCRA section 313 SIC code requirement and is a covered facility for reporting purposes.

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)(1).[9]

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[7] The SIC code coverage has been expanded by regulation. *See* 40 C.F.R. § 372.22(b); *see also* 62 Fed. Reg. 23,834 (May 1, 1997).

[8] In this step of the analysis, the "facility" has already been defined as including more than one establishment. The issue of common ownership or control arises in the core definition of the facility, rather than in the determination of whether the facility, as measured against the predominant SIC Code, is a covered facility for reporting purposes.

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

The Agency has developed a penalty policy to assist in the determination of civil penalties for violations of EPCRA § 313. *See* U.S. Environmental Protection Agency, 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) ("ERP").

B. *Factual and Procedural Background*

1. *Factual Background*

On May 12, 1971, CWPI was incorporated under California law. CWPI's address is 3150 Taylor Drive, Ukiah, California, which is located at the intersection of Taylor Drive and Plant Road. *See* Initial Decision ("Init. Dec.") at 5. CCL was incorporated under California law on October 17, 1986, and is located adjacent to CWPI within the same fenced-in area. *Id.* At the time of the Region's inspection on May 26, 1998, a single sign posted at the entrance of the site read "Coast Wood Preserving, Inc." *Id.*

CWPI is in the business of pressure-treating wood. CWPI's preservation of the lumber is accomplished through the use of a single-cylinder chromated copper arsenate ("CCA") pressure-treating process.[10] *Id.* CWPI stores chemicals at the facility in a chemical storage area. *Id*. This area consists of several above-ground liquid storage tanks. *Id.* These tanks are used to store sodium bichromate, copper sulfate, and arsenic acid. *Id.*

CWPI's primary client is CCL.[11] *Id.* at 7. CCL bids on untreated wood, purchases lumber, maintains an inventory of raw lumber and incises the wood. *Id.* CCL then transfers the untreated lumber to CWPI so that the wood can be treated with chemical compounds that serve as wood preservatives. *Id.* After the wood is treated, it is then transferred back to CCL for transportation and wholesale sale to third parties. *Id.* CWPI never takes ownership of the wood. *Id.*

At all times relevant to the Complaint, CWPI had about five to nine full-time employees and CCL had approximately ten full-time employees. *Id.* at 6-7. CWPI's primary SIC code is 2491, placing it in the SIC major group code 20, which is listed as a regulated code for EPCRA toxic chemical release reporting purposes. *Id.* at 7; *see* 40 C.F.R. § 372.22(b). CCL's primary SIC code is 50, which is not a regulated code for EPCRA toxic chemical release reporting purposes. Init. Dec. at 7.

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[10] The preservation process typically begins with the conditioning of the wood via drying and incising, which permits the preservative to penetrate and to be retained by the wood. The next step is the treatment of the wood by placement into the treatment tank of the CCA cylinder. The tank contains preservative solution, which is replenished as needed until the desired level of retention is reached. Any unused preservative solution is drained off from the tank, and any excess solution present on the wood is vacuumed away. The wood is then removed from the cylinder and placed on a drip pad where it remains until the dripping ceases. Init. Dec. at 7.

[11] At oral argument counsel stated that CWPI's "predominant" customer is CCL. Oral Argument Transcript ("Oral Arg. Tr.") at 16. The testimony at the hearing was that CCL was CWPI's "exclusive" customer. Hearing Transcript ("Hrg. Tr.") at 51.

On May 26, 1998, Adam A. Browning and Greg Gholson, two employees of the Region, inspected the site. *Id.* at 5. During the inspection, Mr. Browning and Mr. Gholson toured the facility and observed its operations,[12] including CWPI's wood treatment operation, its storage area, and its wastewater treatment operation. *Id.*

At the time of the inspection, Mr. Browning and Mr. Gholson also met with Gene Pietila, the plant manager for both CWPI and CCL. *Id.* at 5-6. Mr. Pietila performed these functions for both companies out of the same, on-site office building. *Id.* at 6. In fact, administrative operations for both CWPI and CCL are performed out of the same office building. *Id.* Both corporations use the same controller, Mr. Thomas Gatton, who testified at the evidentiary hearing. Hrg. Tr. at 172-73. Mr. Gatton's responsibilities include overseeing the companies' bookkeeping and presenting financial figures to the companies' certified public accountant. Hrg. Tr. at 138.

Harold W. Logsdon is the President of both CWPI and CCL, a position he has held since the companies were formed. Init. Dec. at 6. Similarly, Cordes Langley has been the Vice President of both companies since they were founded. *Id.* Brenda Schmidt serves as the Secretary and the Treasurer of CWPI, but does not serve in any official capacity for CCL. *Id.* Messrs. Logsdon and Langley, and Ms. Schmidt are the only shareholders of CWPI and CCL.[13]

After the inspection, Mr. Browning and Mr. Gholson requested that CWPI submit, among other matters, its payroll records for all full-time, part-time, and contract workers; copies of its federal tax returns; and copies of any contracts between CWPI and any other individuals or firms working for the facility. *Id.* at 7-8. In response to an EPCRA section 313 information request, Thomas Gatton asserted, by letter dated July 13, 1998, that neither CCL nor CWPI is subject to the EPCRA Section 313 reporting requirements. *See* C Ex. 7. Mr. Gatton asserted that CCL does not have the requisite SIC code, that CWPI has less than ten employees, and that the value of services provided by CWPI is less than the value of services and products supplied by CCL. *Id.*

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[12] The observations that Mr. Browning and Mr. Gholson made during the inspection were later memorialized in an inspection report dated October 28, 1998. *See* Hrg. Tr., Complainant's ("C") Ex. 2.

[13] Messrs. Logsdon and Langley and Ms. Schmidt are all involved in other lumber-related companies. *See* Init. Dec. at 6 n.4.

2. *Procedural Background*

a. *The Complaint*

The Region filed a Complaint against CWPI on September 28, 2000. The Complaint alleged that CWPI violated the reporting requirements of section 313 of EPCRA and its implementing regulations at 40 C.F.R. part 372 for the reporting years 1995 to 1997.

The Complaint set forth six counts against CWPI and proposed a penalty of $32,500. Count I alleged that CWPI failed to submit a Toxic Chemical Release Inventory Form R ("Form R") for approximately 64,550 pounds of chromium compounds that were processed at CWPI's facility in 1995. Count II alleged that CWPI failed to submit a Form R for approximately 133,131 pounds of chromium compounds that were processed at CWPI's facility in 1996. Count III alleged that CWPI failed to submit a Form R for approximately 210,387 pounds of chromium compounds that were processed at CWPI's facility in 1997. Count IV alleged that CWPI failed to submit a Form R for approximately 31,300 pounds of arsenic compounds that were processed at CWPI's facility in 1996. Count V alleged that CWPI failed to submit a Form R for approximately 53,201 pounds of arsenic compounds that were processed at CWPI's facility in 1997. Count VI alleged that CWPI failed to submit a Form R for approximately 26,955 pounds of copper compounds that were processed at CWPI's facility in 1997.

b. *The Answer and Motions*

CWPI filed an Answer to the Complaint on October 27, 2000. In its Answer, CWPI admitted that it did not file Form Rs for the chemical compounds enumerated in the Complaint for the calendar years specified. CWPI also set forth six affirmative defenses in its Answer. On March 12, 2001, the Region filed a Motion for Accelerated Decision on the issue of CWPI's liability, and on April 2, 2001, CWPI filed a Cross-Motion for Accelerated Decision. The Administrative Law Judge denied both Motions in an Order issued June 28, 2001 ("June Order").[14]

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[14] The Region's Motion for Accelerated Decision as to liability was based on its assertion that CWPI's Answer was defective under section 22.15 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (2001) ("CROP"), 40 C.F.R. § 22.15, and thus the material factual allegations contained in the Complaint should be deemed admitted. The Region's Motion essentially was a motion to strike CWPI's Answer. In the June Order the ALJ determined that CWPI's Answer was adequate to meet the requirements of 40 C.F.R. § 22.15(b) and, as such, the ALJ denied the Region's Motion for Accelerated Decision.

CWPI's Cross-Motion for Accelerated Decision was based on its assertion that the EPA regulation at 40 C.F.R. § 372.22(b), which was promulgated pursuant to EPCRA section 313, 42 U.S.C. § 11023, is invalid as a matter of law. Specifically, CWPI argued that 40 C.F.R. § 372.22(b) creates a new standard, inapposite to federal law, for piercing the corporate veil. In the June Order the ALJ found that CWPI had failed to demonstrate sufficiently compelling circumstances to warrant a review of the regulation in question, and denied CWPI's Cross-Motion for Accelerated Decision.

The ALJ held an evidentiary hearing in this matter in San Francisco, California, on September 5, 2001, for the purpose of the presentation of evidence on the issues of CWPI's liability and the appropriateness of the proposed penalty. Two witnesses testified during the hearing: Adam A. Browning, a toxics release inventory program coordinator with the Region;[15] and Thomas Gatton, the controller at both CCL and CWPI.

c. *The Initial Decision*

The ALJ concluded, in relevant part, that CWPI's "facility, comprised of the establishments of [CWPI and CCL], is located on a single site and is owned and/or operated by the same person (or by any person which controls, is controlled by, or under common control with such person). 40 C.F.R. § 372.3." Init. Dec. at 10.

As a preliminary matter, the ALJ's analysis characterized the issue as a dispute over "the jurisdiction of the EPA with regard to its prosecution of this case under Section 313 of EPCRA and its implementing regulations." *Id.* at 13. The ALJ explained:

> [CWPI] contends that the EPA cannot treat [CWPI] and [CCL] as being under "common control" to establish EPA jurisdiction under 40 C.F.R. § 372.3 because this regulation piercing the separate corporate entities is invalid as a matter of law. * * * Specifically, CWPI contends that the EPA has impermissibly included the workers at [CCL] to establish that [CWPI] is a covered facility under 40 C.F.R. § 372.22(b), thereby subjecting [CWPI] to the reporting requirements of EPCRA.

Id.

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[15] As noted earlier, Browning was a regional employee who conducted the Region's inspection of the CWPI facility.

The ALJ concluded that the EPA's interpretation of the regulation "is fair and reasonable and is consistent with the statutory intent of EPCRA and the implementing regulatory scheme." *Id.* at 14 (citing *In re Mobil Oil Corp.*, 5 E.A.D. 490, 500-03 (EAB 1994)). The ALJ also concluded that "the presumption is an exceptionally strong one of nonreviewability [of the regulation that] may only be overcome by the most compelling circumstances," *id.* (citing *In re Woodkiln, Inc.*, 7 E.A.D. 254, 269 (EAB 1997)), and "[CWPI] has not demonstrated sufficient compelling circumstances to warrant a review of the regulation at issue." Init. Dec. at 14.

However, the ALJ noted that CWPI "has pinpointed a thorny question embedded in these regulations, namely whether the regulations create a new standard for piercing the corporate veil," but she "ultimately * * * rejected" CWPI's argument "in light of the plain meaning of EPCRA and its implementing regulations." *Id.* at 15 n.14.

Accordingly, the ALJ applied the EPCRA definitions of "facility" and "establishment" and concluded that CWPI's establishment along with CCL's establishment constitute a single facility. *Id.* at 16. The ALJ relied on the Region's unrebutted evidence "showing that [CWPI] and [CCL] are located on the same enclosed property in Ukiah, California; Mr. Logsdon serves as the President of both establishments; Mr. Pietila serves as the Plant Manager of both establishments and performs these functions out of the same office; the management and administrative functions of both establishments occur at the same office building at the shared site; and the officers of both companies are the same (with the exception of Brenda Schmidt who is the secretary of [CWPI] but is not an officer of [CCL]) and one-hundred percent of the capital stock is owned by the officers." *Id.* at 16-17.

Having concluded that the two establishments make up the facility, the ALJ applied the regulations to determine whether the facility was a covered facility for EPCRA section 313 reporting purposes. First, she simply added the employees of both establishments together to determine if the facility had the requisite number of ten or more employees. *Id.* 21-22. Second, the ALJ found that the regulatory criterion regarding the threshold quantities of toxic chemicals under 40 C.F.R. § 372.22(c) was, based on the undisputed facts, satisfied. Init. Dec. at 22-23.

Finally, with respect to the issue of whether the facility had the requisite SIC code, the ALJ concluded that the Region had established a prima facie case that CWPI's facility is covered under EPCRA section 313 as a multi-establishment complex within the meaning of 40 C.F.R. § 372.22(b)(3). Init. Dec. at 19. To establish that CWPI met the regulatory criteria for SIC code coverage, the ALJ relied on Mr. Browning's testimony. Mr. Browning testified that he compared the value of CWPI's wood treatment service to the value of CCL's lumber wholesale activity. In this analysis, he compared the contract price

paid by CCL to have its raw lumber treated by CWPI to CCL's sales price for the treated lumber, less the total value of treated lumber. *Id.* at 18-19. Mr. Browning also testified that his comparison looked at "the amount of value added to a particular product through a service" or "value added to that particular operation, to that particular product through that operation." Hrg. Tr. at 91.

CWPI challenged the Region's approach as comparing "apples and oranges" because it alleged that Mr. Browning had compared CWPI's gross revenues with CCL's net revenues. *See* Init. Dec. at 19. The ALJ found that CWPI's arguments regarding the Region's case in this regard were "specious."[16] *Id.* at 20. The ALJ found that CWPI's proffered definition of the regulatory term "value" involved corporate income and loss and was not supported by the language of the regulation. *Id.* The ALJ ultimately concluded that the Region's "methodology in calculating the amount of added value attributable to each establishment * * * is not [to] be applied unquestioningly, [but] it is a fair and reasonable approach and clearly is the more compelling." *Id.* at 21.

CWPI now has filed its notice of appeal from the Initial Decision. CWPI raises two general arguments on appeal: (1) the ALJ's application of the term "facility" in this case creates "an impermissible new federal standard for piercing the corporate veil" in violation of *United States v. Bestfoods*, 524 U.S. 51 (1998), *see* CWPI Br. at 11-20; and (2) the ALJ's application of the "multi-establishment complex regulation," 40 C.F.R. § 372.22(b): (a) fails to provide adequate notice of prohibited conduct; (b) is subject to an interpretation that could not reasonably be applied by the regulated community; and (c) was erroneously applied in this case. *See* CWPI Br. at 20-27. The Region filed a reply brief in opposition to CWPI's appeal. *See* Brief of Appellee ("Region's Br."). The Board held oral argument in this matter on July 30, 2002.

II. *DISCUSSION*

The Board reviews an administrative law judge's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.30(f) (the Board shall "adopt, modify, or set aside" the ALJ's findings of fact and conclusions of law or discretion); *see* Administrative Procedure Act § 8(b), 5 U.S.C. § 557(b) ("[o]n appeal from or review of the initial decision, the agency has all the powers [that] it would have in making the initial decision except as it may limit the issues on notice or by rule").

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[16] CWPI argued that the term "value" should be determined by income, losses, and profits as reported for corporate income tax purposes. *See* Init. Dec. at 20. Furthermore, with respect to the Region's approach, CWPI argued that deducting the cost of the raw lumber was not appropriate, and that costs of chemicals for wood treatment should have been taken into account. *Id.* at 21.

Matters in controversy must be established by a preponderance of the evidence. 40 C.F.R. § 22.24(b); *In re Antkiewicz*, 8 E.A.D. 218, 227 (EAB 1999).

In this case, CWPI raises two main issues: (1) whether the ALJ erroneously applied the EPCRA definition of "facility" in determining liability against CWPI; and (2) whether the ALJ's application of the multi-establishment complex rule was error. We address each of these issues in turn below.

A. *The ALJ's Application of the EPCRA Definition of "Facility" Was Not Erroneous*

CWPI's first argument on appeal challenges the ALJ's application of the EPCRA definition of "facility." *See* CWPI's Br. at 11-20. CWPI argues that the ALJ's interpretation of the term "facility" impermissibly creates a new standard for corporate veil piercing in order to establish CWPI's liability under EPCRA. *See id.* at 12. CWPI also disagrees with the ALJ's addition of CWPI's five to nine full-time employees to CCL's ten full-time employees to satisfy the statutory ten full-time employee threshold. CWPI argues:

> EPA did not apply established California or federal common law regarding the legal standards for establishing that two separate corporations are owned or operated by the same person. Instead EPA applied an *ad hoc* novel legal standard for determining common ownership (i.e., piercing the corporate veil) for purposes of aggregating the assets of those two corporations to meet the regulatory threshold of greater than 10 employees under EPCRA.

Id. at 5-6 (footnote omitted). CWPI asserts that the Supreme Court's decision in *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998) is controlling and "EPA must apply the statutory definition of 'Facility,' and its own regulations implementing that definition * * * consistent with the holding in *Bestfoods*." CWPI Br. at 19. Thus, CWPI contends that in interpreting the EPCRA statutory and regulatory definition of "facility," and specifically the term "controls, is controlled by, or under common control with," the ALJ should have applied traditional corporate veil-piercing standards. It maintains that "nothing in [EPCRA's] statutory language or legislative history indicates that Congress intended to overcome the strong presumption that traditional common law veil piercing principles apply." *Id.* at 13-14.

We find nothing inconsistent between *Bestfoods* and the ALJ's conclusion that CWPI and CCL are a "facility" within the meaning of EPCRA. Our rationale follows.

1. *Bestfoods and the Principles of Piercing the Corporate Veil*

As background to the discussion of *Bestfoods* that follows, we note that a general principle of corporate law recognizes corporations as legal entities separate from shareholders (either corporate or individual), officers, and directors. As such, corporate liabilities remain the obligation of the corporation rather than of the shareholders, directors, or officers of the corporation. This basic principle of "separate corporateness" applies even in situations where the shareholder in question is a controlling corporate shareholder, i.e., as in a parent-subsidiary relationship.[17] Harry G. Henn & John R. Alexander, *Laws of Corporations and Other Business Enterprises* § 148, at 354-55 (3d ed. 1983) ("*Laws of Corporations*").

The doctrine of "piercing the corporate veil" refers to the "judicially imposed exception to this principle by which courts disregard the separateness of the corporation and hold a shareholder responsible for the corporation's action as if it were the shareholder's own." Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL. L. REV. 1036, 1036 (1991). "Corporate privileges — such as limited liability — vanish whenever corporateness is disregarded." *Laws of Corporations* § 146, at 346. As stated in *Laws of Corporations*:

> [W]hen the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. * * * The test is simply whether or not recognition of corporateness would produce unjust or undesirable consequences inconsistent with the purpose of the concept.
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> The concept will be sustained only so long as it is invoked and employed for legitimate purposes. Perversion of the concept to improper purposes and dishonest ends (e.g., to perpetrate fraud, to evade the law, to escape obligations), on the other hand, will not be countenanced.

Id.

Common law tests have emerged in the various jurisdictions for "piercing the corporate veil." While the features of veil-piercing theory vary to some degree from jurisdiction to jurisdiction, they tend to center around such considerations as

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[17] A major category of veil-piercing cases "involves parent-subsidiary combinations, where creditors of the subsidiary attempt to reach assets of the parent." *See* Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 110 (1985). This was the situation in *Bestfoods*, discussed in Part II.A.1., *infra*.

those referenced by CWPI as central under California law - inadequate capitalization and failure to observe corporate formalities. *See* CWPI Br. at 15 (citing *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft*, 69 Cal. App. 4th 223, 249-50 (Cal. 1999); *Seymour v. Hull & Moreland Eng'g*, 605 F.2d 1105, 1111 (9th Cir. 1979)).

As summarized in *Laws of Corporations* with regard to subsidiary and affiliated corporations:

> Separate corporateness of subsidiary and other affiliated corporations will be recognized, in the absence of illegitimate purposes, where: (a) their respective business transactions, accounts, and records are not intermingled; (b) the formalities of separate corporate procedures for each corporation are observed; (c) each corporation is adequately financed as a separate unit in the light of its normal obligations foreseeable in a business of its size and character; and (d) the respective enterprises are held out to the public as separate enterprises.

Laws of Corporations § 148, at 354.

With this as background we now turn to a discussion of *Bestfoods*. *Bestfoods* involved whether, under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), as amended, 42 U.S.C. §§ 9601-9675, "a parent corporation that actively participated in, and exercised control over, the operations of a [wholly-owned] subsidiary, may without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary." *Bestfoods*, 524 U.S. 51, 55 (1988). The Supreme Court held that "more" was required in order to abrogate well-established principles of limited liability for corporations and find a parent corporation derivatively liable. To establish derivative operator liability of the parent based upon the extent of its control of the subsidiary, liability can only be found when the requirements for piercing the corporate veil are met. *Id.* at 63-64. The Court reasoned that "the failure of [CERCLA] to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *Id.* at 63.

Significantly for our purposes, *Bestfoods* also stands for an equally important proposition, that Congress may legislate direct accountability for persons involved in an enterprise. Thus, the Court held that under the plain language of CERCLA, "any person who operates a polluting facility is directly liable for the costs of cleaning up the pollution * * * regardless of whether that person is the facility's owner, the owner's parent corporation or business partner * * * ." *Id.* at

58. To determine what constituted "direct parental 'operation'" of the facility, the Court gave "the term its 'ordinary or natural meaning.'" *Id.* at 59 (citing *Bailey v. United States*, 516 U.S. 137, 145 (1995)). Finding that the court of appeals had erred in unnecessarily limiting direct liability under the statute, the Court remanded for a determination of whether certain persons were directly liable as operators of the facility. *Id.*

2. *Finding CCL and CWPI To Be a Single Facility Is Consistent with Bestfoods and Effectuates the Purposes of EPCRA*

As noted, *Bestfoods* was a CERCLA case concerned with the interpretation of the statutory term "owner and operator." The Court in *Bestfoods* described the statutory term "owner and operator"[18] as "defined only by tautology." *Id.* at 56. It was, in part, the "circularity" of the definitions of those terms that prompted the Court's review of the Sixth Circuit's opinion. *Id.* In contrast, the principal issue in the case before us involves EPCRA's definition of the term "facility," which, unlike CERCLA's definition of "owner and operator," enjoys a clear and detailed definition.[19] *See supra* Part I.A.; *see also* EPCRA § 329(4), 42 U.S.C. § 11049(4); 40 C.F.R. § 370.2.

Moreover, in this case, the Region is seeking to find CWPI *directly*, *not derivatively*, liable for the EPCRA reporting violations. The Region charged CWPI, the entity actually processing or using the listed chemicals, with the EPCRA reporting violations. *See* Complaint ¶¶ 1, 8. It never alleged a parent-subsidiary relationship existed, nor did it charge CWPI as a parent corporation for reporting violations committed by CCL.[20] *See id.* ¶¶ 15-38. For this reason, the ALJ's decision did not abrogate a fundamental premise of limited liability for corporations as the ALJ never relied on such a relationship as the basis for imposing civil liability on CWPI.

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[18] CERCLA defines the term "owner and operator" to include, in relevant part:

> [I]n the case of an onshore facility * * * , any person owning or operating such facility * * * .

CERCLA § 101(20)(A)(ii), 42 U.S.C. § 9601(20)(A)(ii).

[19] As noted above, EPCRA defines the term "facility," in relevant part, as:

> [A]ll buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with, such person).

EPCRA § 329(4), 42 U.S.C. § 11049(4).

[20] The Region is not seeking to hold CCL liable at all.

Furthermore, CWPI's argument fails to take account of the plain language of EPCRA as well as the direct liability aspects of the Supreme Court's holding in *Bestfoods.* EPCRA section 313 applies to "persons," more specifically "owners and operators of facilities." EPCRA § 313, 42 U.S.C. § 11023; *see id.* § 325(c), 42 U.S.C. § 11045(c).[21] EPCRA defines the term "person" to include corporations. *Id.* § 329(7), 42 U.S.C. § 11049(7). Congress further provided in the definition of facility that "person[s]" under "common control" who own or operate buildings "at a single or contiguous site" may be deemed to own or operate a single "facility." EPCRA § 329(4), 42 U.S.C. § 11049(4). In view of this statutory architecture, it is plain that Congress intended that a single facility for purposes of EPCRA reporting could be comprised of the buildings of two or more separate corporations operating under common control.[22] Thus, for buildings owned or operated by separate, but related, corporations to be combined as a single facility for EPCRA purposes, only two predicates are required: site proximity and common control.

CWPI's argument that veil-piercing standards should be layered on top of this two-part test is fundamentally misplaced. As noted above, veil-piercing standards are simply not applicable to the facts of this case where neither corporation is a shareholder of the other, and, accordingly, there is no attempt to impose derivative liability on CCL for the acts of CWPI.[23]

Here, there is a single site where a "person" (CCL) is "under common control" with CWPI, an owner or operator of the site.[24] Thus, once the ALJ deter-

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[21] Under EPCRA § 325(c), "persons" who violate EPCRA § 313's reporting requirements are liable for civil and administrative penalties. Similarly, 40 C.F.R. § 372.5 is captioned "[p]ersons subject to this part" and it provides, *inter alia,* that owners and operators of facilities described in 40 C.F.R. § 372.22 are subject to the requirements of part 372. Section 372.22 in turn describes "covered facilities for toxic chemical release reporting."

[22] It is undisputed that CWPI and CCL occupy different portions of the same site within the same fenced in area. CWPI has not argued that it is not an owner or operator of the facility.

[23] Even if we were to assume for the sake of argument the theoretical proposition that veil piercing considerations could nonetheless be relevant to circumstances such as these in the abstract, the application of such considerations would be incongruous with Congress' framing of the statute. Congress plainly contemplated that under certain circumstances (i.e., where both common control and site proximity are present), two or more corporations could be deemed to be operating a single facility. Thus, Congress, through this provision, intended to aggregate the activities of two or more otherwise legitimate but related corporations conducting business at the same location. CWPI would have us limit the reach of the statute to those circumstances where the factual predicate for piercing the corporate veil is also present, and would thus effectively augment the statutory test for regulatory coverage. We cannot reconcile such an outcome with the express terms of the statute.

[24] Mr. Browning testified:

> [D]uring our initial interview and subsequent discussions with Mr. Gene Pietila, it was represented to me as there being * * * two establishments

Continued

mined that the CWPI and CCL establishments were co-located on a single site and that common control existed between CWPI and CCL, Init. Dec. at 6, 10 (Findings of Fact 5-7, Conclusions of Law 2-3), the statutory definition of facility was satisfied.

At oral argument CWPI's counsel proffered no credible explanation for how its argument could be squared with the foregoing statutory language. If Congress' principal concern was protecting corporate form, such that two corporations under common control and operating on the same site could not be considered a single facility, it undoubtedly would have chosen an alternate formulation of the term "facility." Here, Congress' choice to aggregate affiliated entities owning or operating a single or contiguous site for purposes of satisfying EPCRA's "facility" definition, irrespective of their form,[25] is precisely the kind of direct accountability legislation sanctioned by the second holding of *Bestfoods*.[26]

There is nothing revolutionary in Congress' approach in this regard. In many other contexts, most notably in the public utility, securities, and banking contexts, Congress has legislated accountability for affiliated enterprises by using the operative language "controls, controlled by, under common control with," or words similar thereto. *See, e.g.,* Public Utility Holding Company Act of 1935, 15 U.S.C. § 79(b)(7); Bank Holding Company Act, 12 U.S.C. §§ 1841-1850; Security Act of 1933, 15 U.S.C. § 77e (2002) (requiring corporations and their affiliates to register stock sales); Phillip I. Blumberg, *Control and the Partly Owned Corporation: A Preliminary Inquiry Into Shared Control*, 10 FLA. J. INT'L L. 419, 427-48 (1996) (providing overview of statutes employing enterprise principles to expand the regulatory program); *see also* Clean Air Act § 324, 42 U.S.C. § 7625 (2002) (providing exemption to vapor recovery requirements for a person who "controls, is controlled by, or is under common control with, a refiner"). There is scant legislative history to inform our judgments with respect to the definition of

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(continued)

> under common control at that same facility, and a search of public records confirmed that for me, and it's never been represented to me otherwise.

Hrg. Tr. at 77.

[25] *See U.S. v. Re*, 336 F.2d 306, 316 (2nd Cir. 1964) (where statute does not define the term "control," court finds it "is no different than it is in normal everyday usage").

[26] To be a "covered" facility under EPCRA, and thus liable if the owner or operator fails to report under section 313, additional criteria must be satisfied. However, one does not even reach the threshold questions of number of employees, SIC Code, and threshold chemicals until the facility is defined.

"facility."[27] Nonetheless, in order to give meaning to the clear and unambiguous words Congress enacted into law, we must reject CWPI's strained interpretation of that term.[28] *See City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 337 (1994) (the statute "is the authoritative expression of the law"); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("Courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then * * * 'judicial inquiry is complete.'" (quoting *Rubin v. United States*, 449 U.S. 424, 430, (1981))); *Sierra Club v. EPA*, 314 F.3d 735 (5th Cir. 2002) (relying on the plain terms of the Clean Air Act to reverse EPA action).

B. *Whether the Facility Is a Covered Facility Within the Meaning of EPCRA and Its Implementing Regulations*

Having concluded that the site at 3150 Taylor Road is a facility within the meaning of EPCRA, we must next determine whether it is a covered facility for EPCRA section 313 purposes. This means that the facility must meet the statute's prerequisites for number of employees, chemicals covered, and SIC code. *See* 42 U.S.C. § 11023(b) ("Covered Owners and Operators of Facilities"); 40 C.F.R. § 372.22 ("Covered facilities for toxic chemical release reporting").

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[27] While the EPCRA legislative history does not answer the precise question before us, it nevertheless confirms for us that a plain language interpretation of the term "facility" is consistent with the primary purpose of EPCRA — "to provide the public with the information they need and deserve to learn about the hazards of toxic chemicals." 132 CONG. REC. H9561, H9619 (daily ed. Oct. 8, 1986) (statement of Rep. Edgar).

Representative Edgar, a "principal architect" and co-sponsor of the legislation, provided clarifying instructions that EPCRA "reporting provisions * * * should be construed expansively to require the collection of the most information permitted under the statutory language." *Id.* Rep. Edgar further instructed that "the reporting requirements should be construed to allow the public the broadest possible access to toxic chemical information." Finally, Rep. Edgar stated, with respect to the Administrator's authority to add covered facilities under § 313(b)(1)(B), that the "principal consideration is whether the addition would meet the objectives of this section to provide the public with a complete profile of toxic chemical releases." *Id.* at H9 621.

In light of these statements, we find it difficult to conclude that Congress intended for the Agency to apply traditional principles of corporate veil piercing as a constraining overlay in assessing whether there is a facility for EPCRA § 313 reporting purposes.

[28] To the extent that CWPI seeks to challenge the underlying regulations themselves, we decline review. *See In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 194 (EAB 1997) (affirming that "there is a strong presumption against entertaining challenges to the validity of a regulation in an administrative enforcement proceeding"), *appeal dismissed,* 192 F.3d 917 (1999), *vacated as moot*, 200 F.3d 1222 (9th Cir. 2000); *In re Echevarria*, 5 E.A.D. 626, 634 (EAB 1994) (holding that the "review of a regulation will not be granted absent the most compelling circumstances").

There is no dispute that CWPI meets the threshold requirement for chemicals covered. *See* Init. Dec. at 22-23.

1. *CWPI's Challenge to the Number of Employees*

Having determined the facility consists of two establishments, we conclude that the Agency may look to both establishments of the facility to determine the number of employees of the facility. While CWPI argues that *Bestfoods* is controlling here, we think otherwise for the reasons stated above. As noted, the Region did not seek to hold CCL liable. Rather, it sought only to attribute CCL's employees to the facility to satisfy the ten-employee threshold for facility coverage purposes. The ALJ applied the plain meaning of the ten-employee threshold requirement by totaling the number of CCL's employees and CWPI's employees, all of whom indisputably work at the facility, to conclude that the ten-employee threshold was satisfied. Through this approach, the ALJ has not abrogated fundamental principles of limited liability for corporations.

Moreover, her conclusion is fully supported by the statutory language. EPCRA provides that "[t]he requirements of [section 313] apply to owners and operators of *facilities that have ten or more full-time employees*."[29] EPCRA § 313(b)(1)(A), 42 U.S.C. § 11023(b)(1)(A) (emphasis added). This language lends support to the ALJ's approach of aggregating employees at the facility. However, we note that the title of section 313(b) is captioned "Covered owners and operators of facilities." This raises the question whether the interpretative focus should be on the "owners and operators" of the facility, as opposed to the "facility" itself. However, any ambiguity in this regard is resolved by the structure and context of the statute. First, as a matter of grammar, the "ten or more full-time employees" language in EPCRA section 313(b)(1)(A) modifies the word "facilities," rather than "owners and operators." Second, as explained earlier, under the definition of facility, proximately situated buildings owned or operated by persons under common control may constitute a single facility. *See Id.* § 329(4), 42 U.S.C. § 11049(4). Therefore, to give effect to the "common control" language in the definition of facility, the logical interpretation is to count the number of employees in the aggregate at the facility. Having concluded that Congress intended such a result, we are not free to disregard the terms of the statute it enacted into law.

At oral argument, counsel for CWPI directed the Board's attention to *Papa v. Katy Industries*, 166 F.3d 937 (7th Cir. 1999), as additional, controlling post-*Bestfoods* precedent. *See* Oral Arg. Tr. at 11. *Papa* involved the question of whether an employer with fewer than fifteen or twenty employees, and thus below the threshold for coverage by federal anti-discrimination laws, should be deemed

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[29] We note that the legislative history of EPCRA is silent with respect to the rationale for the ten-employee threshold.

covered because it is part of an affiliated group of corporations that has more than the aggregate minimum number of employees.

Although *Papa* at first blush appears relevant because it involves whether an entity has sufficient employees to be within the scope of coverage of the anti-discrimination laws, we conclude that it is not on all fours with the case before us. First, there is nothing to suggest that the *Papa* court was charged with interpreting a statutory term as detailed as, or otherwise similar to, the term "facility" at issue here.[30] Second, *Papa* also relies on the *Bestfoods* direct liability holding to conclude that "limited liability does not protect a parent corporation when the parent is sought to be held liable for its own act, rather than merely as the owner of the subsidiary that acted." *Papa,* 166 F.3d at 941. The *Papa* court, consolidating two appeals involving the same question, affirmed the district courts' decisions to dismiss the cases because there was "no suggestion that the parent * * * or the enterprise as a whole formulated or administered the specific * * * personnel actions, of which plaintiffs are complaining." *Id.* at 942. As we stated previously, the Region here was attempting to hold CWPI directly liable for section 313 reporting violations, not derivatively liable for violations committed by CCL, and it was not seeking to reach the assets of CCL at all. Thus, CWPI can neither rely on *Papa* nor invoke the limited liability protections of corporate law and *Bestfoods* to evade coverage under EPCRA section 313.

Ultimately, however, the outcome of this case turns not on the presence or absence of the requisite number of employees, but on another issue — whether the facility meets the EPCRA section 313 requirements for SIC code coverage. It is that issue to which we now turn.

2. *CWPI's Challenge to the Multi-Establishment Complex Regulation*

The second issue that CWPI raises on appeal concerns whether CWPI had fair notice of the Region's limiting interpretation of the multi-establishment complex regulation at 40 C.F.R. § 372.22(b)(3). As noted earlier, that regulation provides that a facility may satisfy the SIC code criterion of the regulations if the facility is a multi-establishment complex in which one of the following is true:

> (i) The sum of the value of services provided and/or products shipped and/or produced from those establishments that have primary SIC major group or industry codes in the above list [of covered SIC codes] is greater than 50 percent of the total value of services provided and/or

[30] Indeed, *Papa* acknowledges that a different statute might dictate a different result, but the anti-discrimination laws did not do so. *See* 166 F.3dat 941.

> products shipped from and/or produced by all establishments at the facility.
>
> (ii) One establishment having a primary SIC major group or industry code in the above list contributes more in terms of value of services provided and/or products shipped from and/or produced at the facility than any other establishment within the facility.

40 C.F.R. § 372.22(b)(3)(i)-(ii).

In essence, the position advanced by the Region in this case is that the only appropriate method for performing the comparative valuation contemplated by the regulations is the so-called "value-added" approach. By seeking to hold CWPI accountable for having failed to report, the Region maintains that at the time CWPI's reporting obligation accrued it should have known that the Region's value-added approach was the appropriate method for determining the comparative valuation. The value added method, as applied in this case, involves a calculation of the value of CWPI's wood-preserving services (i.e., the amount CCL paid CWPI to treat its raw lumber), and a comparison of that value to the value of CCL's service (i.e., the difference between the price of untreated wood plus wood treatment costs and the sales price of treated wood).[31] *See* Region's Br. at 16.

CWPI argues that the regulation does not provide adequate notice to the regulated community, as required by *General Electric Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995), of how to compute the "value of services and/or products shipped or produced," and thus does not restrict the range of available comparative valuation methodologies to the value-added method advanced by the Region. CWPI Br. at 20. Furthermore, CWPI claims that its total revenues method[32] reflects a reasonable interpretation of the regulation and exempts it from EPCRA reporting requirements. *Id.* at 21. CWPI also charges that the Agency failed to provide adequate guidance in this case as to how to calculate the "sum of services

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[31] By way of example, for 1996, the Region calculated the value of CWPI's services based upon the $775,877 that CCL paid CWPI for treating CCL's raw lumber. The Region calculated the value of CCL's treated wood ($5,147,216) by adding the raw lumber ($4,391,339) and the wood treatment service ($775,877). The Region then subtracted the value of CCL's treated wood ($5,147,216) from the wholesale price of the treated wood ($5,511,644) to obtain the value of CCL's wholesale treated wood service ($354,578). Thus, the Region concluded that CWPI's treatment service ($775,877) contributed more than 50 percent of the value of the facility's combined products and services ($775,877 + $354,578 = $1,130,455). Region's Br. at 16.

[32] A total revenues method, as described by CWPI, involves a calculation and comparison of the gross revenues of each establishment, based on 1996 income tax returns. *See* CWPI Br. at 21.

For 1996, CWPI asserts that its total revenue of $825,782 "effectively represented" the sum of the value of services provided and was far exceeded by CCL's total revenue of $5,511,644. *Id.*

provided and/or products shipped" by CWPI, and that the Agency's available guidance documentation on this issue is ambiguous. *Id.* at 21-22.

The Region, on the other hand, argues that its interpretation that the value-added method is the only acceptable comparative valuation methodology under 40 C.F.R. § 372.22(b)(3) is "not only readily ascertainable to the regulated community, but as the Presiding Officer found, is also a far more reasonable interpretation of the regulatory language than the meaning of value advocated" by CWPI. Region's Br. at 16. Furthermore, the Region argues that its guidance documents are not ambiguous, pointing to a document entitled "EPCRA Section 313 Questions and Answers Guide" and the preamble to the section 313 rules, 53 Fed. Reg. 4500, 4501-02 (Feb. 16, 1988). *Id.*

Because we find that CWPI did not have fair notice of the Region's interpretation of this regulation as it was advanced in this case, we reverse the ALJ's finding of liability and vacate the penalty assessed.

a. *The Region's Interpretation of the Regulation as Advanced in This Case Was Not Ascertainably Certain*

The Board has considered a variety of challenges to the Agency's enforcement of regulations based on claims that the regulated community lacked fair notice of the prohibited conduct. *See, e.g., In re Tenn. Valley Auth.* ("*TVA*"), 9 E.A.D. 357, 411-16 (EAB 2000), *appeal docketed,* No. 99-15936-E (11th Cir. Nov. 13, 2000); *In re V-1 Oil Co.*, 8 E.A.D. 729, 751-52 (EAB 2000); *In re B.J. Carney Indus.*, 7 E.A.D. 171, 195-96 (EAB 1997), *appeal dismissed*, 192 F.3d 917 (1999), *vacated as moot*, 200 F.3d 1222 (9th Cir. 2000).

As we observed in *TVA*, the Supreme Court has stated, "'[R]egulations affecting only economic interests must be sufficiently definite so that ordinary people exercising common sense know what they mean.'" *TVA*, 9 E.A.D. at 411 (quoting *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952)). The D.C. Circuit has further elaborated:

> [W]e must ask ourselves whether the regulated party received, or should have received, notice of the Agency's interpretation in the most obvious way of all: by reading the regulations. If by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainable certainty," the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.

General Elec. Co. v. EPA, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

In *TVA*, the Board examined *General Electric* and summarized our view of what is required for a regulation to provide adequate notice as follows:

> Significantly, providing fair notice does not mean that a regulation must be altogether free from ambiguity. Indeed, the case law shows that even where regulatory ambiguity exists, the regulations can still satisfy due process considerations. * * * Thus, the question is not whether a regulation is susceptible to only one possible interpretation, but rather, whether the particular interpretation advanced by the regulator was ascertainable by the regulated community.

TVA, 9 E.A.D. at 412 (citations omitted). There we concluded that TVA had fair notice of the agency's interpretation. *See id.* at 416 (finding that the agency's interpretation was "'ascertainably certain' from both the regulation's text and its context").

Therefore, our inquiry, consistent with *General Electric,* focuses on whether CWPI could have determined with "ascertainable certainty" the Region's approach in this case. For the reasons explained below, we conclude that it could not.

i. *The Regulatory Language Fails to Provide the Requisite Notice of the Region's Interpretation in this Case*

We begin our review by examining the applicable regulation. In our view, the text of the regulation sets forth no rule or combination of rules that either requires a value-added calculation, as the Region utilized, or expressly prohibits a total revenues analysis as presented by CWPI. The word "value" can be subject to a variety of definitions, and the regulation does not lay out the precise method for calculating value. In this regard, the language of the regulation can be interpreted in more than one way, and the Region conceded as much at oral argument. *See* Oral Arg. Tr. at 82, 107. Thus, while the regulation uses the term "value," it does not foreclose proof that the value of particular products or services can be measured by revenues.

It is true, as EPA argued at oral argument, *see id.* at 81, that a comparison should be made as to which of one or more establishments "*contributes more* in terms of value of services provided and/or products shipped from and/or produced at the facility," *see* 40 C.F.R. § 372.22(b)(3)(ii) (emphasis added), but this does not lead irretrievably to a value-added approach. Notably, the words "value-added" are not contained in the regulatory text, leaving room for calculations of value that otherwise fit within the scope of the regulations. The regulation

merely refers to "value of services provided," "value of products shipped," and "value of products produced."

In this case there is an additional level of complexity because CWPI must not only determine how to calculate value, but it also must determine whether, and how, to compare "products" (whether shipped or produced) to "services provided." The regulation uses the conjunctive "and/or," which is commonly used to indicate that either or both of the items connected by it can be involved. *See* American Heritage Dictionary of the English Language (4th ed., 2000). Thus, in the context of this case, we are faced with the question of whether the regulation calls for a "service" to "service" comparison (i.e., comparing the services provided by CCL and CWPI, respectively) or a "service" to "service and products" comparison (comparing the services provided by CWPI to the products and services provided by CCL). *See* Oral Arg. Tr. at 105. While the Region's approach was a "service" to "service" comparison, CWPI argued strenuously that CCL both produced or sold a product and provided a service (i.e., it acquired and prepared raw lumber for treatment and it shipped and sold a finished product). *Id.* at 105, 109-11; *see* C Ex. 7 ("Thus the value of services provided by [CWPI] are less than the value of the services and products supplied by [CCL].").

In light of the above, we believe the regulatory language alone fails to inform the regulated community of the Region's approach in this case. Given that the phrase "value-added" does not even appear in the text of the regulation, that the regulation is susceptible to more than one interpretation, and that on these facts considerable ambiguity or uncertainty existed as to how the regulation was to be applied, we conclude that something more was required to fully apprise CWPI of the value-added approach the Region used in this case.

ii. *The Agency's Public Statements Fail to Provide the Requisite Notice of the Region's Interpretation in This Case*

(a) *The Preamble to the Regulation*

We next consider whether the Agency's public statements available during the relevant time frame provide the requisite fair notice. First, at the Region's urging, we examine whether the preamble to the final 40 C.F.R. part 372 rules provides sufficient notice of the Region's approach. In particular, as cited in the Region's response brief, the preamble provides as follows in a section pertaining to SIC code coverage:

> [A] facility can be a much larger, more complex operation than an establishment. The definition of primary SIC Code is generally considered to be the code related to the

> types of products distributed from an establishment that have the highest dollar value added.

53 Fed. Reg. 4500, 4501 (Feb. 16, 1988). We are not persuaded that the mere mention of the words "value added" as quoted above provides the missing notice to the regulated community. While the term value-added does appear in the preamble, this discussion concerns what a primary SIC code is. It does not purport to represent how one calculates the value of products or services to determine if a multi-establishment facility satisfies the SIC code criteria of EPCRA section 313. Indeed, the discussion relevant to the calculation of value for multi-establishment facilities appears in a later part of the preamble. *See id.* at 4502; Oral Arg. Tr. at 89.

For example, in the part of the preamble that discusses calculation of value for multi-establishment facilities, the preamble provides:

> Facilities may refer to data they submitted to the U.S. Department of Commerce, Bureau of the Census, for the Annual Census of Manufacturers (Form MA-1000) to calculate the relative values of products shipped and/or produced.

53 Fed. Reg. at 4502.[33] However, nothing in the record before us indicates that either party used, or the ALJ relied upon, such information in this case. *See* Oral Arg. Tr. at 37, 90.[34] Accordingly, this reference in the preamble to an optional way a company can compute relative values of products shipped tends to convey flexibility and does not provide the requisite notice of the Region's particular method.

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[33] The record before us does not include the Form MA-1000 for the relevant time period. Thus we are unable to determine whether the Form MA-1000 contained appropriate instructions that would have put CWPI on notice of the Region's interpretation. A recent search of the Census Bureau on the World Wide Web revealed that the census Form MA-1000, as of October 25, 2001, gathers information titled, "Value of Products Shipped and Other Receipts" and instructs that "[v]alue should be net selling value f.o.b. plant after discounts and allowances. EXCLUDE freight charges and excise taxes." Instruction for Completing the Annual Survey of Manufacturers Report for 2001, at 8 (Oct. 9, 2001). Part I.C of the 2001 MA-1000 form does make reference to a value-added statistic "derived by the Bureau of the Census from the figures reported for value of shipments, cost of materials, and inventories." Without more, the reference to Form MA-1000 in the preamble to the final rule is not enough to obviate our fair notice concerns.

[34] There is no indication in the record that the Region either requested such information, *see* Hrg. Tr., Respondent's ("R") Ex. 2, considered such information, or utilized such information in its analysis of CWPI's coverage as a multi-establishment facility.

Significantly, our review of the preamble uncovered an important discussion of the value-added concept not cited to us by either party. Specifically, in a later discussion concerning the scope of facility coverage, the preamble provides as follows:

> EPA is planning to initiate an evaluation of facility coverage in 1988. * * * The results of this evaluation and any recommended additions or deletions to the scope of covered facilities will be published as a proposed amendment to this rule.
>
> As part of this analysis EPA will also look at the concept of value of products shipped and/or produced from designated SIC code establishments. Another potentially more equitable approach of determining multi-establishment facility coverage is by using "value added" instead of the value of products shipped and/or produced. The value added approach may create less distortion and duplication when comparing the contribution by individual establishments for the purposes of overall facility coverage determination. However, value added information may be less available and more burdensome to determine than value of shipments and/or production. EPA will review the first few years of reported data and attempt to evaluate how the value of shipments and/or products approach affects overall facility coverage.

53 Fed. Reg. at 4504.

This language strongly suggests to us that the Agency viewed the value-added approach as different from the one it promulgated in the form of value of products shipped and/or produced. At a minimum, based on this statement, it would be eminently reasonable for the regulated community to assume that a value-added approach had not been adopted in the final rule, and that additional notice would be forthcoming before such an approach was applied. We have examined subsequent *Federal Register* notices and have seen no indication, nor has any been cited to us, that such an approach was adopted in subsequent rule amendments. Thus, based on the preamble to the final rule, our fair notice concerns are substantially heightened, and the preamble does not supply the necessary fair notice in this case.

(b) *The Form R Instructions*

In our quest for public statements that would inform the regulated community of the Region's interpretation of the regulation, we also examined the

Agency's Form R instructions.[35] At the outset, we note that the Form R instructions for the 1996 and 1997 reporting years at issue here[36] were not part of the record.[37] The Region and the ALJ appear to have relied on a post-1998 reporting year Form R instruction to advance the value-added interpretation of the multi-establishment regulation. Our research reveals that the publicly available "Toxic Release Inventory Reporting Form R and Instructions" for the 1996 (EPA 745-K-97-001 (May 1997)) and 1997 (EPA 745-K-98-001 (Feb. 1998)) reporting years did not contain any reference to a value-added analysis. In fact, the first year that the value-added concept was included in the Form R instructions was the 1998 reporting year. *See* U.S. Environmental Protection Agency, EPA 745-K-99-001, Toxic Release Inventory Reporting Form R and Instructions for 1998 (Feb. 1999). In light of this information, we cannot conclude that the Region's interpretation was reasonably ascertainable in 1996 or 1997, the years that CWPI is being held accountable for reporting.[38]

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[35] At trial, the Region argued, and the ALJ agreed, that the regulatory provision at issue is informed by the Form R instructions. *See* Init. Dec. at 24; C Ex. 8 (undated portion of the Form R Instructions at 7-10). The Region also claims on appeal that "the methodology is spelled out in the Form R Instructions." Region's Br. at 16.

[36] The Region had charged CWPI with EPCRA § 313 reporting violations for the 1995, 1996, and 1997 reporting years. Complaint at 5-9. Count I, the 1995 violation, was dismissed upon the ALJ's finding that the Region failed to establish its prima facie case. Init. Dec. at 26.

[37] The Form R Instructions included in the record are undated, but appear to be 1998 or later. *See* Hrg. Tr., C Ex. 8.

[38] The Region also asserts that the value-added methodology was "derived from the Department of Labor SIC Manual." Region's Br. at 16. We note that the portions of the SIC Manual included in the record are undated. *See* Hrg. Tr., C Ex. 9.

The SIC Manual provides in relevant part:

> *Ideally*, the principal product or service should be determined by its relative share of value added at the establishment. In practice, however, *it is rarely possible to obtain this measure* for individual products or services; typically it is necessary to adopt some other criterion which may be expected to give approximately the same results * * * .

Hrg. Tr., C Ex. 9, at 15 (emphasis added).

We are reluctant to rely on such information as a statement of the Region's interpretation for several reasons. First, we cannot ascertain whether this document was available during the operational time frame to fairly apprise CWPI of the Region's interpretation. Moreover, even if we were to rely on the guidance in the SIC Manual, our reading of this additional guidance does not lead us to conclude that the regulated community was given fair notice of the value-added approach. The SIC Manual, rather than confirming that value-added calculations are required, instructs that such calculations are idealistic and that other gauges should be utilized. Furthermore, in describing alternate measures for services, the SIC Manual refers to "receipts or revenues." *Id.* at 16. Thus, the SIC Manual would not appear to foreclose the total revenues calculations conducted by CWPI and described *supra* note 32.

(c) *Other Guidance Documents*

Finally, the Region points to a guidance document entitled "EPCRA Section 313 Questions and Answers Guide" as supporting its value-added analysis as reasonably ascertainable. Region's Br. at 18. In particular, the Region argues that Question 72 of that Guide provided clear guidance to CWPI and the regulated community on how one determines a facility's primary SIC code.[39] As the Region admitted that this guidance was not made available until 1998, *see* Oral Arg. Tr. at 87, and in any event the document does not appear to be in the record, we do not rely on it here.[40]

Because the regulation is susceptible to more than one interpretation, leaving considerable ambiguity or uncertainty as to how the regulation was to be applied to these facts, and because the value-added methodology the Region used in

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[39] Question 72 provides:

> A *multi-establishment facility* grows wheat and mills it into flour. At the agriculture portion of the *facility*, all of the wheat grain is grown, harvested and placed into a silo. After leaving the silo, 20 percent of the wheat grain is sold, while the remaining 80 percent of the wheat grain is milled into flour and packaged. If the *facility* farms and sells more than it mills into flour and sells, is it a *covered facility*? What is the primary SIC code of this *facility*?
>
> In order to make the *facility* coverage determination, the *facility* must compare the relative value of products shipped and/or produced at the two different *establishments* (i.e., agriculture versus the flour processing). The value of the product produced at the agricultural *establishment* (SIC code 0111, not in a *covered SIC code*) is the market value of all the wheat grain harvested during the reporting year. The value of the product from the milling/packaging *establishment* (in SIC code 2041, a *covered SIC code*) is the value of the products shipped and/or produced minus the market value of the wheat grain used to produce the flour. In other words, you do not double count the value of the wheat grain as part of the value of the products from the flour processing operation. If the "value-added" of milled flour products is greater than the value of harvested grain, then the *facility's* primary SIC code would be within a *covered SIC code* and the facility would be subject to reporting under EPCRA Section 313.

U.S. Environmental Protection Agency, *EPCRA Section 313 Questions and Answers Guide* 21.

[40] The Question and Answer document appears to have been issued in December 1998, after the July 1998 due date for the 1997 reporting year. *See* Hrg. Tr., C Ex. 9. The Region also admitted that while there was an earlier version of this document available, it also was not in the record. Oral Arg. Tr. at 87-88. While the Region argued that the same information was available in the 1996 Form R instructions at page seven, in fact the information at page seven of the 1996 Form R instructions is not the same and does not even use the term "value added." In any event, the 1996 Form R instructions were not in the record.

this case was not reasonably ascertainable from the regulation and other publicly available guidance documents during the relevant time frame, we reverse the ALJ's decision in this respect.

III. *CONCLUSION*

For the foregoing reasons, consistent with *General Electric*, we reverse the ALJ's finding of liability and vacate the civil penalty assessed.

So ordered.