UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

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IN THE MATTER OF:	§	
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THOMAS PETROLEUM, LLC	§	
PILOT THOMAS LOGISTICS, LLC	§	DOCKET NO. EPCRA-06-2019-0501
	§	
	§	
RESPONDENT	§	

RESPONDENTS' PREHEARING EXCHANGE

Pursuant to 40 C.F.R. § 22.19(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules of Practice"), and to Administrative Law Judge Christine Donelian Coughlin's November 8, 2019 Prehearing Order (the "Order"), Respondents Thomas Petroleum, LLC ("Thomas", the "Company" or "Respondent") and Pilot Thomas Logistics, LLC ("PTL") hereby submit their prehearing exchange in the above-captioned matter as follows:

PILOT THOMAS LOGISTICS, LLC

Relying on Complainant United States Environmental Protection Agency's ("EPA" or "Complainant") "Clarification of Respondents" and stated plan not to pursue this matter against PTL, Respondents' Prehearing Exchange will not address matters related to PTL. Should Complainant not amend its Complaint and Notice of Opportunity for Hearing ("Complaint") to remove PTL, Respondent reserves its right to supplement this Prehearing Exchange in regard to PTL.

A. WITNESS TESTIMONY AND TIME NEEDED TO PRESENT THOMAS' CASE

The names of all expert and other witnesses intended to be called at hearing are as follows:

1. Blaine Zwahlen – Mr. Zwahlen will testify as a fact witness and an expert witness. Mr. Zwahlen's resume is attached as Attachment A.

Mr. Zwahlen is an independent technical consultant who has assisted in preparation of Toxic Release Inventory ("TRI") filings for industrial clients. Mr. Zwahlen will testify that he made calculations for Thomas' TRI filings for the years 2012 and 2013 and that some of his calculations were based on conservative assumptions that overestimated actual amounts of those chemicals. Mr. Zwahlen will testify that recalculation of chemical content using actual product content or more realistic estimates results in amounts of ethylene glycol significantly lower than initially reported in some cases, and amounts of zinc below reporting thresholds in some cases. Mr. Zwahlen will testify that nearly 90% of Thomas' TRI filings were on Form A and no corrections to such filings involved filing a Form R where a Form A had previously been filed.

2. Megan Zettlemoyer – Ms. Zettlemoyer will testify as a fact witness. Ms. Zettlemoyer's prior resume is attached as Attachment B and will be supplemented by her current resume.

Ms. Zettlemoyer was a member of Thomas' Health, Safety and Environmental ("HSE") Department in 2014 when the TRI filings at issue were made. Ms. Zettlemoyer will testify regarding Company operations and TRI filings for 2012 and 2013 at the 12 Region 6 facilities that are subject to the Complaint (collectively, the "Facilities"), complexities related to initiating TRI filings for same, the Company's efforts and its dedication of resources to be environmentally compliant before and after its acquisition in 2014, its dedication of resources to respond promptly and accurately to EPA inquiries, and expenditures made to assure compliance.

3. Mendi Martino – Ms. Martino will testify as a fact witness and will authenticate Thomas' documents. Ms. Martino's resume is attached as Attachment C.

4. Bryan Christian – Mr. Christian will authenticate documents and testify regarding the Company's commitment to environmental compliance after the 2014 acquisition. Mr. Christian will also testify that, except for some additional corrections to pre-acquisition filings where needed, Thomas' new owner was not involved in, and had no control over, the alleged violations since the alleged violations occurred prior to the acquisition. Mr. Christian's resume is attached as Attachment D.

B. EXHIBITS

Per the Order, Respondent must submit copies of any documents: (A) in support of the denials made in Respondent's answer; (B) in support of Respondent's asserted affirmative defenses; (C) that Respondent considers relevant to penalty assessment; and (D) that Respondent relies upon in support of penalty reduction or elimination. Thomas' denials in its Answer relate to two issues, neither of which Complainant, per its Initial Prehearing Exchange ("Prehearing Exchange"), intends to pursue: Complainant's allegations related to PTL, and certain 2013 naphthalene-related allegations involving EPA TRI guidance **(Prehearing Exchange pp. 5, 6 and 8)**. Accordingly, Respondent is not submitting any documents in support of denials made in its answer. Documents related to the other three categories are listed below:

RX 1	EPA Press Release dated February 4, 2014
RX 2	Ragna Henrichs Letter to James Murdock, EPA, dated September 8, 2016
RX 3	Dr. Wakeland Emails with Megan Zettlemoyer dated September 16, 2014
RX 4	2012 and 2013 TRI Submissions Chart
Rx 5	Thomas Petroleum Headcount
RX 6	*In re: DIC Americas, Inc.*, 6 E.A.D. 184, 1995 Westlaw 646512 at *4-5 (EAB 1995)
RX 7	*In re: Employers Ins. of Wausau*, 6 E.A.D 735, 1997 Westlaw 94743 at *15-16
RX 8	*In re: Steeltech, Ltd.*, 8 E.A.D. 55, 1999 Westlaw 673227 at *6 (EAB, 1999)
RX 9	*In re: Gilbert Martin Woodworking Co.* 2001 Lexis 27, *1 (EPA 2001)
RX 10	EPA Audit Policy
RX 11	*In re: GCA Chemical Corp.* 2002 WL 1472043 (EPA 2002)
RX 12	Blaine Zwahlen Letter to Thomas Petroleum LLC dated March 9, 2020
RX 13	DOJ Criminal Division - Evaluation of Corporate Compliance Programs (April 2019)
RX 14	Thomas Petroleum Code of Ethics and Business Conduct
RX 15	Thomas Petroleum Haul Safety Handbook
RX 16	Thomas Petroleum Zero Spill Product Transfer Prevention Checklist SOP
RX 17	EHS Policy – Environmental Sustainability
RX 18	EHS Policy – Ammonia Awareness
RX 19	EHS Policy – Benzene Awareness
RX 20	EHS Policy – Emergency Action Plan
RX 21	EHS Policy – Gas Hazard Procedures
RX 22	EHS Policy – Gaseous Chlorine Awareness
RX 23	EHS Policy – Transportation of Hazardous Materials
RX 24	EHS Policy – Naturally Occurring Radioactive Material
RX 25	EHS Policy – Non Hazardous Industrial Waste Management
RX 26	EHS Policy – Silica Awareness

RX 27	EHS Policy – Spill Response Protocol - Procedure

C. **APPROPRIATE PLACE OF HEARING; ESTIMATE OF TIME NEEDED TO PRESENT CASE; TRANSLATION SERVICES**

As noted in its Preliminary Statement, Respondent wishes for the hearing to take place in Fort Worth, Texas. Alternatively, Respondent proposes to have the hearing in Houston, Texas.

Respondent expects to need up to two days to present its direct case. Respondent will not require the services of an interpreter.

D. **EXPLANATION OF AFFIRMATIVE DEFENSES**

Respondent's affirmative defenses are discussed in the sections below, except that Affirmative Defense No. 2 is no longer applicable given Complainant's stated decision not to pursue the 2013 naphthalene-related allegations involving EPA TRI guidance. However, Respondent reserves the right to pursue Affirmative Defense No. 2 should Complainant not amend the Complaint to remove these allegations.

FACTUAL INFORMATION RELEVANT TO PENALTY ASSESSMENT

Thomas is dedicated to environmental compliance and expends substantial resources to achieve and maintain compliance. For instance, Thomas currently employs, and at all times relevant to this proceeding has employed (including in 2012 and 2013), an HSE department. This department is responsible for, among other things, maintaining compliance with environmental laws, including the Emergency Planning and Community Right-to-Know Act ("EPCRA"). Indeed, in 2012, 2013 and currently, Thomas has complied with non-TRI provisions of EPCRA, including completing Tier II reporting. The allegations in the Complaint generally involve small chemical quantities and small releases of air emissions.

Many years ago, Thomas analyzed whether TRI reporting was required for the Facilities and concluded that TRI reporting was not applicable. This singular determination affected all of the Facilities. When Thomas re-evaluated whether TRI filings should be made, it determined that TRI filings were appropriate for some of the Facilities, and timely filed for calendar year 2013 by the July 1, 2014 deadline. (CX 5). To achieve compliance, Thomas took what it logically believed was the proper course of action:

upon determining that filing was needed, Thomas focused its efforts on meeting the then-current filing deadline (July 1, 2014 for calendar year 2013). Thomas did not file for prior years, including 2012, because Thomas correctly understood EPA had already incorporated TRI data reports for 2012 and before into its annual TRI summaries published for those years and that filing late reports would serve no practical purpose. **(CX 5; RX 1,** press release documenting that the TRI report for 2012 was released on February 4, 2014; and **RX 2).** At that time, TRI reporting was being handled internally by Thomas' technical staff, who were unaware of the TRI Enforcement Response Policy ("ERP") regarding penalty assessment for prior years, or of the EPA Audit Policy.

It is uncontroverted that Thomas' discovered its singular error—the determination that TRI reporting was not applicable to the Facilities—on its own, and that no EPA investigation, inspection or enforcement of Thomas had been commenced or noticed. **Joint Stipulations of Fact and Law filed February 14, 2020** ("Stipulations") **p. 2.** EPA Region 6 became aware of this issue only when it found Thomas' first-time reporter status. ***Id.*** Thomas was then contacted by Dr. Morton Wakeland of EPA Region 6 on approximately September 4, 2014. **(CX 1)** Thomas strongly disputes Complainant's assertion in its Prehearing Exchange that Thomas "was not initially well prepared when contacted about the Tyler facility". **(Prehearing Exchange, p. 25)** Between September 4 and 15, 2014, Dr. Wakeland and Megan Zettlemoyer, then an employee in Thomas' HSE department[1], exchanged emails regarding the location of the Tyler facility and why the Tyler facility did not previously report. **(CX 2, 3).** Ms. Zettlemoyer, who joined the HSE department in 2014 after previously working with the Company's retail operations and who resided in Corpus Christi, Texas, not Tyler, understandably was not aware of the Tyler facility's latitude and longitude coordinates and could not instantly respond to questions on matters regarding which she had no involvement, such as why the Company initially determined TRI reporting was not required for the Tyler facility. Despite these limitations, she promptly responded to Dr. Wakeland's questions, often within hours to one day. ***Id.*** Ms. Zettlemoyer was polite and helpful in their communications, promising she was responding to Dr. Wakeland's questions

[1] Ms. Zettlemoyer is no longer with the Company.

as quickly as she could (*e.g.*, "I am gathering the data and will send it to you as soon as quickly [sic] as I can gather it.") **(CX 3, p. 2)**, and her prompt substantive responses were indicative of her efforts.

In light of documented efforts, Dr. Wakeland's email of September 17, 2014 is bewildering. In an earlier email dated September 16, 2014, Dr. Wakeland asked Ms. Zettlemoyer for the "specific reason why the [Tyler] facility did not have to report." **(RX 3)**. Ms. Zettlemoyer reasonably and correctly responded the following morning that she needed to research the answer because she was not in the HSE department at the time of the determination. ***Id.*** Ms. Zettlemoyer was given no time to complete this research because roughly 40 minutes later, Ms. Zettlemoyer received another email from Dr. Wakeland, who threatened a potential fine or imprisonment for up to five years for any false statements made to the federal government. ***Id.*** This unprovoked threat of criminal liability was bizarre and wholly uncalled for, as Thomas' and Ms. Zettelmoyer's actions provided no basis to believe that Thomas or any employee thereof intended to knowingly or willfully make any false statements. To the contrary, Thomas had identified the issue and initiated reporting on its own, and Ms. Zettlemoyer had helpfully written just 40 minutes earlier that she would "hopefully have an answer soon". ***Id.*** It was at this point that Ms. Zettlemoyer and Thomas' technical staff escalated the matter for legal input and learned of EPA's Audit Policy.

One day later, on September 18, 2014, EPA noticed an inspection of the Thomas Tyler facility for October 29, 2014. **(CX 4)**. On the same day, EPA sent a letter requesting TRI chemical usage and release calculations for all of Thomas' other Region 6 Facilities. **(CX 7)**. Thomas expended considerable resources responding to EPA's requests: preparing TRI filings for reporting years 2009-2012 for the nine facilities for which filings for reporting year 2013 had already been made (Damascus, Hobbs, Bridgeport, Robstown, LaGrange, Laredo, Odessa, Tyler and Victoria), and re-evaluating its conclusion that TRI reports were not required for Thomas' other Region 6 Facilities. **(CX 8)**. Thomas' applicability analysis, in particular its analysis related to employee headcounts, was complicated, and there was initially internal confusion about how to account for part-time employees, including truck drivers who may have worked out of multiple facilities and were sometimes paid by the load, not hours. When completing its filings for reporting year 2013, Thomas believed the number of full-time employees (as defined in EPCRA) at the Beaumont,

Broussard and San Benito facilities was below the TRI reporting threshold, but in re-evaluating the issue Thomas determined reporting was needed for these facilities. Thomas promptly commenced preparing TRI filings for reporting years 2009-2013. (***Id.* at, p. 2**). Thomas' significant efforts resulted in completion of the Tyler filings for reporting years 2009-2012 just two weeks later, on October 3, 2014. **(CX 5, CX 39, CX 40)**. All other filings for the Facilities were completed between October 22, 2014 and October 28, 2014. **(CX 19, CX 21-23, CX 25, CX 27, CX 29, CX 31, CX 33, CX 35, CX 37, CX 38, CX 41)**. In Thomas' rush to make the TRI filings, some mistakes were made but once identified, Thomas promptly corrected them. (*see, e.g.,* **CX 14, CX 15, CX 16,** and **CX 17**). The products Thomas processed had a relatively small percentage by weight of each subject TRI chemical and involved very small releases of air emissions. Indeed, approximately 90%[2] of the subject 2012 and 2013 filings were on Form A, which is indicative of the low levels of air emissions involved. **(RX 4)**. Particularly given the number of Facilities (12) and the number of chemicals at each Facility (up to 10) in generally small amounts, Thomas' significant efforts to initiate compliance voluntarily and to promptly correct non-compliance, as well as to cooperate and quickly respond to EPA's requests, were commendable. EPA has recognized that Thomas assisted EPA in its investigation and audit and that Thomas promptly filed TRI reports for prior years. **(Stipulations, p. 2)**.

In sum, it was Thomas, not EPA, that discovered the applicability of TRI filing requirements to the Facilities, and commenced TRI filings on its own initiative and not pursuant to any investigation or enforcement by EPA. When EPA made follow-up inquiries, Thomas promptly cooperated and undertook considerable efforts to quickly get into compliance, submitting all requested filings within just 34-40 days. **(CX 19, CX 21-23, CX 25, CX 27, CX 29, CX 31, CX 33, CX 35, CX 37, CX 38, CX 41)** Additionally, the allegations against Thomas are historical and are unlikely to recur. All of the allegations in the Complaint relate to alleged violations that occurred before Thomas was acquired in December 2014. Thomas has timely filed TRI reports since the acquisition, as well as promptly fixing any 2012 or 2013 TRI issues discovered following the acquisition. Further, the Hobbs and San Benito facilities closed in 2015 and 2016, respectively,

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[2] This number includes naphthalene, allegations regarding which are currently present in the Complaint.

and as of the date hereof, only four of the Facilities meet the TRI reporting threshold of 10 full-time employees. **(RX 5)**.

ARGUMENTS IN SUPPORT OF DOWNWARD PENALTY ADJUSTMENT

EPA has not yet identified a penalty amount. However, any proposed penalty based on rote application of the ERP would be excessive for a number of reasons, including (i) Thomas' voluntary initiation of TRI reporting, (ii) that a single analytical error (the determination TRI reporting was not required) impacted 12 Facilities, most for more than one year, (iii) the generally low releases of air emissions involved, (iv) that each facility had multiple chemicals, (v) the historical nature of the alleged violations, which all occurred under prior ownership, and (vi) TRI compliance since 2014 as well as historical and current environmental compliance programs. Though discussed below for completeness, application of the ERP adjustment factors would not result in a fair and just penalty in this case.

A. Application of the ERP Would Cause Manifest Injustice

1. The Environmental Appeals Board Has Authorized Deviation From the ERP

The Environmental Appeals Board has recognized that penalty policies such as the ERP are not rules subject to notice and comment. While a presiding officer must consider an applicable penalty policy (**40 CFR § 22.27(b)**), rigid application of such policies is not required, and the presiding officer is free to "deviate from it where circumstances warrant". ***In re: DIC Americas, Inc.*, 6 E.A.D. 184, 1995 WL 646512 at *4-5 (EAB 1995) (RX 6)**; *see also*, ***In re: Employers Ins. of Wausau*, 6 E.A.D 735, 1997 WL 94743 at *15-16 (EAB 1997) (RX 7)**. Moreover, extraordinary circumstances need not be present to warrant deviation from a penalty policy. ***In re: Steeltech, Ltd.*, 8 E.A.D. 55, 1999 WL 673227 at *6 (EAB 1999) (RX 8)**. In this case, deviation from the penalty policy is not only warranted, but necessary to avoid a manifest injustice.

Other presiding officers have accepted the Environmental Appeals' Board invitation to deviate from an applicable penalty policy in appropriate circumstances. For instance, in ***In re: Gilbert Martin Woodworking Co.***, Gilbert Martin Woodworking Company d/b/a Martin Furniture failed to file TRI reports for two facilities for three years. **2001 EPA ALJ Lexis 27, *1 (EPA 2001) (RX 9)**. The complaint against Gilbert Martin alleged eight violations, significantly fewer than the 135 allegations against Thomas. ***Id.*** Yet,

even with a small number of counts, the presiding officer concluded application of the ERP would result in an unfair penalty amount. ***Id.* at *13-14.** The presiding officer largely relied on Gilbert Martin's apparent independent discovery of the need for TRI reporting before EPA commenced an investigation, though none of the Form R's were submitted until *after* the company was contacted by EPA. ***Id.* at **13-14, 31.** That is, though Gilbert Martin may have discovered the issue, there was no voluntary initiation of reporting. Indeed, during EPA's initial telephone conference with the company's consultant, the consultant failed to disclose his knowledge that TRI reporting was required, despite apparently already knowing that it was. ***Id.* at *14.** The presiding officer cited Gilbert Martin's disclosure that another company facility that was not completing TRI reporting, the company's prompt submission of the TRI reports once contacted by EPA, and the company's steps to ensure future compliance, including no longer meeting the TRI thresholds that trigger a reporting requirement, as further support for deviating from the ERP. ***Id.* at **31-35.** The presiding officer ultimately decreased EPA's ERP-derived proposed penalty by nearly 75%. ***Id.* at **1, 35.**

The Thomas facts are far more compelling. First, Thomas also independently discovered the need to file TRI reports, but unlike in *Gilbert Martin*, Thomas initiated reporting *prior* to being contacted by EPA. Indeed, Thomas' actions fulfilled the spirit and most of the provisions of the EPA Audit Policy despite Thomas not being aware of the Audit Policy. For instance, the Audit Policy allows 60 calendar days to complete corrective action, and more if an extension is sought. **(RX 10).** Thomas completed its corrective measures well within the 60-day period, with all filings completed within 34-40 days, and the Tyler filings completed within just two weeks. **(CX 5, CX 19, CX 21-23, CX 25, CX 27, CX 29, CX 31, CX 33, CX 35, CX 37, CX 38, CX 41; RX 10).** Further, after re-evaluating its other Region 6 facilities, Thomas did not just disclose one additional facility, but three (Broussard, Beaumont and San Benito). **(CX 8, p. 2).** Moreover, as in *Gilbert Martin*, Thomas has taken steps to ensure environmental compliance, including employing a dedicated HSE department, engaging a consultant to complete its annual TRI reports and drastically decreasing the number of the Facilities subject to TRI reporting, from 12 to just four **(RX 5).** If application of the ERP in *Gilbert Martin* would have created a manifest injustice related to just eight counts, then application of the ERP certainly creates a manifest injustice related to the 135 counts alleged in this case.

Another example of a presiding officer deviating from an applicable penalty policy is ***In re: GCA Chemical Corp.***, a case that examined the Toxic Control Substances Act's ("TSCA") penalty policy. **2002 WL 1472043 (EPA 2002) (RX 11).** In *GCA Chemical*, the company did not complete required reporting. ***Id.* at *2.** As in this case, the failure to report was a circumstance Level 1 violation under the penalty policy. ***Id.* at *3.** In contrast, however, GCA Chemical did not discover the violation on its own, rather, EPA identified the reporting issue during an inspection. ***Id.* at *3.** The presiding officer took issue with the penalty policy's formulaic restrictions, stating that "robotically fill[ing] in the blanks on the penalty calculation worksheet" created an inequitable result. ***Id.* at *8.** Further, while acknowledging that the goal of a penalty policy "is to provide consistent enforcement", the presiding officer recognized that "the uniform application of a single penalty assessment methodology, regardless of the facts and circumstances of each case, can produce results contrary to the statutory criteria in a given instance". ***Id.* at *8.** Accordingly, the presiding officer undertook its own analysis of criteria enumerated in TSCA. ***Id.* at *9-13.** Unlike TSCA, Section 313 of EPCRA has no statutory criteria for assessing penalties, but presiding officers have looked to the TSCA factors examined in *GCA Chemical* to evaluate the efficacy of proposed TRI penalties. ***See, e.g., Gilbert Martin,* 2001 EPA ALJ Lexis 27 at *30.** The *GCA Chemical* presiding officer emphasized many factors favoring downward penalty adjustment from the penalty proposed under the penalty policy, including the company's cooperation and responsiveness, its general compliance with other applicable sections of TSCA, the lack of harm resulting from the company's failure to report, and the general efforts GCA Chemical took to comply, even though those efforts did not result in compliance until after EPA discovered the violation. ***Id.*** The factors examined in *GCA Chemical* are also relevant to Thomas, and are not adequately accounted for under the ERP, even if all adjustment factors are considered:

i. Thomas not only fully cooperated, but in contrast to *GCA Chemical*, also discovered the issue and initiated reporting on its own **(CX 5)**;

ii. Lack of harm is demonstrated by the very low releases of air emissions involved **(CX 19-CX 42, RX 4)** and Thomas' correct determination that since EPA published TRI data for 2012 before the

applicability of the TRI reporting requirement was discovered **(RX 1)**, reporting for 2012 would serve no practical purpose;

iii. Thomas has a long history of considerable efforts to comply with environmental laws, including employing an HSE department, developing and implementing numerous compliance-related policies and procedures, and hiring a consultant to assist with its TRI reporting obligations; and

iv. Similar to *GCA Chemical*, at the time of the alleged violations and currently, the Facilities have complied with other environmental laws, including other provisions of the relevant statute, EPCRA (i.e., completion of Tier II reporting).

The presiding officer in *GCA Chemical* ultimately reduced EPA's proposed penalty by over 80%. ***In re: GCA Chemical*, 2002 WL 1472043 at *1, 13.**

2. Use of the "Extent" Criterion Creates An Unreasonable Penalty Amount

Under the ERP, the gravity-based penalty is determined by the circumstances and extent of the violation. **(CX 46, p. 11)** Regarding extent, the ERP bases the penalty level on the chemical quantity and the size of the facility. ***Id.*** Primary emphasis is intended to be on the quantity. Indeed, the ERP states that "using the amount of the §313 chemical involved in the violation as the primary factor in determining the extent level underscore[s] the overall intent and goal of EPCRA §313 ...". ***Id.* at p. 12.** (emphasis added). In particular, under the ERP, EPA considers whether a facility manufactures, processes or otherwise uses 10 times or more of the threshold amount of a chemical. ***Id.*** Per the ERP, "[t]en times the threshold for distinguishing between extent levels was chosen because it represents a *significant* amount of chemical substance." ***Id. at* p. 13** (emphasis added).

Application of the penalty policy in this instance would result in a penalty far exceeding a reasonable or just penalty, because Thomas processed petroleum products with relatively small weight percentage amounts of each subject TRI chemical with very small releases of air emissions and no releases to other media. In fact, Thomas was eligible to file roughly 90% of the chemicals[3] as a Form A annual certification, rather than on Form R **(RX 4)**. The Form A alternative to filing a Form R was developed specifically for

[3] This number includes naphthalene, allegations regarding which are currently present in the Complaint.

facilities that EPA recognizes involve "a *low* annual reportable amount of a listed toxic chemical". **(CX 47, p. 1)** (emphasis added). Further, most of the counts involve far less than 10 times the threshold amount of the reportable chemical: approximately 44% of the counts involve chemicals where Thomas' reported amount was less than three times the applicable reporting threshold and nearly 70% were less than half the threshold that EPA considers significant under the ERP.[4] **(CX 19-42)**. Accordingly, application of the ERP in this case would place disproportionate emphasis on the Company's large size. Thomas' single error—wrongly determining TRI reporting was not needed—affected 12 facilities, each with a number of reportable chemicals, but typically involving small quantities and very small releases to air.

The *In re: Trinity Indus. Inc.* case is instructive. **2002 WL 826938 (EAB 2002)** In contrast to Thomas, the violations in *Trinity* were discovered only after EPA initiated an investigation—there was no discovery or disclosure by Trinity. ***Id.* at *6**. The presiding officer concluded application of the ERP would result in a penalty that was "arbitrary and capricious" and that deviation from the ERP was appropriate. ***Id.* at *16**. The presiding officer's analysis largely focused on the low quantities of chemicals involved and the unfairness that would result from applying the extent criterion when the chemical usage averaged approximately 3.3 times the reportable amount.[5] ***Id.* at *17-19**. Similarly, in this case, Thomas' reportable amounts were typically far below the 10 times threshold. **(CX 19-42)**. In *Trinity*, the presiding officer ultimately decreased EPA's proposed ERP-generated penalty amount by approximately 60%. ***In re: Trinity Indus. Inc.* 2002 WL 826938 (EAB 2002) at *1.**

3. The ERP Adjustment Factors

As Complainant has not identified a proposed penalty in the Complaint or in its Initial Pre-Hearing Exchange, discussion of actual numbers by Respondent is not possible. However, given the volume of counts, it is clear that rote application of the ERP, including its adjustment factors, would result in a manifest injustice:

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[4] This number includes naphthalene, allegations regarding which are currently present in the Complaint.

[5] In *Trinity*, the reportable quantity was 10,000 lbs., and the chemical usage averaged 23,000 lbs. above that amount, or 33,000 lbs. The penalty ERP states, "[F]acilities which manufacture, process or otherwise use ten times or more than the threshold of the § 313 chemical involved…". **(CX 46 p. 12)**. Trinity's average 33,000 lb. chemical usage is 3.3 times the 10,000 lbs. reportable quantity in that case.

an excessive penalty grossly disproportionate to an equitable amount for Thomas' noncompliance. Nonetheless, preliminary discussion of the adjustment factors is appropriate.

Voluntary Disclosure

The ERP establishes two penalty reductions for voluntary disclosure, a fixed 25% reduction and a second reduction of up to 25% for meeting certain enumerated criteria **(CX 46, p. 17)**. Strict adherence to the ERP voluntary disclosure criteria has not been required by the Environmental Appeals Board. In *In re: Steeltech, Ltd.*, the company received a 42% reduction for voluntary disclosure even though *none* of the violations was voluntarily disclosed, and the TRI reporting violations were not discovered by the Company at all, but during an EPA inspection. ***1999 WL 673227 at *10***. Indeed, the violations deemed "voluntarily disclosed" were not disclosed by Steeltech until after the initial complaint was filed. ***Id.*** EPA, in its enforcement discretion, still allowed a 35% reduction for voluntary disclosure, which the presiding officer increased to 42% based on Steeltech's meeting several of the enumerated criteria for the second 25% reduction. ***Id.* at *10-11**. The Environmental Appeals Board subsequently upheld the presiding officer's penalty assessment. ***Id.* at *15**. Accordingly, Thomas' actions need not strictly conform to the ERP to qualify for the full 50% voluntary disclosure reduction, and Thomas should be granted the entire reduction.

The purpose of the ERP is "to distinguish between those facilities which make an immediate attempt to comply with §313 as soon as noncompliance with §313 is discovered and those which do not." **(CX 46, p. 18)**. Thomas timely filed 2013 TRI reports after discovering its mistake **(CX 8)**. Indeed, not only did Thomas discover its error and initiate reporting **(Stipulations)**, but Thomas completed reporting of four additional years (2009-2012) for 12 Facilities and numerous chemicals within just 34-40 days **(CX 19, CX 21-23, CX 25, CX 27, CX 29, CX 31, CX 33, CX 35, CX 37, CX 38, CX 41)**, and the Tyler reports for all years were submitted even sooner, within just two weeks. **(CX 5)**. Comparison to the EPA Audit Policy for voluntary disclosure is appropriate, and this time frame is well within the 60 days for corrective action allowed under that policy, which authorizes up to a 100% reduction off the gravity-based penalty. Completing these filings was challenging, and Thomas dedicated significant efforts to this task. Thomas has also undertaken concrete actions to ensure future compliance at the Facilities, including engaging an environmental consultant

to complete TRI reporting, which is one of the examples in the ERP **(CX 46, p. 18)**, and lowering the number of employees at two-thirds of the Facilities to below the 10 employee reporting threshold **(RX 5)**. As further evidence of the actions taken to achieve compliance, there have been no alleged TRI violations at the Facilities since Thomas was acquired in December 2014. Lastly, as recognized by EPA, Thomas has no history of prior violations. **(Prehearing Exchange, p. 25)**. Thomas' compliance efforts merit the full amount of the 50% voluntary disclosure reduction.

Attitude

Under the ERP, the downward penalty adjustment for attitude has two components, cooperation and compliance, and an adjustment of up to 15% can be made for each component, for a total of 30%. The first component, cooperation, relates to the "cooperation extended to EPA throughout the compliance evaluation/enforcement process or the lack thereof". **(CX 46 at p. 21)** Factors include cooperation during the inspection and preparedness for it, allowing EPA access to records, the facility's responsiveness and speed of providing documents requested by EPA during or after the inspection, and the company's cooperation and preparedness during the settlement process. ***Id.*** Thomas deserves the full 15% available under the cooperation component. It is uncontroverted that Thomas was prepared for the Tyler facility inspection, that Thomas fully cooperated with the inspection and EPA's desk audit of the other facilities, that Thomas has allowed access to its records, and that Thomas has expeditiously responded to all of EPA document requests and questions. **(Stipulations, p. 2; Pre-Hearing Exchange at p. 25-26)**. Further, Thomas refutes any assertion of ill-preparedness related to EPA's initial inquiries regarding the Tyler facility. As discussed in the factual section above, Ms. Zettlemoyer responded to Dr. Wakeland within hours or days. **(CX 6, p. 6)**.

The second attitude component, compliance, relates to a facility's good faith efforts to comply with EPCRA and the speed and completeness with which it comes into compliance. Thomas' timely initiation of TRI reporting for calendar year 2013 **(CX 8)** evidences its good faith effort to comply, and the fact that Thomas completed all filings for all chemicals and all facilities for reporting years 2009-2012 within just 34-40 days (and for the Tyler facility, within just two weeks) shows that Thomas came into compliance with both speed and completeness. **(CX 5, CX 19, CX 21-23, CX 25, CX 27, CX 29, CX 31, CX 33, CX 35, CX**

37, CX 38, CX 41) (RX 10). Further, any reporting errors—some of which were internally discovered by Thomas—were promptly corrected by Thomas. **(CX 8, pp. 2, CX 15, CX 17).** Accordingly, Thomas deserves the full 15% available under the compliance component, and a total attitude downward adjustment of 30%.

Other Factors As Justice May Require

Under the ERP, an additional reduction is allowed for "other factors as justice may require". For the reasons previously discussed herein and additional reasons discussed below, penalty policy deviation is needed in the interests of justice.

First, the amounts of chemicals subject to reporting were even smaller than initially reported. In furtherance of making filings as promptly as possible, Thomas' consultant conservatively estimated product content in several cases. **(RX 12).** Chemical content for ethylene glycol and for zinc compounds has been recalculated based on the actual chemical reported concentrations from respective Safety Data Sheets ("SDS"), in products or more realistic content estimates. ***Id.*** Based on these recalculations, in addition to the information previously provided to EPA regarding reporting ethylene glycol for the Robstown and Broussard facilities (see **RX 2**), ethylene glycol which was reported on Form R at Hobbs (2013), Laredo (2013) and Victoria (2013) was actually present in volumes that qualified for reporting on Form A. In addition, reports for zinc compounds were not required at all for Victoria (2012), LaGrange (2012), Laredo (2012), Odessa (2012), Hobbs (2012), Tyler (2012), Damascus (2012), Bridgeport (2012), Broussard (2012 and 2013), Beaumont (2012 and 2013) and San Benito (2012 and 2013) because zinc compound volumes were actually below the reporting threshold (**RX 12**).

Further, the focus of the ERP and its language concentrates on violations related to Form R filings. Perhaps due to the very small air emissions involved in Form A reports, the ERP does not mention Form A except to address instances where a Form A filing should have been on Form R **(CX 46, p. 26)**, a circumstance not at issue in this proceeding. Accordingly, in the interest of justice, the ERP is an inadequate guide for analyzing Thomas' alleged violations.

Also noteworthy, Thomas was acquired in December 2014. None of the allegations in the Complaint relate to Thomas' actions under its current ownership.

Lastly, the U.S. Department of Justice ("DOJ") Criminal Division has formulated guidance for the evaluation of an entity's corporate compliance program in determining an appropriate monetary penalty, "if any". **(RX 13)**. Though not directly applicable to civil matters, if consideration of a corporate compliance program is appropriate to achieve justice in penalty determinations in criminal cases, then it certainly should be an appropriate consideration in administrative enforcement actions. If such consideration can result in no penalty in a criminal case, this factor should bear no less weight in an administrative or civil enforcement case. Thomas operates under an extensive and effective corporate compliance program that includes numerous policies and practices that are circulated to Thomas facilities to foster environmental compliance and enhancement. Respondent's exhibits **RX 14-27,** are a sampling of the over 80 such protocols developed both prior to and after Thomas was acquired in 2014. These procedures often include a call for training on the subject matter. The Company's attention to compliance based on these programs is effective, resulting in consistent compliance since Thomas' acquisition.

CONCLUSION AND RESERVATION OF RIGHTS

In sum, environmental compliance is of utmost importance to Thomas, and Thomas dedicates significant resources to this effort. Thomas initiated an evaluation and determined on its own that TRI reporting is required for the Facilities, and Thomas promptly commenced reporting once that determination was made. There was no EPA inspection, investigation or enforcement ongoing or noticed at that time. The vast majority of chemical releases to air involved are low, and Thomas was eligible to file them on Form A. Moreover, most of the chemical quantities are less than half the 10 times reporting threshold that EPA has identified as indicative of a significant chemical amount. For these reasons and the others discussed herein, Thomas urges that no penalty be assessed, or alternatively a substantial penalty reduction and deviation from the ERP.

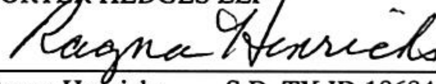
Respondent respectfully reserves the right to call all witnesses called by Complainant, to recall any of its witnesses in rebuttal, and to modify or supplement this Prehearing Exchange, the exhibits and the names

of witnesses prior to the Adjudicatory Hearing pursuant to 40 C.F.R. Part 22, and upon adequate notice to Complainant and the Presiding Officer.

DATED: March 10, 2020

Respectfully submitted,

PORTER HEDGES LLP



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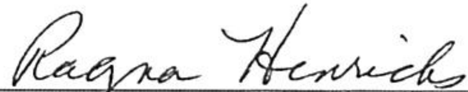
ATTORNEY FOR RESPONDENTS
THOMAS PETROLEUM, LLC
PILOT THOMAS LOGISTICS, LLC

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2020, the Respondent's Prehearing Exchange was filed with the OALJ E-Filing System.



Ragna Henrichs

ATTACHMENT A
Statement of Qualifications for Blaine R. Zwahlen, P.E.

Registered Professional Engineer in Utah, Wyoming, Nevada, Idaho and California with the following qualifications:

EXPERIENCE:

Z Engineering and Environmental Services, Inc., Established Sept. 1999

Position: President and Owner

Scope: Provide engineering and environmental services to industry.

Accomplishments:

- Providing environmental compliance services to industry including Air Quality, Hazardous Water, Water, Groundwater, Oil Pollution Prevention, Toxic Release Inventory, SARA Community Right-to-Know, etc.
- Developed and certified SPCC and Facility Response Plans for many facilities throughout the United States.
- Completed Phase I and Phase II Environmental Site Assessments. Completed course for Environmental Property Assessor with the National Registry of Environmental Professionals.
- Conducted Process Safety Management (PSM) Audits and Industrial Safety Training to help clients comply with OSHA regulations.
- Provided process-engineering support for large engineering and construction company.

Quaker State Resources/Genesis Petroleum

Position: Plant Manager.

Responsibilities: Manage the operations and maintenance of a new technology used oil re-refinery.

Scope: Work encompassed all necessary phases to manage the facility and solve problems associated with the plant including:

- Direct operations to optimize the production of specified oil.
- Manage environmental compliance and reporting.
- Plan and arrange all plant maintenance.
- Employee management including scheduling, training, disciplining, interviewing and hiring new employees.
- Develop and implement safety policies and training.

Accomplishments:

- Started up a new technology re-refining plant and successfully made useful products from used oil.
- In addition to management responsibilities I worked as an environmental consultant for Pennzoil-Quaker State Company, to review site assessments, prepare SPCC plans, solve underground storage tank issues, conduct environmental audits, and assist in "Right-to-Know" reporting and compliance.

Big West Oil Co./Flying J Refinery

Position: Superintendent of Maintenance and Engineering.

Responsibilities: Managed the maintenance and related engineering for the entire petroleum refinery.

Scope: Work included all maintenance management of the process units, wastewater system, tank farm, loading and unloading docks, and buildings. Specifically:

- Managed maintenance supervisors and all maintenance employees.
- Arranged and supervised maintenance contractors.
- Planned and managed the plant turnarounds.
- Managed the maintenance portion of the refinery Process Safety Management (PSM) program.
- Prepared bid packages and work scopes for all maintenance-related projects and many new projects.

Accomplishments:

- Successfully planned and managed plant turnarounds so that each turnaround was completed ahead of schedule and under budget.
- Prepared and implemented the maintenance section of the Process Safety Management (PSM) program and assisted in the completion of the entire refinery PSM policy.

ATTACHMENT A

Big West Oil Co./Flying J Refinery

Position: Environmental Engineer

Responsibilities: Perform the necessary environmental engineering to keep the refinery and Flying J Travel Plazas in compliance with applicable environmental regulations.

Scope: Work encompassed engineering for air quality, water quality, and hazardous waste compliance including:

- Managed regulatory compliance and reporting.
- Field sampling of refinery groundwater wells.
- Monitoring of facility pollution control equipment.
- Managed hazardous waste issues.
- Address Underground Storage Tank (UST) issues.

Accomplishments:

- Managed the closure of the refinery Land Treatment Area.
- Supervised the closure of three wastewater ponds.
- Provided management for environmental projects at Flying J refining facilities in Cody Wyoming, Cut Bank Montana, and Williston North Dakota.
- Helped management stay up to date with environmental regulations associated with industry including RCRA, SARA, NESHAPS, NPDES, OSHA, and OPA.
- Worked to help Flying J manage the under ground storage tank program for their entire travel plaza network.

Big West Oil Co./Flying J Refinery

Position: Process Engineer

Responsibilities: Provided process engineering for all refinery units to improve operations and optimize production. Units worked in include Crude unit, Gas Plant, Vacuum unit, Reforming and Hydrotreating unit, Thermal Catalytic Cracking unit, Hydrofluoric Acid Alkylation unit and a HDS facility.

Scope: Work included the application of a variety of engineering disciplines such as:

- Heat and material balances.
- Equipment specification and design.
- Provided process simulation information for the refinery with the use of HYSIM.
- Unit modification studies.
- Process optimization activities.
- Worked with consulting engineers as the refinery liaison for projects that required outside engineering.
- Prepared isometric drawings for many of the refinery mechanical projects.

Accomplishments:

- Project manager for the construction and start up of a refinery gas plant, a wastewater treatment plant and a new loading dock.
- Successfully completed notable courses on refinery engineering, refinery inspection, and Catalytic Reforming.
- Completed two courses on HYSIM process simulation.
- Successfully completed the Reno Fire Fighting School for refineries.
- Completed safety training in all aspects related to refining.
- Haz-Mat certified and CPR certified.

NOTABLE: Registered Professional Engineer in Utah, Wyoming, Nevada, Idaho and California
Certified Environmental Manager (CEM) in State of Nevada.
Possesses excellent computer skills with experience using spreadsheets, Access database, Autocad, Basic programming and Hysim/Hysis process simulation.

EDUCATION: Bachelor of Science, Chemical Engineering, 1986 University of Utah

ATTACHMENT B

Megan Zettlemoyer

909 Santa Fe
Victoria, Texas 77904
Phone: (281)323-9561
Email: meganzettlemoyer@sbcglobal.net

OBJECTIVE

To obtain a position that requires strong leadership and communication skills.

QUALIFICATIONS

I am a quick learner and enjoy learning new aspects of a company. I am an independent worker, but also enjoy working with other individuals. Strong communication and leadership skills are important to me in a working atmosphere.

EDUCATION

August 2000-December 2000	Montgomery College
January 2001-December 2001	Blinn College
January 2002-December 2002	Texas A&M University

EMPLOYMENT

November 2009 - November 2010 Service Manager, Wells Fargo

Managed the teller services function to ensure prompt and efficient transaction processing and the generation of sales through quality referrals. Established sales referral and service goals. Created, trained and coached a successful service and referral team. Responsible for effective staff salary administration and rewards. Responsible for scheduling staff efficiently to maximize resources and achieve service and sales goals. Ensured compliance with audit and operational regulations and guidelines.

September 2008-November 2009 Banking Officer, Prosperity Bank

Helped supervised operations and personnel administration for the Banking Center. Ensured all employees were following compliance. Coached employees daily to ensure career development. Pulled daily reports to ensure branch was meeting goals. Made sure all customers were satisfied with banking experience. Acted as the Lobby Manager in absence of the manager. Interviewed loan applicants and completed loan applications. Evaluated credit data, cash flow, financial statements, and collateral to determine the credit worthiness of applicants. Reviewed loan renewal requests to ensure continued credit worthiness of the applicant and timely payment of the loan. Prepare documents for loan processing to include the loan worksheet, loan documentation sheet and loan review sheet. Responsible for accurately closing the loans. Service the loan from loan closing to the date of loan payoff. Ensure customer satisfaction throughout the life of the loans, resolving problems as they arise. Monitor the past due list to ensure that loans are paid on a timely basis. Contact and counsel customers with delinquent accounts as necessary by phone or letter to arrange loan payment.

April 2004-July 2006 Assistant Manager, Washington Mutual

Supervised sales, operations, and personnel administration for the Financial Center. Ensured all employees were following compliance. Coached employees daily to ensure career development. Pulled daily reports to ensure branch was meeting goals. Helped organize and speak at branch meetings monthly. Originated and sold consumer and business lending applications. Ensured branch was meeting sales goals. Made sure all customers were satisfied with banking experience. Acted as the Financial Center Manager in absence of the manager.

ATTACHMENT B

August 2003-April 2004 — Front Desk Supervisor, Spring Klein Vision Center
Handled all major vision insurance billing and coding. Filed claims with attention to detail. Helped optician with dispensing of glasses making sure patient was satisfied. Answer multi line phone in a friendly manner.

January 2003-August 2003 — Secretary, Vogel and Associates, Inc.
Handled all incoming calls in an extremely fast paced environment. Insured a detailed follow up system to insure complete satisfaction of all customers. Generated very detailed proposals for clients.

May 2002 August 2002 — Summer Internship, The Apex Group, Inc.
Answered phones in a friendly and considerate manner. Researched and helped put together presentations for major companies including Mercedes Benz, Jaguar, etc. Assisted in training new employees.

May 2001-August 2001 — Teller, Aggieland Credit Union
Balanced drawer on a daily basis. Had the responsibility of posting debits and credits. Made money orders and cashier's checks. Accurately handled large amounts of cash. Answered the phone in a courteous manner.

May 2000-January 2001 — Teller, Klein Bank
My responsibilities were the following: balanced drawer daily, posted debits and credits, made money orders and cashier's checks, accurately handled large amounts of cash. Balanced ATM machine on a daily basis, and helped balance the main vault.

VOLUNTEER HISTORY

May 2000 August 2007 — Volunteer, Colin Powell Elementary
Read to the students and helped assist teacher.

February 2007- Current — Volunteer, All Texas Dachshund Rescue
Take adoption applications from the internet. Contacted and interviewed clients interested in adopting a dachshund. Insure all dogs get a great home.

COMPUTER SKILLS

Adobe PageMaker
Adobe Photoshop
Microsoft Access
Microsoft Excel
Microsoft PowerPoint
Microsoft Money
Microsoft Word
Microsoft Works
QuickBooks Pro 2003

ATTACHMENT C

Mendi Martino
222 Richter Road
Inez, TX 77968
Ph: 361.935.7426 * Email: mmartino@clthomas.com
LinkedIn: https://www.linkedin.com/in/mendi-martino-82a11745/

Human Resource Professional

Respected HR Business Partner with 20+ years of progressive, exempt and non-exempt level HR experience. I am intentionally engaged with employees at every level and known for consistently responding to organizational needs with highest urgency. I have a strong work ethic and continuously promote a high-trust, collaborative team environment.

Core Competencies

Employee Relations * Performance Management * Salary Administration * HR Best Practices * Investigations & Conflict Resolution * Staff Coaching & Mentoring * Change Management * Policy Creation, Revision & Interpretation * State & Federal Employment Law * Organization Effectiveness * Process Optimization * Union Avoidance

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Professional Experience

C.L. Thomas, Inc. – March 12, 2016 through Present
Talent Manager

Collaborating with Department Managers to develop and execute plans for enhancing talent within the organization. Providing consultation on all phases of talent management – for example: succession planning, assessment, talent pipelines, selection processes, etc.

Over the course of my employment with C.L. Thomas, Inc., I have also served as the Company Representative in legal matters. While my position is Talent Manager, my job duties have often been focused on legal matters. I have conducted extensive research, steered investigations, interviewed subjects and documented these interviews, created and maintained wide-ranging chronologies, assisted in writing affidavits, fulfilled requests for production and have, in general, worked extensively with legal counsel.

Pilot Thomas Logistics, LLC - December 1, 2014 through March 11, 2016
Director of Field HR

On December 1, 2014, Thomas Petroleum LLC merged with Pilot Logistics to become the leading provider of fuel, lubricant & chemical solutions to the North America energy, mining & marine industries. As a tenured HR Manager with Thomas Petroleum at the time, I was promoted to the Director of Field HR position for the newly merged Company of approximately 5000 employees.

Key achievements:

- Managed a staff of 5 Field HR Managers that were responsible for all daily employee relations issues while also personally handling all HR matters for the South Texas Region.
- Developed a collaborative HR team focused on customer service delivery in a very fluctuating and demanding market.
- Established strong relationships throughout entire Company to support business needs.
- By utilizing best practices and versions of former policies & procedures from both legacy companies, assisted in the creation of an employee handbook that was an easily accessible guide to the company's policies.
- Company representative in legal matters – Lawsuits, EEOC charges & DOT complaints.

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- Member of the design and implementation team for new HRIS system (Workday).

Thomas Petroleum, LLC - March 9, 2005 through December 1, 2014
Employee Relations Manager

This was an organic growth position charged with establishing an HR partnership with all terminals across the nation. At the time I began with the Company, there were 11 total terminals in Texas, New Mexico and Louisiana. Over the next nine years, through acquisitions and grass-root start-ups, the Company had expanded to 40 terminals nationwide.

Key achievements:

- Established strong rapport & developed working partnership between HR & Terminal Management by consulting with and providing guidance on a daily basis.
- Policy & procedure development & implementation. Additionally, ensured ongoing employee compliance.
- Assist & provide guidance, and in many cases, carry out disciplinary action notices and/or employee terminations when warranted.
- Employee complaint investigation and successful resolution according to Company policy.
- Participate and assist as needed in legal issues – formal responses to EEOC charges & lawsuits.
- Between 2006 & 2011, in addition to HR, I was personally responsible for all recruiting efforts of management & higher level positions and oversaw the recruiting of supplemental warehouse positions & drivers.
- Between 2011 & 2015, acquired and managed a staff of 7 Recruiters & Recruiting Coordinators to sustain significant staffing requirements.

Inteplast Group, Ltd. April, 1992 thru February, 2005
Human Resources Administrator

Key achievements:

- Salary Administration – solely responsible for annual evaluation and merit increase process for ~800 hourly and ~400 salaried employees. Ensured that all reviews were accomplished according to policy and then processed timely.
- Benefit Administration – assist in the enrollment process for medical/dental insurances; 401k; Flexible Spending Account; FMLA; Short Term Disability, etc.
- Complaint Resolution – responsible for the investigation & successful resolution of complaints according to Company policy.
- Miscellaneous responsibilities – delegated responsibility for HR department in Manager's absence; assisted in the writing & implementing of policies; training supervisors on HR policies/procedures; process all unemployment claims and represented the Company in hearings when necessary; processed payroll for 400 hourly employees and 60 salaried employees when needed for vacation relief.

Education

- **Associate of Applied Science Degree** – Wharton County Junior College – 1990
- **High School Diploma** – Industrial High School – 1988

Professional HR Affiliations

Society of Human Resources Management (SHRM) – Member of local and national chapters.
South Texas Society of Human Resources Management (STSHRM) – Currently serving as Secretary

ATTACHMENT D

Bryan K. Christian
2520 21st Ave, APT 4
Parkersburg, WV 26101

Cell: 304-550-1724
Email: bryan.christian@live.com

Pilot Thomas Logistics, Fort Worth, TX

August 2015 to Present — Environmental Compliance Manager
January 2013to July 2015 — Regional EHSS Manager
May 2010 to December 2012 — EHSS Specialist

Responsible for environmental, health, safety and security (EHSS); duties include, but not limited to development of policies, procedures, best practices, and training curriculum. Ensured regulatory compliance with respect to regulatory agencies, such as: DOT, MSHA, OSHA, DEP, EPA; state and local agencies; and internal policies. Assisted company to operate within regulatory requirements in an effort to reduce liability, accidents, injuries and product loss and maintaining environmental stewardship.

RJ Recycling, LLC Nitro, WV

March 2008 to May 2010 — Transportation Manager

Responsible for the inbound and outbound movement of metal scrap for three locations by truck, rail, and barge. Managed the use of internal employees as well as outside contractors; duties include, but not limited to: safety, dispatching, routing, customer service, inventory, compliance with federal DOT, state, and local regulations, fleet management and the supervision and management of thirteen (13) and one (1) mechanic.

Rite Aid Corp. Distribution Center, Poca, WV

August 2006 to March 2008 — Dispatch Supervisor

Responsible for the on time delivery of retail and pharmaceutical merchandise in a safe and efficient manner; some of these duties included are, but not limited to: safety, dispatching, routing, inventory, cube factoring, payroll, internal and external audits, compliance with federal DOT, state, and local regulations, fleet management and the supervision and management of seventy (70) drivers.

Infinity Transport Inc. Charleston, WV
Dba Market Transport Services, a UTI company (Corporate Medford, OR)

April 2006-October 2006 — Carrier Relations and Freight Movement

Provided the service to carrier of finding freight to fill empty lanes as well as front and back haul lanes while offering competitive rates to customers; assisted in office operations and sales as needed.

Central Transport International Inc. (Corporate Warren, MI)

June 2005-April 2006	Terminal Manager	Dunbar, WV
Jan 2005-May 2005	Operations Manager	Dunbar, WV
Dec 2004-Jan 2005	Account Executive (Sales)	Dunbar, WV
Apr 2004-Nov 2004	Terminal Manager	Oak Hill, WV
Apr 2004-Nov 2004	Account Executive (Sales)	Oak Hill, WV
June 2003-Mar 2004	Operations Manager	Oak Hill, WV
Mar 2003-May 2003	Dock Supervisor	Oak Hill, WV

Duties included the pickup and delivery of general commodities for a common carrier. Tasks and skills included but were not limited to dispatching, customer service, budgeting, sales, forklift operations, safety, claims, supervision, managing and general administrative tasks.

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Bryan K. Christian
Page 2

Appalachian Tire Products Crab Orchard, WV

Sept 2002-Feb 2003 Service Manager

Duties include, but not limited to, customer service, 24/7 dispatching, shipping and receiving, inventory control, management and supervision of employees, and maintaining a safety program, while operation under federal, state, and local regulations. Organization and office skills, professionalism, and quality customer service are always performed.

Applied Card Systems Beckley, WV

August 2002 to Sept 2002 Customer Assistance Specialist (Interim position)

Duties included credit card management, collections, educating customer to prevent credit rating problems and to prevent loss of revenue for Cross Country Bank.

Schlumberger Beckley, WV

July 2002-August 2002 Driver and equipment operator (interim position)

Wendell Transport Corp. Corporate Clayton, NC (sold to Eagle Transport of Rocky Mount, NC)

March 2002 to May 2002	Terminal Manager	Greensboro, NC
April 01 to Feb 2002	Regional Manager	Beckley, WV & Huntington, WV
Nov 99 to March 2001	Dispatcher/Terminal Manager	Beckley, WV

Responsible for the safe, efficient pickup and delivery of petroleum products for bulk plant and convenient store customers. Duties, tasks, and responsibilities included, but not limited to; scheduling labor, customers, and vendors; supervising and managing daily operations; maintaining utilization through effective controlling and dispatching; efficiently used equipment and labor to stay under budget requirements. Organizational office skills, professionalism, and quality customer service always maintained.

United States Air Force

Sept 1992-Dec 1999 Fuels Specialist Honorable Discharge

Directly responsible for the receipt, storage, distribution, and accounting of: aviation and ground fuel products, cryogenic projects, and deicing fluid. Successful in managing the used of thirty to forty personnel and over $8 million worth of fuel servicing equipment; dutifully controlled the distribution of fuel to military, foreign, and commercial aircraft in a safe and efficient manner.

Education

January 1999 Associate of Applied Science, Community College of the Air Force

- Major in Logistics
- Dean's list 6 terms
- GPA 3.5

June 2005 — Bachelors of Applied Science, Mountain State University, Beckley, WV
- Major in Organizational Leadership
- Graduated Cum Laude

February 2012 — PEC Safety Certified instructor for Safeland/Safegulf Curriculums

Additional Education — Teams and Tools, Customer Focus, Total Quality Management, Train the Trainer Course, Equal Opportunity Training, Defensive Driving, OSHA 10/30 Hour Certified, MSHA Training Certified

Additional Accomplishments and Skills

- Proficient in Microsoft Windows and Microsoft Office
- Extremely quick learner; adapts quickly to systems and procedures
- Great organizational skills, professional, and a great team player
- CDL Class A
- Extensive knowledge of DOT FMCSA, OSHA, EPA, DEP, MSHA regulations.
- PEC Safeland Certified Trainer
- WV Trucking Association Board Member

Professional and personal references available upon request.

Newsroom

All News Releases By Date

EPA's 2012 Toxics Release Inventory Shows Air Pollutants Continue to Decline

Release Date: 02/04/2014
Contact Information: Carissa Cyran (News Media Only), cyran.carissa@epa.gov, (202) 564-4363, (202) 564-4355; En español: Lina Younes, younes.lina@epa.gov, 202-564-9924, 202-564-4355

WASHINGTON - Total releases of toxic chemicals decreased 12 percent from 2011-2012, according to the U.S. Environmental Protection Agency's (EPA) annual Toxics Release Inventory (TRI) report released today. The decrease includes an eight percent decline in total toxic air releases, primarily due to reductions in hazardous air pollutant (HAP) emissions.

"People deserve to know what toxic chemicals are being used and released in their backyards, and what companies are doing to prevent pollution," said EPA Administrator Gina McCarthy. "By making that information easily accessible through online tools, maps, and reports, TRI is helping protect our health and the environment."

The 2012 data show that 3.63 billion pounds of toxic chemicals were either disposed or otherwise released into the environment through air, water, and land. There was also a decline in releases of HAPs such as hydrochloric acid and mercury, which continues a long-term trend. Between 2011 and 2012, toxic releases into surface water decreased three percent and toxic releases to land decreased 16 percent.

This is the first year that TRI has collected data on hydrogen sulfide. While it was added to the TRI list of reportable toxic chemicals in a 1993 rulemaking, EPA issued an Administrative Stay in 1994 that deferred reporting while the agency completed further evaluation of the chemical. EPA lifted the stay in 2011. In 2012, 25.8 million pounds of hydrogen sulfide were reported to TRI, mainly in the form of releases to air from paper, petroleum, and chemical manufacturing facilities.

Another new addition to TRI reporting is a requirement for each facility located in Indian country to submit TRI reports to EPA and the appropriate tribe, and not the state where the facility is geographically located. EPA finalized this requirement in a 2012 rule aimed at increasing tribal participation in the TRI Program.

This year's TRI national analysis report includes new analyses and interactive maps for each U.S. metropolitan and micropolitan area, new information about industry efforts to reduce pollution through green chemistry and other pollution prevention practices, and a new feature about chemical use in consumer products.

The annual TRI report provides citizens with critical information about their communities. The TRI Program collects data on certain toxic chemical releases to the air, water, and land, as well as information on waste management and pollution prevention activities by facilities across the country.
The data are submitted annually to EPA, states, and tribes by facilities in industry sectors such as manufacturing, metal mining, electric utilities, and commercial hazardous waste. Many of the releases from facilities that are subject to TRI reporting are regulated under other EPA program requirements designed to limit harm to human health and the environment.

Also available is the expanded TRI Pollution Prevention (P2) Search Tool, which now allows users to graphically compare facilities within the same industry using a variety of environmental metrics.
Under the Emergency Planning and Community Right-to-Know Act (EPCRA), facilities must report their toxic chemical releases to EPA by July 1 of each year. The Pollution Prevention Act of 1990 also requires facilities to submit information on waste management activities related to TRI chemicals.
More information on the 2012 TRI analysis, including metropolitan and micropolitan areas is available at www.epa.gov/tri/nationalanalysis.

More information on facility efforts to reduce toxic chemical releases, including the new P2 facility comparison report, is available at www.epa.gov/tri/p2.

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Recent additions

- 12/23/2014 EPA Announces Availability of $2.7 Million in Environmental Education Local Grants
- 12/23/2014 EPA, Coast Guard Extend Pollution Control Agreement with Royal Caribbean: New advanced technologies allow industry to comply with emission standards, reduce costs
- 12/23/2014 EPA to Hold Public Hearings in California, Texas and D.C. on Proposed Smog Standards
- 12/23/2014 Nominations for EPA New England's Annual Environmental Merit Awards-Deadline is January 30, 2015
- 12/22/2014 XTO Energy, Inc. to Restore Areas Damaged by Natural Gas Extraction Activities

Last updated on 12/16/2016

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September 8, 2016

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By US Mail and E-mail (murdock.james@epa.gov)

James Murdock
Assistant Regional Counsel
RCRA & Toxics Enforcement Branch
U.S. Environmental Protection Agency, Region 6
1445 Ross Avenue, Suite 1200 (6RC-ER)
Dallas TX 75202

Re: TRI – Thomas Petroleum, LLC

Dear Mr. Murdock:

On behalf of Thomas Petroleum, LLC ("Thomas"), thank you for the opportunity to provide comments on the spreadsheets prepared by EPA related to Thomas' TRI filings.

As background, Thomas itself discovered that TRI reports were required for certain of its facilities and initiated the required filings for 2013, the then current year, to come into compliance. EPA noted the initiation of TRI reporting and on September 18, 2014 noticed an inspection of the company's Tyler TX facility for October 29, 2014. In preparation for the inspection, among other things, EPA requested copies of Form A and Form R reports for 2009 – 2012. Thomas had not submitted late filings for the years prior to 2013 because EPA had already compiled data submitted for those prior years into annual, published inventory reports. Thomas then believed that late filings would serve no practical purpose. The company was not aware that filing late reports, even several years late, would be considered better than filing no reports for the historical periods.

However, upon EPA's request for copies of prior year filings, the company promptly prepared and filed such TRI reports for the Tyler TX and its other facilities. These reports were all completed and filed in October 2014. In the course of hurriedly preparing so many filings, some mistakes occurred. Some errors were discovered based on EPA inspection questions or comments, and others were independently identified by the company. When discovered, these errors were promptly and voluntarily corrected with new filings.

In all, we wish to emphasize that the company voluntarily and in good faith made TRI filings to come into compliance, has been open and responsive to EPA's inquiries and requests and has cooperated with EPA in an attempt to resolve outstanding issues. Since the filings for 2013, the company has filed all annual TRI reports. When the company discovered a few minor issues with these post-2013 reports, the company made corrective filings voluntarily and notified EPA of its actions. Thomas has been forthright regarding these filings, its past non-compliance, and corrective action to come into compliance.

Specifically regarding the spreadsheets supplied for comment, Thomas notes the following:

1. A footnote regarding naphthalene that appears in the spreadsheet for each facility appears to take issue with Thomas' explanation of the threshold it used for reporting. As noted in many of the spreadsheet footnotes, EPA's published TRI guidance (which has never been retracted and is referenced in EPA's *Toxic Chemical Release Inventory Reporting Forms and Instructions,* Revised 2013 Version (EPA 260-R-14-001, dated January 2014)) provides a 1% threshold *de minimis* level for naphthalene in Table 3-4, *EPCRA Section 313: Guidance for Petroleum Terminals and Bulk Storage Facilities*, February 2000 (EPA 745-B-00-002) ("Guidance"). Thomas used this Guidance to prepare its 2013 reports submitted in July 2014. The Guidance document itself contains an error in that the reporting threshold for naphthalene should be 0.1%. Thomas discovered the updated information itself and used 0.1% in calculations for all filings made in October 2014, including the 2013 filings not previously made (see #2 below).

   The spreadsheet footnotes imply that, since EPA had notified Thomas on January 2, 2015 of the calculation error in the filings made in July 2014, Thomas' reference to the Guidance as an explanation for the error was disingenuous because Thomas had used the updated, corrected number for filings made in October 2014 (prior to the EPA January notification). Thomas objects to any implication that its explanation for use of 1% for the 2013 reports filed in July 2014 was incorrect. It was after July 2014, but well before January 2015, that the company discovered updated information inconsistent with the published Guidance, and without prompting from EPA on this issue, Thomas used 0.1% in calculations for reports submitted in October 2014. In addition, filings for 2013 that used the Guidance numbers were later corrected.

2. When Thomas evaluated employee data to determine whether 2013 filings were required, there was some internal confusion about how to account for part-time employees at the San Benito, Broussard (Lafayette) and Beaumont facilities and the company initially determined that the number of employees at these facilities was below the reporting threshold. When it evaluated the need for TRI filings for years prior to 2013, Thomas discovered the part-time employee issue on its own and submitted both 2013 and prior years' filings for these facilities. Once again, though the initial calculation was mistaken, Thomas discovered the problem and made corrections.

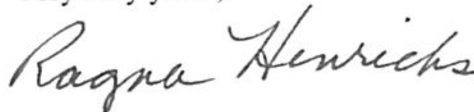
3. The task of obtaining extensive internal data, evaluating TRI reporting requirements for each facility, and making calculations for required reports was a monumental one to accomplish in a short time. The company dedicated the resources necessary to produce the reports filed in October 2014. Unfortunately, some errors occurred, but when found corrected filings were voluntarily and promptly made.

4. Ethylene glycol, a chemical reported for each facility, is a constituent of antifreeze. Various brands of antifreeze contain varying percentages of this constituent. The highest ethylene glycol content in any antifreeze product at a Thomas facility is 80%. Given the time pressure to make calculations and submit reports for 2013 and prior years, 80% was assumed as a conservative estimate for all antifreeze volumes for those reports. For the years 2014 and 2015, however, more detailed information regarding the various antifreeze products and the ethylene glycol content of each was used to calculate reportable amounts. If these more detailed calculations, rather than use of the assumed highest content, had been used for 2010-2013 calculations, the amounts of ethylene glycol processed at Broussard (Lafayette) in 2012 and 2013, and at Robstown in 2012 do exceed the 10x threshold.

5. It is noteworthy that 84% of the required filings involved Form A, while only 16% involved Form R. We note these statistics not as a comment on whether filings were required, but as a comment on the significance of the volumes of the chemicals at Thomas' facilities.

In sum, while there was a lapse regarding historical reporting, when the requirement was discovered, filings were voluntarily initiated and corrective filings made where necessary. Thomas asks your consideration of its good faith and cooperation in this matter.

Very truly yours,



Ragna Henrichs
Attorney for Thomas Petroleum, LLC

REDACTED - ATTORNEY CLIENT PRIVILEGE

Sent from my iPad

Begin forwarded message:

From: "Wakeland, Morton" <wakeland.morton@epa.gov>
Date: September 17, 2014 at 11:25:13 AM CDT
To: Megan Zettlemoyer <MZettlemoyer@CLTHOMAS.com>
Cc: "Stranne, Lawrence" <stranne.lawrence@epa.gov>
Subject: RE: Thomas Petroleum -- Tyler Warehouse --

Meg

I hate to say, but this strongly suggests that Thomas Petroleum is in violation of 40 CFR 372.10 (Record Keeping) pursuant to EPCRA 313.
Otherwise, all you would have to do is open up a file cabinet and gather the information or simply retrieve the information from a computer.

I am going to ask does Thomas Petroleum have EPCRA 313 files from 2009 to present on all its operations in Region 6?

Before you answer, please realize that under 18 U.S.C. Section 1001 a person who knowingly and willfully makes a false statement to the federal government is subject to a fine and or imprisonment up to five years.

Mort Wakeland

Morton E. Wakeland, Jr., Ph.D. ("Mort")
EPCRA 313 Enforcement & TRI Program Coordinator

U.S. EPA Region 6
Dallas, Texas 75202
214.665.8116

-----Original Message-----
From: Megan Zettlemoyer [mailto:MZettlemoyer@CLTHOMAS.com]
Sent: Wednesday, September 17, 2014 10:46 AM
To: Wakeland, Morton
Cc: Stranne, Lawrence
Subject: Re: Thomas Petroleum -- Tyler Warehouse --

I am having to research the answer to your question below because I was not in my role at that time. I will hopefully have an answer soon.

Thank you,
Megan Zettlemoyer
Corporate Environmental Compliance Specialist / Retail Regional HSE Manager
HSE Department
361-212-7583 cell

On Sep 16, 2014, at 11:20 AM, "Wakeland, Morton" <wakeland.morton@epa.gov> wrote:

> Thanks for your call.
>
> There has to be a specific reason why the facility did not have to report.
>
> The attorney's should have that info if in fact they are the ones that said the facility wasn't required to report.
>
> We know the facility was in a covered NAICS Code prior to 2009 and there in one for 2009 and forward.
>
> Unless the business has drastically changed over the years, they assuredly would have exceeded threshold as they did in 2013.
>
> The remaining issue is # of employees.
>
> You have to read the reg's closely - 40 CFR 372 - pertaining to # of
>
> employees
>
> employees are not simply a head count....
>
> It is number of hours worked by all full-time, part-time, and contract
>
> employees, including anyone, like yourself, who contributes to

maintaining the facility, even if they are not station at the facility. Divide those total hours by 2,000 hrs/full-time equivalent (Dept of Labor) and if that number is > = 10, you've satisfied that requirement as well.

Like I said, we may or may not have to schedule an inspection depending on what you find out.

Best wishes,

Mort

Chart Summarizing Form A and Form R Reporting for Violations Alleged in Complaint - 2012

2012		n-Hexane	Toluene	1,2,4-Trimethylbenzene	Xylenes	naphthalene	PAC's	Zinc Compounds	Ethylene Glycol	Methanol	Diethanolamine
Arkansas	Form A	X		X	X	X		X	X	X	X
	Form R						X				
Beaumont	Form A	X	X	X	X	X		X	X	X	
	Form R										
Bridgeport	Form A	X	X	X	X	X		X	X	X	X
	Form R						X				
Corpus Robstown	Form A	X	X	X	X	X		X	X	X	
	Form R						X				
Hobbs	Form A				X	X		X	X	X	
	Form R	X		X			X				
Lafayette	Form A	X		X				X	X	X	
	Form R										
LaGrange	Form A	X	X	X	X	X		X	X		
	Form R						X			X	
Laredo	Form A	X	X	X	X	X		X	X	X	X
	Form R						X				
Permian	Form A	X	X	X	X	X		X		X	X
	Form R						X		X		

2012		n-Hexane	Toluene	1,2,4-Trimethylbenzene	Xylenes	naphthalene	PAC's	Zinc Compounds	Ethylene Glycol	Methanol	Diethanolamine
San Benito	Form A	X	X	X	X	X		X	X		
	Form R										
Tyler	Form A	X		X		X		X			X
	Form R						X			X	
Victoria	Form A	X	X	X	X	X		X	X	X	X
	Form R						X				

Chart Summarizing Form A and Form R Reporting for Violations Alleged in Complaint - 2013

2013		n-Hexane	Toluene	1,2,4-Trimethylbenzene	Xylenes	naphthalene	PAC's	Zinc Compounds	Ethylene Glycol	Methanol	Diethanolamine
Arkansas	Form A					X					X
	Form R										
Beaumont	Form A	X	X	X	X	X		X	X	X	
	Form R										
Bridgeport	Form A					X					X
	Form R										
Corpus Robstown	Form A					X					
	Form R										
Hobbs	Form A					X					
	Form R										
Lafayette	Form A			X				X	X	X	
	Form R										
LaGrange	Form A					X					
	Form R										
Laredo	Form A					X					X
	Form R										
Permian	Form A					X					X
	Form R										

2013		n-Hexane	Toluene	1,2,4-Trimethylbenzene	Xylenes	naphthalene	PAC's	Zinc Compounds	Ethylene Glycol	Methanol	Diethanolamine
San Benito	Form A	X	X	X	X			X	X		
	Form R										
Tyler	Form A					X					X
	Form R										
Victoria	Form A					X					X
	Form R										

Thomas Petroleum Headcount

	10/1/2014	10/1/2015	10/1/2016	10/1/2017	10/1/2018	2/14/2019	2/25/2020
Beaumont, TX	10	11	6	5	5	5	5
Bridgeport, TX	25	11	1	5	35	23	2
Broussard, LA	13	8	4	5	3	5	4
Damascus, AR	22	7	1	1	1	1	1
Lagrange, TX	24	12	2	2	2	4	4
Laredo, TX	202	173	96	134	142	143	111
Odessa, TX	181	103	57	148	240	217	181
Robstown, TX	85	13	6	7	8	8	9
Tyler, TX	74	79	17	68	123	61	15
Victoria, TX	131	86	30	32	31	30	29
Hobbs, NM	4	0	0	0	0	0	1
San Benito, TX	13	10	0	0	0	0	closed

6 E.A.D. 184 (E.P.A.), 1995 WL 646512

United States Environmental Protection Agency (E.P.A.)

Environmental Appeals Board

IN RE: DIC AMERICAS, INC. RESPONDENT

Toxic Substance Control Act

TSCA Appeal No. 94-2
September 27, 1995

FINAL DECISION AND ORDER

Syllabus

*1 DIC Americas, Inc. ("DICA") has Appealed an Initial Decision assessing a total civil penalty against it of $85,000 for five violations of regulatory reporting requirements imposed by EPA pursuant to TSCA § 8, 15 U.S.C. § 2607. DICA contends that the penalty amount is excessive. It argues that the Presiding Officer adhered too rigidly to Agency guidance for calculating civil penalties and failed to exercise an independent judgment as to the appropriateness of the penalty amount.

Held: The penalty assessment is affirmed. The Presiding Officer did not abdicate her decisionmaking responsibility merely because she elected to refer to Agency guidance as a basis for calculating a civil penalty. The Presiding Officer stated that she had exercised an independent judgment and DICA has pointed to no evidence to the contrary nor has it demonstrated that the assessed penalty is inconsistent with the penalty factors set forth in TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B).

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.
Opinion of the Board by Judge McCallum:

DIC Americas, Inc. ("DICA") has Appealed an Initial Decision of the presiding officer assessing a total civil penalty against it of $85,000 for five violations of regulatory reporting requirements imposed by EPA pursuant to Section 8 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2607. DICA does not deny that it violated TSCA as alleged. Its sole argument on Appeal is that the penalty is excessive. For the reasons stated below, the penalty assessment is upheld.

I. BACKGROUND

Section 8(b)(1) of TSCA, 15 U.S.C. § 2607(b)(1), requires EPA to "compile, keep current, and publish a list of each chemical substance which is manufactured or processed in the United States." To further that purpose, TSCA § 8(a)(1)(A), 15 U.S.C. § 2607(a)(1)(A), authorizes the Administrator to promulgate rules under which:

> [E]ach person * * * who manufactures or processes or proposes to manufacture or process a chemical substance * * * shall maintain such records, and shall submit to the Administrator such reports, as the Administrator may reasonably require * * *.

TSCA § 15, 15 U.S.C. § 2614, makes it unlawful for any person to fail or refuse to submit reports required by the Agency pursuant to TSCA § 8(a).

In 1977, EPA created the Chemical Substances Inventory, which is a compilation of production data relating to chemical substances that were manufactured or imported for commercial purposes after January 1, 1975. See 42 Fed. Reg. 64572 (Dec. 23, 1977). In 1985, the Agency determined that it needed updated information about the chemicals for which it had obtained data in 1977. See 50 Fed. Reg. 9944 (March 12, 1985). Therefore, on June 12, 1986, EPA issued regulations for the Partial Updating of the Inventory Data Base at 40 C.F.R. Part 710, Subpart B. The regulations required persons who had manufactured, imported or processed listed chemical substances in amounts that exceeded a specified regulatory threshold to submit "Form U" reports containing current information about the substances to EPA between August 25, 1986, and December 23, 1986. 40 C.F.R. §§ 710.28(a), 710.33(a), and 710.39. The Agency stated that it required the updated production data:

> ***2** T]o set priorities for further investigation, to perform first-level screening of chemical substances for testing under TSCA section 4, to estimate, along with other data, the potential for human and environmental exposure to specific substances, to support the implementation of various TSCA regulations, and to perform economic impact analyses for potential TSCA regulations.

50 Fed. Reg. 9944 (March 12, 1985). [1]

DICA owns and operates a facility in Fort Lee, New Jersey, which imports and exports chemicals for commercial purposes. DICA submitted Form U reports for eighteen chemical substances on or about December 22, 1986. Stipulations, Para. 9. On May 31, 1989, EPA Region II conducted a TSCA compliance inspection at DICA's facility. During the inspection, DICA was asked to send EPA a list of the names and quantities of chemicals that DICA had imported in 1985. Stipulations, Para.6. DICA submitted the requested information on September 27, 1989. When Region II compared the list of chemicals that DICA had imported in 1985 with the list of chemicals for which DICA had filed Form U reports on December 22, 1986, it determined that DICA had failed to file Form U reports for five chemicals for which such reports were required. Region II filed a complaint against DICA on September 28, 1990, charging DICA with five violations of TSCA § 8(a). It sought a total civil penalty of $85,000 ($17,000 per violation).

The Region calculated the proposed penalty in accordance with the Agency's Guidelines for Assessment of Civil Penalties Under Section 16(a)(2)(B) of the Toxic Substances Control Act, 45 Fed. Reg. 59770 (Sept. 10, 1980) ("Guidelines") and the Agency's Recordkeeping and Reporting Rules TSCA Sections 8, 12 and 13 Enforcement Response Policy (May 15, 1987) ("ERP"). [2] The Guidelines are generally applicable to all of TSCA whereas the ERP provides specific guidance for penalties covering TSCA Sections 8, 12 and 13. The two penalty policies implement Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a) which provides that:

> 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.

Under both policies, the Region is instructed to follow a two-stage procedure for determining a TSCA civil penalty. During the first stage, the Region derives a "gravity-based penalty" that reflects the Agency's assessment of the "nature, circumstances,

[and] extent" (which together constitute the "gravity") of the violation. See TSCA § 16(a)(2)(B), quoted above. The ERP contains a matrix that takes these factors into account. [3] The vertical axis of the matrix lists six levels of "circumstances" which reflect "the probability that harm will result" from a particular type of violation. ERP at 8 (emphasis added). Failure to file a Form U is deemed a Circumstances Level 1 (High Range) violation. As explained in the ERP, failure to file a required report is considered "an extremely serious violation" because it impairs the ability of the Agency to carry out its statutory risk assessment responsibilities. ERP at 17. The horizontal axis of the matrix classifies violations by "extent." Failure to file a Form U is "significant" in extent because the information required on a Form U is "important to the overall decision making of the Agency in terms of setting its priorities and deciding what rulemaking to pursue." ERP at 22. The penalty amount specified on the matrix for a violation that is "Circumstances Level 1" and "Significant" in extent is $17,000. [4] Therefore, consistent with the ERP, the Region calculated a gravity-based penalty of $17,000 for each of DIC's five reporting violations. During the second stage of penalty calculation, the Region considers the remaining five statutory factors which pertain to the specific conduct and circumstances of the violator. See TSCA § 16(a)(2)(B), quoted above. In this case, the Region concluded that none of the five factors warranted either an upward or downward adjustment of the gravity-based penalty.

***3** DICA filed an Answer on October 1, 1990, in which it denied the allegations in the Complaint. Shortly afterwards, on December 17, 1990, DICA submitted Form U reports for the five chemicals without admitting or denying liability. The Region filed a Motion for a Partial Accelerated Decision as to Liability for the five violations on February 8, 1991, which DICA did not oppose, and which the presiding officer granted on December 24, 1991. The Region then filed a Motion for Partial Accelerated Decision as to Penalty on January 30, 1992, which the presiding officer denied on March 16, 1992. Following a penalty hearing on March 30 and 31, 1992, the presiding officer issued a Decision and Order on December 30, 1993, holding DICA liable for a total civil penalty of $85,000, the amount proposed by the Region. She concluded that the penalty amount "conforms to EPA guidance documents, is fair and reasonable in the circumstances here, and is properly based upon the probability of harm at the time of the issuance of the complaint * * *." Decision at 6. The presiding officer characterized the harm inherent in the violations as the "absence of complete information from respondent's facility in the inventory data base." Id. She emphasized that failure to file a Form U report is a serious violation in light of the importance to the Agency of "maintaining as complete a data base as possible." Id. at 5. She concluded that no adjustments to the gravity-based penalty were warranted.

DICA filed the instant Appeal on February 3, 1994, in which it argues that the presiding officer erred because she adopted the Region's "mechanical" approach to calculating a gravity-based penalty from the ERP instead of exercising her independent judgment as to an appropriate penalty for the violations under TSCA. DICA Appeal Brief at 8. Specifically, DICA contends that the presiding officer erred because she "conclusively presumed" that all Section 8 reporting violations create a "high probability" of adversely affecting EPA's ability to monitor chemical substances, and because she disregarded evidence DICA had submitted to show that Respondent's particular violations would not have had a significant impact on Agency regulatory programs. Id. at 14. DICA further contends that even if it is determined that the presiding officer did not err in these respects, she still erred because she did not reduce the gravity-based penalty based on the circumstances of the violations. [5] Specifically, DICA argues that a substantial downward adjustment in the penalty is warranted because (1) its violations were inadvertent; (2) its representatives were courteous and cooperative at the compliance inspection; (3) it submitted Form U reports after it was notified of the violations; and (4) it implemented a computer system to improve its recordkeeping and thereby prevent future violations. [6] DICA proposes that its penalty be reduced from $17,000 per violation to $500 per violation. Notice of Appeal at 17. It seeks the opportunity for an oral argument. Id. Region II filed a Reply Brief on February 16, 1994, in which it urged the Board to affirm the Initial Decision.

II. DISCUSSION

***4** We affirm the presiding officer's penalty assessment and we adopt her Decision and Order as our own. [7] We reject DICA's argument that the presiding officer "abdicated" her decisionmaking responsibility because she calculated a gravity-based penalty from the ERP matrix. EPA has developed penalty policies to assure that Regional enforcement personnel calculate civil penalties that are not only appropriate for the violations committed but are assessed fairly and consistently. Agency regulations specifically

provide that the presiding officer "must consider any civil penalty guidelines issued under the Act" and must set forth in the Initial Decision specific reasons for deviating from them (emphasis added). 40 C.F.R. § 22.27(b)(emphasis added). The clear implication of this language is that the presiding officer may either approve or reject a penalty suggested by the guidelines. In other words, a presiding officer has the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant. Our past decisions confirm that a presiding officer may utilize a penalty policy in determining an appropriate civil penalty amount. As we stated in In re Great Lakes Division of National Steel Corp., 5 E.A.D. EPCRA Appeal No. 93-3, slip op. at 23-24 (EAB 1994):

The Agency has issued penalty policies to create a framework whereby the decisionmaker can apply his discretion to the statutorily-prescribed penalty factors, thus facilitating the uniform application of these factors. In re Alm Corporation, TSCA Appeal No. 90-4 (CJO, Oct. 11, 1991) [3 E.A.D. 688].[8] * * * [A] penalty policy "reasonably implements the statutory criteria, with a range of penalties to reflect differing circumstances." In re Genicom Corporation, EPCRA Appeal No. 92-2 (EAB, Dec. 15, 1992) [4 E.A.D. 426]. Therefore, a presiding officer may properly refer to such a policy as a means of explaining how he arrived at his penalty determination. [9]

See also In re Mobil Oil Corp., 5 E.A.D. EPCRA Appeal No. 94-2 (EAB 1994). By referring to the penalty policy as a basis for assessing a particular penalty, the presiding officer is incorporating the underlying rationale of the policy into her decision. The reference to the policy becomes, in effect, a form of "shorthand" for explaining the rationale underlying the penalty assessment. In re Empire Ace Insulation Manufacturing Corp., 3 E.A.D. 226, n.1 (CJO 1990); In re National Coatings, Inc., 2 E.A.D. 494, 498 (CJO 1988) ("By conforming to the guidelines, a presiding officer provides a clear, reviewable explanation of the rationale for his penalty assessment.").

In the instant case, the presiding officer informed the parties at the beginning of the penalty hearing that she had considered the TSCA guidelines and that she had reached a tentative conclusion that "the penalty seems * * * to have been properly placed on the matrix," but that she was open to DICA's arguments why she should deviate from the penalty amount derived from the matrix based on the circumstances of the violations. Tr. 8. In stating that she was following the guidelines in this case, the presiding officer nevertheless made it plain that she did not consider herself constrained by the guidelines; rather, she expressed the view that she was free to deviate from them if warranted by the circumstances.

*5 [I]t is a good idea to have a penalty policy which starts off the calculations on the part of the Government so that there is some unanimity, at least at the outset. * * * However not every case comes out * * * just the way the Government asked when the matter is before me for decision. I am willing to listen to any reasonable assertions with respect to why, in the interests of justice particularly, the penalty ought to be reduced * * * which is why I denied the motion for Summary Judgment as to the penalty in this case.

Tr. 8 and 10. These views of the presiding officer belie DIC's claim that the presiding officer surrendered independent judgment when she assessed a penalty prescribed by the guidelines. Under the regulation previously cited, a presiding officer is obligated to "consider" any penalty policy guidelines issued by the Agency. But obviously that duty carries with it no obligation to adhere to the penalty policy in a particular instance. [10] 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. The fact that the presiding officer has a choice of either following or deviating from the Penalty Policy operates to preserve not restrict the presiding officer's independence.

It is clear that the presiding officer was cognizant of the discretion afforded the decisionmaker under the rules and that she exercised that discretion appropriately. After hearing the witness' testimony at the hearing, the presiding officer determined that a civil penalty derived from the ERP matrix was appropriate for DICA's violations. She emphasized that a "careful effort has been made to determine whether any showing which could form the basis of a reduction in penalty has been made. None appears on the facts of this case." [11] Decision at 6. That the presiding officer exercised independent judgment in arriving at an appropriate penalty is especially clear in this instance since the presiding officer affirmatively stated that she had exercised an

independent judgment and since DICA has pointed to no evidence to show otherwise. To suggest otherwise would ignore the fact that the presiding officer could have chosen to deviate from the penalty policy but explicitly elected not to for the reasons stated.

For DICA to persuade us that the presiding officer's penalty assessment was in error and should be overturned, DICA must demonstrate that the assessed penalty is not consistent with the statutory penalty factors. DICA has not succeeded in that regard. First, it has presented no convincing arguments that the gravity-based penalty derived from the matrix overestimates the seriousness of its violations. As the Region persuasively argued, the value of any data base is substantially diminished if it is incomplete. The ERP states that:

> Section 8 information is used by the Agency to evaluate the potential risks associated with the manufacture and use of a chemical. This data gathering often occurs at the early stages of regulatory decision making. Therefore, complete and accurate information is essential. Incomplete and inaccurate information will have far-reaching effects on the Agency's riskk assessment, regulatory priority setting, and regulation development processes.

*6 ERP at 16. The gravity of such a violation is obviously substantial. Therefore, the presiding officer did not err when she concluded that the failure to file Form U reports was a serious violation. Second, we reject DICA's argument that the presiding officer abused her discretion because she did not utilize any of the statutory adjustment factors to reduce the gravity-based penalty.

When the penalty assessed by the Presiding Officer falls within the range of penalties provided in the penalty guidelines, the Board will generally not substitute its judgment for that of the Presiding Officer absent a showing that the Presiding Officer has committed an abuse of discretion or a clear error in assessing the penalty.

In re Pacific Refining Co., 5 E.A.D. TSCA Appeal No. 94-1, slip op. at 11 (EAB 1994). See also In re Johnson Pacific, Inc., 5 E.A.D. FIFRA Appeal No. 93-4, slip op. at 14 (EAB 1995); In re Mobil Oil Corp., 5 E.A.D. EPCRA Appeal No. 94-2, slip op. at 66 (EAB 1994); In re Ray Birnbaum Scrap Yard, 5 E.A.D. TSCA Appeal No. 92-5, slip op. at 5 (EAB 1994). The presiding officer found that the Region had properly applied the adjustment factors in the Agency's penalty policies and therefore she relied upon the Region's analysis as a basis for her conclusion that no downward adjustment to the gravity-based penalty was warranted. DICA has not shown that the presiding officer, by relying on the Region's analysis, either failed to consider one or more statutory factors or relied upon an analysis of these factors that was flawed. [12] Therefore, it has not demonstrated that the presiding officer's adoption of the Region's penalty analysis as a basis for determining an appropriate and reasonable penalty under TSCA was misplaced.

Finally, we find no basis whatsoever for DICA's contention that "[b]ecause DICA was * * * given no real opportunity to present a defense to EPA's penalty assessment, the hearing it was afforded was in reality only a charade." DICA Appeal Brief at 22. The presiding officer heard two days of testimony on the issue of an appropriate penalty for these violations. She had the benefit of extensive post-hearing briefs. Moreover, as noted supra, the presiding officer emphasized both at the beginning of the hearing and in her Final Decision that DICA had the opportunity to influence her penalty assessment.

III. CONCLUSION

For the reasons stated above, we hereby affirm the Initial Decision assessing a total civil penalty of $85,000 against DICA for its failure to file five Form U reports. Payment shall be made within sixty (60) days after receipt of this Order, unless otherwise agreed by the parties, by sending a certified or cashier's check, payable to the Treasurer, United States of America, to:
Regional Hearing Clerk

U.S. EPA - Region II

P.O. Box 360188M

Pittsburgh, PA 15251

So ordered.

Footnotes

1 As the Agency explained in its Federal Register notice proposing these regulations:
[T]he lack of readily available current production data on these substances has * * * complicated the Agency's investigations of chemical substances [and] compelled the Agency to obtain current information in a resource-intensive and inefficient manner.
Proposed Rule, 50 Fed. Reg. 9944 (March 12, 1985). See also Final Rule, 51 Fed. Reg. 21438 (June 12, 1986).

2 See Region's Proposed Penalty Calculation (C Ex 14) and testimony of Daniel J. Kraft, Chief, Toxic Substances Section, Region II Environmental Services Division, Tr. 167 et seq.

3 Since the Agency considers the "nature" of all reporting and recordkeeping violations as "hazard assessment," the "nature" of the violation is not a variable on the matrix.

4 Although TSCA allows a civil penalty for each day of noncompliance with a statutory duty, the ERP specifically states that, for nonreporting for the Inventory Update, only a "one day" penalty should be assessed rather than a penalty for each day of violation.

5 See n. 6, infra.

6 DICA argues for penalty reductions based on the statutory penalty factors of culpability and "such other matters as justice may require." It does not contend that it lacked the ability to pay the assessed penalty or that the penalty would affect its ability to remain in business.

7 Pursuant to 40 C.F.R. § 22.31(a), the Board may adopt, modify, or set aside the findings and conclusions of the presiding officer. DICA's request for an oral argument is denied.

8 Aff'd, Alm Corp. v. EPA, 974 F.2d 380 (3d Cir. 1992), cert. denied 113 S. Ct. 1412 (1993).

9 Contrary to DICA's assertion, the penalty matrix does not "establish conclusive presumptions." See DICA Notice of Appeal and Appeal Brief at 15. DICA refutes its own claim that the matrix establishes conclusive presumptions by acknowledging that "the ERP and the penalty matrix are not authoritative but merely guidelines meant to carry out the mandates of TSCA Section 16(a)." See DICA Appeal Brief at 21.

10 It has long been the position of the Agency that our regulations governing the assessment of civil penalties do not bind either the presiding officer or the final decision-maker (in this case, the Board) to the formulas set forth in the penalty guidelines. See, e.g., In re Great Lakes Division of National Steel Corp., 5 E.A.D. EPCRA Appeal No. 93-3, slip op. at 23-24 (EAB 1994) (dicta); In re General Electric Company, 4 E.A.D. 884, 908 (EAB 1993) (accepting the Presiding Officer's penalty assessment while noting that "the Presiding Officer disregarded the 1980 PCB Penalty Policy"); In re 3M Company, 3 E.A.D. 816, 822 (CJO 1992); In re ALM Corp., 3 E.A.D. 688 (CJO 1991) (dicta); In re Empire Ace Insulation Mfg. Corp., 3 E.A.D. 226 (CJO 1990) (dicta); In re A.Y. McDonald Industries, Inc., 2 E.A.D. 402, 414 (CJO 1987) ("An ALJ's discretion in assessing a penalty is in no way curtailed by the Penalty Policy so long as he considers it and adequately explains his reasons for departing from it."); In re Sandoz, Inc., 2 E.A.D. 324 (CJO 1987) (citing additional cases at note 13).

11 She noted, as factors militating against a penalty reduction, that "no circumstances out of respondent's control have been shown, * * * [that] there was a three-month delay between issuance of the complaint and compliance by respondent, *

* * [and that] lack of compliance in the first instance may fairly be attributed to insufficient vigilance on respondent's employees' part." Decision at 5.

12 As noted in n.6, supra, the particular statutory factors which, according to DICA warrant a penalty reduction are "degree of culpability" and "such other matters as justice may require." "The two principal criteria for assessing culpability are (a) the violator's knowledge of the particular TSCA requirement, and (b) the degree of the violator's control over the violative condition." 45 Fed. Reg. 59770, 59773. A downward adjustment in the gravity-based penalty is warranted only where both factors are present. The test of lack of knowledge is whether the violator knew or should have known either of the TSCA requirement or of the "general hazardousness of his actions." Id. See, e.g., In re SED, Inc., et al., 3 E.A.D. 150 (CJO 1990). The Region maintains that DICA is not entitled to a penalty reduction based on nonculpability because it knew of the regulatory requirement and/or had the ability to prevent the violation. See Region's Reply Brief at 7. DICA has not refuted the Region's factual assertions. (In instances where a penalty adjustment based on the two principal criteria for assessing culpability is not warranted, the Guidelines provide for an adjustment of the gravity-based penalty to reflect the violator's "attitude." 45 Fed. Reg. 59770, 59773. The Region does not dispute that DICA has been cooperative and courteous but explains that it is not entitled to a penalty reduction based on its "attitude" because such a reduction is warranted only where the violator has taken prompt corrective actions. The Region argues that DICA cannot be considered to have complied promptly because it failed to submit the Form U reports until three months after the complaint was filed. Id.)

With regard to "such other matters as justice may require," DICA not only claims that both the Region and the Presiding Officer failed to consider the factor, but that "EPA's penalty policy does not contemplate the application of the statutory element of 'such other matters as justice may require' in the context of a nonreporting violation." DICA Appeal Brief at 25. The record does not support any of these assertions. Both the Guidelines and the ERP expressly direct the Region to consider "such other matters as justice may require" as a penalty factor. See Guidelines, 45 Fed. Reg. 59770, 59775 and ERP at 6. The Region maintains that it took the penalty factor into account and concluded that there were no extenuating circumstances warranting a reduction in the gravity-based penalty. In particular, the Region asserts that DICA's computerization of its records was merely a prudent business decision and did not merit a penalty reduction as an "environmentally beneficial expenditure" because computerization was implemented prior to the EPA inspection of DICA's facility. Id. at 10. The Presiding Officer agreed with the Region's conclusion that DICA had not demonstrated any basis for a reduction of the gravity-based penalty.

6 E.A.D. 184 (E.P.A.), 1995 WL 646512

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6 E.A.D. 735 (E.P.A.), 1997 WL 94743

United States Environmental Protection Agency (E.P.A.)

Environmental Appeals Board

IN RE: EMPLOYERS INSURANCE OF WAUSAU AND GROUP EIGHT TECHNOLOGY, INC.

Toxic Substance Control Act

Docket Nos. TSCA-V-C-62-90 TSCA-V-C-66-90
TSCA Appeal No. 95-6
February 11, 1997

ORDER AFFIRMING INITIAL DECISION IN PART AND VACATING AND REMANDING IN PART

Syllabus

***1** These administrative enforcement proceedings, arising under sections 15 and 16 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2614 and 2615, pertain to events that occurred in the aftermath of an August 1987 fire that destroyed a building in Wyandotte, Michigan. Respondent Group Eight Technology, Inc. ("Group Eight") was the owner of the building at the time of the fire, and respondent Employers Insurance of Wausau ("Wausau") was Group Eight's insurer under a property insurance policy providing coverage against certain fire losses at the Wyandotte location ("Group Eight site"). After the fire, Group Eight presented a claim under its policy with Wausau.

Between the time of the fire and the early part of 1989, seven electrical transformers remained at the Group Eight site, while the building that had occupied the site was undergoing demolition. During that time, the storage and marking requirements prescribed in 40 C.F.R. Part 761 (the "PCB Rule") were not observed. Consequently, in the action filed against it by U.S. EPA Region V, Group Eight was alleged to have committed several violations of those requirements. The EPA administrative law judge ("ALJ") who presided at the hearing into this matter concluded that Group Eight was indeed subject to liability for the alleged storage and marking violations, and his conclusions in that regard were not timely Appealed.

The Region also alleged that both Group Eight and Wausau had violated one of the "disposal" provisions of the PCB Rule. One of the seven transformers at the Group Eight site was a "PCB Transformer" as defined in 40 C.F.R. § 761.3, meaning that it contained an extremely high concentration of polychlorinated biphenyls and that its contents could lawfully be disposed of only by incineration. Three of the other six transformers did not contain TSCA-regulated levels of PCBs. Whether any of the remaining three transformers contained regulated levels of PCBs (and whether any such determination was ever made before their contents were collected for disposal) remains in dispute. In April 1989, a disposal contractor hired to remove the transformer fluids from the Group Eight site commingled the fluids from all seven transformers, including the PCB Transformer, and delivered the resulting mixture of fluids to an oil recycling facility (*not* an incineration facility equipped to handle wastes containing high levels of PCBs). The oil recycling facility became contaminated with PCBs, and was required to be addressed by EPA as a Superfund site.

After those events transpired, Group Eight insisted that Wausau had been responsible for making all of the arrangements that led to the eventual mishandling under TSCA of the transformer fluids. Wausau, on the other hand, insisted that it had had no significant involvement in any of the events that culminated in the TSCA disposal violation. Region V ultimately alleged in its complaints that Wausau, as well as Group Eight, had violated the PCB Rule's disposal requirements. The Region specifically alleged, among other things, that: (1) Wausau's claims adjuster had invited a cost estimate from the disposal contractor regarding

the contractor's proposal for removing transformer fluids from the Group Eight site; (2) Wausau's claims adjuster had agreed that Wausau would guarantee payment to the contractor for work done in accordance with that proposal; and (3) Wausau did in fact pay the contractor for work that ultimately included the unlawful disposal of PCB-contaminated fluid at an oil recycling facility.

***2** Region V now Appeals from an initial decision issued after the conclusion of a consolidated evidentiary hearing into the Region's TSCA claims against both Wausau and Group Eight. In the initial decision, the ALJ ordered the dismissal with prejudice of Region V's Amended Complaint against Wausau, concluding that the Region had failed to establish Wausau's liability for disposal of PCBs in a manner that violated TSCA section 15 or the PCB disposal regulations. The ALJ concluded, on the other hand, that Group Eight had violated the PCB Rule's disposal provisions as well as the storage and marking requirements cited above, and that a civil penalty would therefore be assessed against Group Eight pursuant to TSCA section 16.

In assessing a civil penalty against Group Eight, the ALJ declined to adopt Region V's recommendation that the amount of the penalty be fixed at $76,000. The Region had attempted to support that figure by showing that it was derived in accordance with the analytical framework in EPA's Polychlorinated Biphenyls Penalty Policy ("Penalty Policy"), which describes a method for translating the TSCA § 16(a)(2)(B) penalty assessment criteria into numerical terms. The ALJ concluded, however, that proof of the recommended penalty's consistency with the Penalty Policy contributed nothing to a determination of whether the recommended penalty was an "appropriate" one -- an issue on which the burden of proof belonged to the Region pursuant to 40 C.F.R. § 22.24. He reached that conclusion because the Penalty Policy does not enjoy the status of a "rule" promulgated in accordance with Administrative Procedure Act requirements and was therefore, the ALJ believed, required to be disregarded as if it "never existed." After concluding for those reasons that the Region's penalty recommendation was inadequately supported, the ALJ performed his own analysis of the penalty criteria described in TSCA § 16(a)(2)(B) and, based on that analysis, calculated that a $58,000 penalty should be assessed against Group Eight.

On Appeal, Region V argues that the ALJ erred when he determined that Wausau was not shown to have committed any TSCA violations. The Region also argues, with respect to Group Eight, that the ALJ erred when he rejected the Region's $76,000 penalty recommendation based on a perceived failure of proof.

Held: 1. The ALJ's initial decision with respect to Wausau is affirmed. Region V failed to satisfy its burden of proving that Wausau engaged in conduct that constitutes improper PCB disposal within the meaning of 40 C.F.R. Part 761, Subpart D. Wausau's liability must be analyzed in terms of its conduct, not its status as an insurance carrier, and nothing in the record clearly establishes that such conduct violated the applicable TSCA regulations. (Nothing in this opinion addresses any principles of liability under Superfund.)

2. The ALJ's initial decision with respect to Group Eight is vacated insofar as it concludes that the Region failed to demonstrate the "appropriateness" of its proposed $76,000 civil penalty. More particularly, the ALJ erred when he concluded that it was impermissible for the Region, in making such a demonstration, to rely on proof of its adherence to the PCB Penalty Policy without also introducing evidence to substantiate the "findings, assumptions and determinations" underlying the Penalty Policy itself.

***3** (a) Nothing in TSCA § 16 required Region V to present the evidence that the ALJ's initial decision deems necessary. Section 16 requires that EPA "take into account" certain enumerated factors when assessing a civil penalty under TSCA. In the PCB Penalty Policy, each of those factors is addressed and analyzed, with specific reference to the manner in which they might apply to the kinds of activities that are regulated under the PCB Rule. The Region acted permissibly by offering to show its reliance on the Penalty Policy in order to establish, thereby, that the penalty it was recommending had indeed taken each of the statutorily prescribed factors "into account."

(b) Nothing in EPA's own regulations required Region V to present the evidence that the initial decision deems necessary. The Region was required, pursuant to 40 C.F.R. § 22.24, to bear the burden of proving that the penalty it had proposed to the ALJ was an "appropriate" one. Part 22 nowhere suggests, however, that that burden ordinarily includes, as a matter of course,

a requirement for the Region to introduce evidence to support each and every factual proposition that is either recited in, or implicit in or underlying, any penalty policy on which the Region may have relied in developing the proposed penalty. Rather, as the Board stated in *In re New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994), the complainant must come forward with evidence to show that it, in fact, considered each of the statutory factors and that its recommended penalty is supported by its analysis of those factors.

When an ALJ considers the question of a proposed penalty's "appropriateness," in a case in which the complainant has relied on a penalty policy in developing its proposal, the ALJ is not under a legal obligation to impose the complainant's recommended penalty even if the recommended penalty takes all of the required statutory factors into account. The ALJ may also conclude that he or she cannot adequately evaluate the proposed penalty's appropriateness without receiving additional argument or evidence. Also, the ALJ may confront a situation in which a respondent genuinely takes issue with the contents of a penalty policy cited by the complainant in support of a proposed penalty. The ALJ is free to demand from the complainant such additional argument or evidence as the ALJ may deem necessary for an informed decision as to the proposed penalty's appropriateness. That does not, however, describe what occurred in this case. Here, neither of the respondents challenged Region V's penalty proposal or anything in the PCB Penalty Policy; and the ALJ, for his own part, never put Region V on notice that it would be expected to present argument or evidence justifying the underlying assumptions of the Penalty Policy.

(c) Nothing in the Administrative Procedure Act or principles derived from it required Region V to present the evidence that the initial decision deems necessary. APA principles prohibit the unquestioning application of a penalty policy as if the policy were a rule with "binding effect." Because the validity of the PCB Penalty Policy's application to the facts of this case was never put at issue prior to the initial decision, there is no indication in the record that Region V intended to apply the PCB Penalty Policy in such an inflexible manner as to suggest that it was treating the policy as a rule. Moreover, contrary to the view expressed by the ALJ, the APA does not require that a penalty policy which has not been adopted as a rule must be disregarded for all purposes as if it "never existed."

*4 For these reasons, the action against Group Eight is remanded for further penalty assessment proceedings consistent with the Board's opinion.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.
Opinion of the Board by Judge Reich:

The U.S. Environmental Protection Agency, Region V, brought administrative enforcement actions against Employers Insurance of Wausau ("Wausau") and Group Eight Technology, Inc. ("Group Eight"), alleging violations of the Polychlorinated Biphenyls Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions (hereinafter "PCB Rule"), 40 C.F.R. Part 761, promulgated pursuant to section 6(e) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2605(e).[1] The two enforcement actions were consolidated, and a hearing was held on October 12 and 13, 1993, before then Chief EPA Administrative Law Judge Jon G. Lotis ("ALJ"). The ALJ issued an initial decision dated September 29, 1995, concluding that (1) Region V failed to establish, by a preponderance of the evidence, that Wausau had violated the PCB Rule as alleged in the Region's Amended Complaint, but (2) the Region did establish Group Eight's liability for certain of the violations with which it was charged. The ALJ directed that the Amended Complaint issued to Wausau be dismissed with prejudice, and that Group Eight be assessed a penalty in the amount of $58,000.

Region V has Appealed the ALJ's decision with respect to both respondents.[2] In its Appeal, the Region contends that the ALJ erred by concluding that the Region failed to prove its claim against Wausau, and by reducing the penalty proposed to be assessed against Group Eight. For the reasons that follow, we affirm the initial decision with respect to Wausau, but we vacate the initial decision in part and remand for further proceedings with respect to the assessment of a penalty against Group Eight.

I. BACKGROUND

On August 24, 1987, fire destroyed a building in Wyandotte, Michigan, that had recently been purchased by Group Eight. Group Eight was insured against certain fire losses at the site under a policy issued by Wausau, and Group Eight sought coverage under the policy. As part of its initial response to Group Eight's claim, Wausau arranged with a pollution control company for removal of three transformers from the site for disposal. More specifically, on September 1, 1987, a letter from Wausau's outside counsel was hand- delivered to Group Eight's president, Bernard S. Schrott, informing Schrott that it would be "necessary to undertake removal of three electric transformers" from the site, and that Wausau, while reserving any determination regarding coverage, "ha[d] made arrangements, on [Group Eight's] behalf, to have a certified pollution control company undertake the proper disposal of these items." On the same day, at Wausau's request, Schrott executed a document stating, in part, "[t]his will authorize Wausau Insurance Companies to have Marine Pollution Control remove the transformer, transport and dispose of the three (3) P.C.B.'s." In reality, there were seven transformers at the Group Eight site when the fire occurred, although Wausau may not have been aware of the other four at the time of its September 1 letter to Schrott. [3]

*5 As envisioned in Wausau's September 1 letter, three transformers were removed from the Group Eight site on or about September 3, 1987. The three transformers were not disposed of, however. Rather, the transformers were taken by Wausau's contractor, Marine Pollution Control, to its own storage facility, and samples of the transformer fluids were forwarded to a testing laboratory on September 4, 1987. Complainant's Trial Exhibit ("CTE") No. 23. The testing laboratory, Environmental Quality Laboratories, Inc., analyzed the samples and concluded, on September 9, 1987, that none of the three transformers contained regulated levels of PCBs. *Id.* On September 10, Marine Pollution Control, which had brought the transformers to its facility under a hazardous waste manifest, notified the Michigan Department of Natural Resources ("MDNR") that the transformer fluids were nonhazardous and that the manifest should therefore be canceled. *Id.* Finally, on or about October 6, 1987, the three transformers were simply returned to the Group Eight site. CTE No. 24. [4]

Meanwhile, during September 1987, Group Eight acceded to a request from the City of Wyandotte by agreeing to have the damaged building demolished. *See* Wausau Trial Exhibit ("WTE") No. 3. In a letter to Group Eight dated November 1, 1987, a company called Sclafani Trucking, Inc. proposed to do the demolition work for a price of $120,000.00, specifying, however, that "[t]his price does not include handling of any hazardous waste or removal of any asbestos." By letter dated November 13, 1987, the Wausau general adjuster assigned to the Group Eight claim, Howard T. Aidenbaum, guaranteed payment to Sclafani Trucking for the services identified in Sclafani Trucking's November 1 proposal, in an amount not to exceed the quoted price of $120,000.00. Aidenbaum further agreed that "[y]our exclusions for handling any hazardous waste or removal of asbestos in the quoted price [are] acceptable." [5]

On December 1, 1987, Schrott sent a brief letter to Sclafani Trucking. CTE No. 23; WTE No. 7. To that letter he attached a copy of the MDNR manifest that had been prepared on September 3, 1987, in connection with the removal of three transformers from the Group Eight site for PCB testing. He may also have attached some of the sample analysis sheets showing the results of the testing that was performed by Environmental Quality Laboratories during September, although that is uncertain. *See* Hearing Transcript at 162-63, 230-31. In his letter, Schrott stated that the enclosed "DNR report on the transformers * * * indicat[es] that no PCB chemicals are present; therefore, you can dispose of them as you wish."

On December 15, 1987, Alfonzo Sclafani wrote to Aidenbaum, reporting that several of the transformers at the Group Eight site had not yet been tested and requesting instructions concerning the disposition of those transformers:
Dear Mr. Aidenbaum:

It has come to my attention that there are four transformers located at 2246 Third St. Wyandotte, MI, which you have contracted my company to demolish, that currently have no disposal status. Three are located in the elevator shaft tower, and one is located on the Cedar St. side of the building. There also are three transformers located on the ground in the courtyard that have been tested negative for PCB's. I will arrange disposal for these three transformers, however the hazardous waste status for the remaining four transformers must be determined. As you know our agreement excludes handling of any hazardous wastes.

*6 If you would like, I can arrange to have these transformers tested and if they test positive, arrange to have them disposed of in a law full [sic] manner. This service would be above and beyond the prices quoted in our agreement, and would be billed to you when completed with net payable in thirty days.

Please respond in writing as soon as possible, so demolition work is not halted. * * * P.S. I am sending copies of hazardous waste report regarding the three transformers in the courtyard that I will dispose of.

No written response to Mr. Sclafani's December 15, 1987 letter (from Aidenbaum or anyone else at Wausau) appears in the record of these proceedings. Moreover, for reasons that are also not clear from the record, it appears that no further action was taken by any interested party in relation to the seven transformers at the Group Eight site throughout 1988.

Finally, in January 1989, the City of Wyandotte contacted the MDNR to express concern about "the presence of abandoned leaking transformers and other chemicals discovered on the [Group Eight] site." [6] A PCB compliance inspection was conducted by MDNR on January 11, 1989, at which time the inspector observed "seven liquid filled transformers sitting on the ground of the property." The inspector's report identifies the seven transformers as follows:
(1) Westinghouse Serial No. 6542983; Liquid: Oil.

(2) Westinghouse Serial No. 6542891; Liquid: Oil.

(3) Westinghouse Serial No. 6542892; Liquid: Oil.

(4) ST Transformer Serial No. R20552; Liquid: Oil.

(5) ST Transformer Serial No. R26697; Liquid: Oil.

(6) ST Transformer Serial No. R20554; Liquid: Oil.

(7) Niagara Transformer Serial No. 39233; Liquid: Askeral.

"Askeral" (or "askerel," as the word appears in the ALJ's initial decision) is a trade name identifying transformer fluid that contains very high concentrations of PCBs. [7] It is undisputed that the Niagara transformer found at the Group Eight site was, for TSCA regulatory purposes, a "PCB Transformer" the contents of which could lawfully be disposed of only by incineration. [8]

Shortly thereafter, on February 8, 1989, a meeting took place that was attended by Alfonzo Sclafani of Sclafani Trucking, Mr. Aidenbaum of Wausau, and Michael Van Hook of K&D Environmental Services, Inc. ("K&D"). According to Mr. Aidenbaum's affidavit, at the February 8 meeting he "requested that Mr. Van Hook provide me with cost estimates for the removal, transport and disposal or treatment of the transformer fluids from the transformers at the Group Eight property." [9] Following that meeting, K&D submitted a proposal to Sclafani Trucking dated February 21, 1989 (with copies also furnished to Aidenbaum and to Group Eight) setting forth, among other items, K&D's proposed "prices for pumping out 6 transformers * * * and disposal cost at your Group Eight Technology job site." The reference to *six,* rather than seven, transformers -- which appears twice in K&D's February 21, 1989 proposal -- is nowhere explained in the record of these proceedings. In any event, with respect to the disposal of transformer fluids and other "oil waste," K&D proposed to charge twenty-five cents per gallon for disposal in the following manner:

> ***7** The oil waste will be broken down into two loads. One for transformers and one for the press pits, this is because the transformers have a low trace of PCB's and we don't want to contaminate the press pit oils. All oil will be taken to CIW Company 39209 Ecorse Road, Romulus, Michigan * * *.

The basis for K&D's understanding that six of the transformers at the Group Eight site had only "a low trace of PCB's" is, once again, nowhere explained in the record of these proceedings.

On or about March 13, 1989, a scientist with EPA Region V, Robert Bonace, telephoned Group Eight's president, Schrott, to express "some concerns about transformers on his property including a PCB transformer." [10] At Schrott's request, Bonace prepared a letter regarding the transformers that had been observed at the Group Eight site. Bonace's letter, addressed to Group Eight on March 20, 1989 (CTE No. 14), stated as follows:
As you requested in our telephone conversation on March 13, 1989, I am writing to inform you of transformers located on your property at 2246 3rd Street, Wyandotte, Michigan.

One of these transformers is a PCB transformer. The other six are mineral oil transformers. Several of the mineral oil transformers, considered to be PCB contaminated under 40 C.F.R. §761.3, are leaking oil onto the ground. Please be informed that use, storage, marking, recordkeeping, and disposal of PCBs are regulated under 40 C.F.R. Part 761 of the PCB regulations. Violations of the PCB regulations can result in penalties of up to $25,000 per day per violation.

Please keep me informed of any action you take involving these transformers. If you have any questions, feel free to call me * * *.

Schrott forwarded Bonace's letter to a Wausau representative in Southfield, Michigan (with a copy to Aidenbaum), explaining in a cover note that "[t]he adjuster was supposed to resolve this but has not." Group Eight Trial Exhibit No. 1. In a letter to Bonace dated April 10, 1989, Aidenbaum responded to Bonace's March 20 letter by stating, in relevant part:
Mr. Bonace, I have now received a copy of your March 20 letter to our insured president, Bernard Schrott.

We have requested and currently received an MID package, which is being completed by the insured so that an MID number can be assigned by the State of Michigan and therefore proceed with the process of having this hazardous waste removed.

Samples are being taken by K and D Industrial Services, Incorporated, who was indicated to be an acceptable contractor by Anthony Pitts of the DNR.

CTE No. 19. [11]

Meanwhile, according to Aidenbaum, he had met for a second time with Alfonzo Sclafani of Sclafani Trucking and Michael Van Hook of K&D on April 5, 1989. "At that meeting," Aidenbaum states, "I agreed to pay a reasonable dollar amount to K&D for the removal, transport and disposal or treatment of the transformer fluids as estimated by K&D in its February 21, 1989 proposal." [12]

***8** K&D's proposal, it will be recalled, indicated that K&D would "pump out 6 transformers" and transport their contents to the CIW Company's facility in Romulus, Michigan -- although there were, in reality, seven transformers at the Group Eight site. Moreover, the CIW Company's facility was an oil recycling facility, and as such was not a proper facility for disposal of transformer fluids that either (a) contained PCB concentrations in excess of 50 parts per million (*see supra* note 8), or (b) were

untested and therefore presumed to contain such concentrations as a matter of law (*see supra* note 4). In any event, on or about April 15, 1989, K&D drained the fluids from all seven of the transformers at the Group Eight site -- including the Niagara "askerel" transformer -- commingled the fluids and delivered them all to the CIW facility. Wausau, on behalf of its insured, paid the bill submitted by K&D for performance of those services in accordance with its prior agreement. The CIW facility became contaminated by PCBs and was ultimately required to be cleaned up under the auspices of the federal Superfund program. [13]

Region V learned of the contamination of the CIW site, and of its origin in the improper disposal of transformer fluids from the Group Eight site, during May 1989. On or about May 22, 1990, Region V issued a TSCA administrative complaint against Group Eight in six counts, seeking penalties totaling $76,000, and a separate TSCA administrative complaint against Wausau in one count, seeking a penalty of $25,000. Amended complaints were filed in both actions, with leave of Administrative Law Judge Thomas B. Yost, during August 1991. Following Judge Yost's retirement in September 1992, the TSCA penalty actions against Wausau and Group Eight were reassigned to then Chief Administrative Law Judge Jon G. Lotis. Judge Lotis formally consolidated the two actions by order dated July 30, 1993, presided at a consolidated hearing during October 1993, and issued his initial decision on September 29, 1995.

II. DISCUSSION

A. *The Claim Against Wausau (Case No. TSCA-V-C-62-90)*

Region V's TSCA civil penalty action against Wausau alleges that Wausau, by its involvement in the unlawful disposal of PCB-contaminated fluids from the Group Eight site, violated the PCB disposal regulations at 40 C.F.R. Part 761, Subpart D. The ALJ concluded, however, that Region V failed to prove that Wausau had become actively involved in the disposal of PCBs or had otherwise deviated from the usual role of an insurance carrier in adjusting a potentially covered loss. We agree that the evidence introduced before the ALJ was insufficient to support the imposition of a TSCA penalty against Wausau for unlawful disposal of PCBs, and we therefore affirm the initial decision as it relates to Wausau.

We emphasize at the outset that both the Region and Wausau agree -- indeed, they both insist -- that the Region's claim against Wausau must be analyzed in terms of Wausau's conduct, not its status. Specifically, the Region urges that we impose a TSCA penalty against Wausau "not because of its status as an insurance carrier, but rather because of what Wausau did." Appellant's Brief at 18. Wausau embraces the same distinction and maintains that the imposition of a penalty against it on the basis of status, as opposed to "specific acts," would represent an "improper, unlawful extension of TSCA." Wausau's Brief at 36. By the same token, neither party suggests that the imposition of a TSCA penalty against Wausau, given proof of violative conduct, would be impermissible merely because Wausau is in the insurance business rather than the waste disposal business. [14] Accordingly, with the parties in agreement that Wausau's conduct is what matters (a proposition with which we, too, agree), our inquiry focuses on the actions taken by Wausau in connection with the removal of the transformer fluids from the Group Eight site.

***9** The underlying statutory provision, TSCA section 6(e)(1), 15 U.S.C. § 2605(e)(1), simply directs EPA to "promulgate rules to * * * prescribe methods for the disposal of polychlorinated biphenyls." TSCA itself does not define "disposal," nor does it otherwise identify the class or classes of persons against whom the Agency's PCB disposal rules were to be made enforceable. The Region therefore relies, for its analysis of what constitutes potentially violative conduct, on the definition of "disposal" that appears in 40 C.F.R. § 761.3:

Disposal means intentionally or accidentally to discard, throw away, or otherwise complete or terminate the useful life of PCBs and PCB Items. Disposal includes spills, leaks, and other uncontrolled discharges of PCBs as well as actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs and PCB Items.

That definitional provision represents the linchpin of the Region's Appeal. The Region argues that by facilitating the retention of K&D Environmental Services to dispose of transformer fluids from the Group Eight site -- that is, by inviting a cost estimate from K&D for disposal of the transformer fluids, agreeing to pay K&D for the disposal in accordance with that estimate,

and ultimately paying K&D for the work that it did -- Wausau took "actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs," and therefore engaged in PCB "disposal" within the meaning of the Part 761 regulations. We do not agree.

It is true, as the Region emphasizes, that the regulatory definition of "disposal" is extraordinarily broad. However, complicating the analysis is the fact that while section 761.3 defines "disposal," the regulations do not explicitly assign responsibility for TSCA compliance to any particular participants in the disposal process. [15] "The disposal requirements are written in the passive voice, stating *how* PCBs must be disposed of, but not saying *who* is responsible for an improper disposal of PCBs." *In re City of Detroit*, 3 E.A.D. 514, 522 (CJO 1991) (emphasis in original).

For that reason, we do not share the Region's apparent conviction that Wausau's responsibility for TSCA compliance in this case follows from a straightforward application of clear regulatory language. The regulatory language sweeps broadly, but there must be some reasonable basis for applying the disposal regulations to the conduct that the Region seeks to penalize. It is clearly not sufficient for the Region simply to recite that the respondent performed an "action related to" taking PCBs out of service. If any "action related to" PCB disposal were truly a sufficient predicate for the imposition of TSCA liability, the City of Wyandotte itself would arguably be subject to a TSCA penalty in this case for its "action" of encouraging the removal of the transformers from the Group Eight site -- a result that presumably no one would consider appropriate.

***10** Recognizing the ambiguity as to the reach of the PCB disposal regulations, the Agency's Chief Judicial Officer ("CJO") in *City of Detroit*, *supra*, limited the scope of TSCA penalty liability under those regulations to parties having actual influence over the disposal activity (such as by direct involvement in the activity) or the ability to exert such influence (such as would arise, for example, from ownership of a PCB source). In *City of Detroit*, an improper disposal of PCBs occurred in the form of uncontrolled discharges (*i.e.*, spills and leaks), and EPA sought to assess a TSCA penalty against the entity that owned the affected real property at the time those discharges were discovered. The CJO concluded, however, that it would not be reasonable to impose a penalty under Part 761, Subpart D, absent proof that the respondent actually caused the disposal or that (in a case involving spillage or leakage) the respondent owned the source of the PCBs at a time when spills or leaks were occurring:

> The regulatory provisions * * * suggest the following two conclusions as to when a person will be held responsible for an improper disposal [of PCBs]: (1) a person will be held responsible if that person caused (or contributed to the cause of) the disposal, and (2) in cases involving uncontrolled discharges, the person who owned the *source* of the PCBs at the time of the discharge will be deemed in most cases to have caused the discharge.

City of Detroit, 3 E.A.D. at 526 (emphasis in original). The landowner in *City of Detroit* had not yet taken possession of the affected property at the time of the uncontrolled PCB discharges; nor had the landowner otherwise caused or contributed to the occurrence of those discharges; nor did the landowner own any PCB source at the time of an uncontrolled discharge. The CJO concluded, therefore, that no penalty could be assessed against the landowner for violation of the PCB disposal regulations. *Id.* at 531-32. [16]

Guided by the principles articulated by the CJO in *City of Detroit*, we must first determine what Wausau actually did with respect to the transformers at the Group Eight site, and we must then consider whether Wausau's conduct can reasonably be characterized as the regulated activity of "disposal." Because evidence bearing on the more fundamental question -- What did Wausau actually do? -- is in important respects either ambiguous, or in conflict, or simply lacking, we emphasize that it is Region V that bears the burden of proving the elements of the alleged violation by a preponderance of the evidence. *See* 40 C.F.R. § 22.24; *see also In re Santacroce*, 4 E.A.D. 586, 595 (EAB 1993) (noting the heightened significance of the complainant's burden of proof in cases "where, as here, the evidence is scant, contradictory, and subject to varying interpretations").

Chronologically and, we think, analytically, Wausau's actions appear to form two relatively discrete episodes: The first consists of actions taken during 1987, shortly after Wausau received notice of the Group Eight fire loss, and the second consists of actions taken during 1989, after the MDNR's January 11 PCB compliance inspection. Having examined both sequences of conduct in light of the applicable burden of proof, we conclude that neither set of actions undertaken by Wausau will support the imposition of a TSCA penalty for improper disposal of PCBs.

***11** During September 1987, in the immediate aftermath of the fire, Wausau decided that three transformers would have to be removed from the Group Eight site for disposal. Wausau told its insured, in a hand-delivered letter from Wausau's outside counsel, that the planned disposal was "necessary * * * in order to protect the public and the environment from the possibility that the contents of the transformers might be released." Although Wausau took care to obtain the insured's written authorization, we think it clear that the decision to undertake the disposal was Wausau's decision, not the insured's: The disposal was presented to the insured as a "necessary" undertaking, and Wausau apparently engaged a pollution control company of its own choosing to do the job. By making and implementing decisions of that nature, Wausau may well have at least approached the threshold of engaging in TSCA-regulated conduct, if not crossed it. We need not decide whether the threshold was crossed, however, because no improper disposal of PCBs actually occurred at the time of these events. The three transformers removed from the Group Eight site at Wausau's direction did not contain regulated concentrations of PCBs, and the transformers were simply tested and returned to the site. Wausau's involvement in the removal and testing of those three transformers during September 1987 does not support the imposition of a TSCA penalty for an improper disposal of transformer fluids that occurred nearly two years later.

With respect to the events of early 1989, we reach the same result for different reasons: A disposal of PCBs certainly occurred, and the TSCA regulations were certainly violated, but Region V has not proven that the nature and quality of Wausau's actions were such as would subject Wausau to the requirements and prohibitions of the TSCA PCB disposal regulations. Nothing in this record clearly demonstrates that Wausau made the decision to go forward with the disposal of the transformers, that Wausau selected K&D as the waste removal contractor to do the job, or that Wausau exerted any influence over the scope, timing, or other details of K&D's disposal work. Mr. Aidenbaum's affidavit -- which, we note, was admitted into evidence by the ALJ upon the *Region's* motion -- states only that he asked K&D for a cost estimate, that he agreed to pay K&D for its services based on the estimate that K&D had submitted, and that he did in fact cause payment to be made to K&D. Aidenbaum specifically denies, moreover, having had any prior association with K&D or any involvement in the selection either of K&D as a disposal contractor or of the CIW Company facility as a disposal site. With the Region relying almost exclusively on Aidenbaum's affidavit as evidence of Wausau's role, [17] we simply cannot conclude that Wausau did anything more at the time of these events.

Of course, it is possible that Wausau played a more influential role in the events of February, March, and April 1989 than it has acknowledged. Schrott's testimony, for example, would certainly tend to support that view, and Aidenbaum's April 10, 1989 letter to Bonace, though ambiguous, could be read to support that view as well. But the Region did not meet its burden of proof with regard to Wausau's role in these events, either to the satisfaction of the ALJ or to our own satisfaction. Both before the ALJ and on Appeal, the Region has cited Aidenbaum's affidavit as evidence that Wausau played an active decisionmaking role at the Group Eight site, *see* Complainant's Post-Hearing Brief at 5; Appellant's Brief at 14, but the affidavit, as far as the February through April 1989 period is concerned, is careful to suggest just the opposite. With the Region having offered Aidenbaum's affidavit into evidence, having relied heavily on portions of the affidavit, and having failed to examine Aidenbaum (who was physically present during the Region's case in chief) with respect to the portions of the affidavit that minimize Wausau's role, the record supports no alternative to Aidenbaum's characterization of several events that are central to the outcome of this case. If the Region believed that Aidenbaum's affidavit did not fully or accurately describe Wausau's role, then the Region could and should have called Aidenbaum to testify at the hearing under questioning appropriate to a "hostile" witness.

***12** The Region's failure to effectively refute Aidenbaum's account is fatal to the claim against Wausau, because the specific conduct described by Aidenbaum (asking for and agreeing to a cost estimate and paying the subsequent bill) does not appear to deviate, in any obvious respect, from the conduct one would expect of an insurance carrier in circumstances such as these, as opposed to the conduct of one who actually sought to influence the disposal activity itself. Aidenbaum's affidavit states that

he was present in an essentially passive role as plans were made to dispose of Group Eight's transformer fluids. He insists that he made no effort to influence any of those plans. *See* Aidenbaum Aff. ¶ 11 ("At [the February 8] meeting I did not discuss potential disposal or treatment sites for the transformer fluids * * * nor did I select a disposal or treatment site or direct that the transformer fluids should be removed to any particular site."); *id.* ¶ 13 ("As I did not have the authority to control the removal, transport, disposal or treatment of the transformer fluids, my only purpose at the [April 5] meeting was to reach an agreed price with K&D."). Aidenbaum does not, in short, portray Wausau actively engaging at the relevant time in conduct that could, in our opinion, reasonably be characterized as PCB "disposal." The Region may disagree with Aidenbaum's account in several respects, but the Region, which bears the burden of proof with respect to Wausau's conduct, has not presented sufficient evidence to refute that account.

The Region objects to the ALJ's finding that the removal of the transformers was performed by K&D "pursuant to an agreement it had reached with Sclafani." Appellant's Brief at 18 (citing Initial Decision at 18). The Region argues that "there is no evidence in the record that Sclafani ever identified to K&D the scope of the work to be performed at the Group 8 property, that Sclafani ever offered to pay K&D to do the work, or that Sclafani ever actually paid K&D to do the work." Appellant's Brief at 18. What the record does or does not show about Sclafani's conduct is, however, ultimately beside the point. The pertinent question is what the record shows about *Wausau's* conduct, and the record evidence on that subject was *introduced by the Region itself* in the form of Aidenbaum's affidavit. That affidavit is entirely consistent with the ALJ's conclusion that Wausau did not, during the early part of 1989, "dispose" of PCBs within the meaning of the TSCA regulations.

For these reasons we conclude, as did the ALJ, that Wausau did not itself engage in PCB "disposal" within the meaning of the Part 761 regulations, either by inviting cost estimates from K&D (so as to determine the magnitude of Wausau's own potential payment obligation), or by agreeing to make payment to K&D for services that included PCB disposal, or by making such payment. We therefore affirm the dismissal of Region V's Amended Complaint against Employers Insurance of Wausau.

B. *The Claims Against Group Eight (Case No. TSCA-V-C-66-90)*

***13** Because Group Eight did not timely Appeal the ALJ's initial decision, there is no issue before us concerning Group Eight's liability, [18] and such liability is assumed in the discussion that follows. The issues presented on Appeal arise from the ALJ's rejection of the Region's $76,000 penalty proposal with regard to Group Eight, and his decision to substitute a $58,000 penalty.

In support of its proposed penalty the Region sought to demonstrate, in its briefs and at the hearing, that the proposed penalty had been calculated in a manner consistent with EPA's April 1990 Polychlorinated Biphenyls Penalty Policy ("Penalty Policy"). In his initial decision, however, the ALJ turned aside the Region's effort as fundamentally misguided. He ruled that proof of the proposed penalty's consistency with the Penalty Policy -- even if unchallenged -- could not have justified his entry of an order assessing that penalty against Group Eight, absent evidence in the record substantiating the various "findings, assumptions and determinations" that are reflected in the Penalty Policy. Initial Decision at 22.

On Appeal, Region V challenges the conclusion that its failure to substantiate the factual and legal "underpinnings" of the PCB Penalty Policy on the record compelled the rejection of its $76,000 penalty proposal. [19] We agree with the Region. We therefore vacate the initial decision insofar as it rejects the $76,000 penalty proposal, and we remand for further penalty assessment proceedings with respect to Group Eight. Our reasons follow.

1. *The Region's Penalty Recommendations*

Six different kinds of PCB Rule violations were alleged to have been committed by Group Eight, five pertaining to improper storage and marking and the sixth pertaining to improper disposal. For each regulation allegedly violated, Region V formulated a penalty recommendation based on Group Eight's conduct with respect to the 236-gallon Niagara askerel transformer. [20] Thus, in its prehearing exchange, the Region presented its penalty recommendations to the ALJ and to Group Eight as follows:

(1) Amended Complaint Count I -- Failure to dispose of the PCB Transformer within one year of its placement in storage, as required by 40 C.F.R. § 761.65(a) -- Proposed Penalty: $6000.00.

(2) Amended Complaint Count II -- Storage of the PCB Transformer in an inadequate storage facility, *i.e.*, one not satisfying the criteria set forth in 40 C.F.R. § 761.65(b)(1) -- Proposed Penalty: $13,000.00.

(3) Amended Complaint Count III -- Failure to date the PCB Transformer with the date of its placement in storage, as required by 40 C.F.R. § 761.65(c)(8) -- Proposed Penalty: $6000.00.

(4) Amended Complaint Count IV -- Failure to mark the PCB Transformer with mark M_L, as required by 40 C.F.R. § 761.40(a)(2) -- Proposed Penalty: $13,000.00.

(5) Amended Complaint Count V -- Failure to mark the storage area used to store the PCB Transformer with mark M_L, as required by 40 C.F.R. § 761.40(a)(10) -- Proposed Penalty: $13,000.00.

***14** (6) Amended Complaint Count VI -- Disposal of the fluid from the PCB Transformer in a manner not permitted by 40 C.F.R. § 761.60 -- Proposed Penalty: $25,000.00.

See Complainant's Prehearing Exchange at 9-11. In total, the penalty proposed to be assessed against Group Eight amounted to $76,000.00.

Region V made clear, before the commencement of the hearing, that its penalty recommendations had been derived by applying the factors listed in TSCA § 16 "to the particular allegations that constitute the violations charged," Amended Complaint at 10, and specifically by applying those factors in the manner described in the Penalty Policy. Complainant's Prehearing Exchange at 8. The Penalty Policy was included among the exhibits identified in the Region's prehearing exchange (*see* Complainant's Prehearing Exchange at 7), and the ALJ admitted the Penalty Policy into evidence at the hearing, without objection by either respondent, as Complainant's Trial Exhibit number 20. Hearing Transcript at 539. At the hearing, EPA witness Robert Bonace testified that he had been personally involved in formulating Region V's penalty proposal with respect to Group Eight, and that the proposal had been developed in the manner described in the Penalty Policy. *Id.* at 353-73.

In his initial decision, the ALJ ruled that the Region had failed to satisfy its burden of proof with respect to the "appropriateness" of the proposed $76,000 penalty. He explained that when, as in this case, the Region proposes to assess a penalty calculated in accordance with a penalty policy, the Region "must, through its evidence, support the findings, assumptions and determinations on which [the] policy rests." Initial Decision at 22. He further explained that, because Region V had failed to substantiate the "findings, assumptions and determinations" underlying the Penalty Policy, he could not properly consider anything in that policy in reasoning toward his own penalty decision. We conclude, however, that nothing in TSCA itself, in 40 C.F.R. Part 22, or in the Administrative Procedure Act dictates the imposition of such an onerous standard of proof.

2. *Penalty Assessment in General*

Whenever EPA seeks to assess a monetary penalty for violation of TSCA § 15, EPA must adhere to the following statutory requirement:

> In determining the amount of a civil penalty, [EPA] 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.

TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B).[21] EPA procedural regulations seek to ensure compliance with that requirement by providing, among other things, that in administrative penalty proceedings "[t]he complainant has the burden of going forward with and of proving * * * that the proposed civil penalty * * * is appropriate." 40 C.F.R. § 22.24. A TSCA penalty is "appropriate," for purposes of 40 C.F.R. § 22.24, only if it is calculated in a manner consistent with the Agency's obligation to "take into account" the factors enumerated in TSCA § 16(a)(2)(B). *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994) (quoting TSCA § 16(a)(2)(B)). It is therefore incumbent upon the complainant in all TSCA penalty cases, in order to establish the "appropriateness" of a recommended penalty, to demonstrate how the TSCA section 16 penalty criteria relate to the particular facts of the violations alleged.

***15** In *New Waterbury, supra*, we looked closely at the nature of the "prima facie" penalty case that the complainant must present, in any TSCA action, if it is to satisfy its burden of "going forward" under 40 C.F.R. § 22.24. We stated that section 22.24 requires the complainant to "come forward with evidence to show [1] that it, in fact, considered each factor identified in [TSCA] Section 16 and [2] that its recommended penalty is supported by its analysis of those factors." *New Waterbury*, 5 E.A.D. at 538. "The depth of consideration will vary in each case," we explained, "but so long as each factor is touched upon and the penalty is supported by the analysis a prima facie case [regarding the proposed penalty's 'appropriateness'] can be made." *Id.*

Once the Region presents a prima facie case with respect to the appropriateness of its recommended penalty, the respondent may or may not choose to offer evidence or argument in rebuttal.[22] In this case we need only consider the situation in which the Region's penalty case goes unrebutted, *i.e.*, the respondent offers no evidence or argument of its own with respect to the appropriateness of the Region's penalty proposal. In those circumstances, even though the Region has done all that 40 C.F.R. § 22.24 requires of it, the Presiding Officer is (as we explain in the following discussion) nonetheless under no obligation to assess the penalty recommended by the Region. Rather, the Presiding Officer may do either of two things.

If the Presiding Officer agrees with the Region's analysis of the statutory penalty factors and their application to the particular violations at issue, the Presiding Officer may issue an initial decision assessing the penalty recommended by the Region. The Region will have carried its burden of proving that the proposed penalty is "appropriate," and the Presiding Officer, before assessing the recommended penalty, will have ensured that the requisite statutory factors were indeed "take[n] into account." Moreover, by reviewing the Region's analysis of the statutory factors and independently determining that the analysis is a reasonable one and that the recommended penalty is supported by that analysis, the Presiding Officer acts to ensure that the Agency's penalty assessment satisfies the Administrative Procedure Act's "abuse of discretion" standard, 5 U.S.C. § 706(2), *i.e.*, that the assessment is neither "unwarranted in law" nor "without justification in fact." *See Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185-86 (1973).[23]

If, on the other hand, the Presiding Officer does not agree with the Region's analysis of the statutory penalty factors or their application to the particular violations at issue, the Presiding Officer may specify the reasons for the disagreement and assess a penalty different from that recommended by the Region. *See* 40 C.F.R. § 22.27(b) ("If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease."). While the Presiding Officer must consider the Region's penalty proposal (and, as discussed below, "any civil penalty guidelines issued under the Act"), he or she is in no way constrained by the Region's penalty proposal, even if that proposal is shown to have "take[n] into account" each of the prescribed statutory factors. If the Presiding Officer chooses not to assess complainant's recommended penalty, even though that recommended penalty may in fact have taken each prescribed factor into account, the Presiding Officer need only explain

the basis for that choice in the initial decision. Of course, the Presiding Officer must also ensure that the penalty he or she ultimately assesses reflects a reasonable application of the statutory penalty criteria to the facts of the particular violations.

***16** It is also noteworthy that nothing in the Part 22 regulations expressly limits or restricts what the Presiding Officer may consider in determining whether to adopt the Region's unrebutted penalty proposal or to deviate from that proposal. As previously noted, the regulations do require the Presiding Officer to "consider any civil penalty guidelines issued under the Act" (40 C.F.R. § 22.27(b)) -- that is, under the statute authorizing the institution of the enforcement action (*id.* § 22.03(a)) -- but they neither specifically require nor specifically preclude the Presiding Officer's consideration of any other materials. Moreover, this Board has repeatedly stated that a Presiding Officer, having considered any applicable civil penalty guidelines issued by the Agency, is nonetheless free not to apply them to the case at hand. *E.g.*, *In re DIC Americas, Inc.*, TSCA Appeal No. 94-2, slip op. at 6 (EAB, Sept. 27, 1995), 6 E.A.D. __ ("[A] presiding officer has *the discretion either to* adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant.") (emphasis in original); *In re Pacific Refining Co.*, 5 E.A.D. 607, 613 (EAB 1994) ("[W]hile penalty policies facilitate the application of statutory penalty criteria, they serve as guidelines only and there is no mandate that they be rigidly followed."). The Presiding Officer's penalty assessment decision is ultimately constrained only by the statutory penalty criteria and by any statutory cap limiting the size of the assessable penalty, by the Agency's regulatory requirement (40 C.F.R. § 22.27(b)) to provide "specific reasons" for rejecting the complainant's penalty proposal, and by the general Administrative Procedure Act requirement that a sanction be rationally related to the offense committed (*i.e.*, that the choice of a sanction not be an "abuse of discretion" or otherwise arbitrary and capricious).

3. *Use of a Penalty Policy*

Among the principles we have just surveyed, there is nothing that would have required Region V to substantiate the "underpinnings" of the PCB Penalty Policy as a matter of course, as a necessary element of its prima facie case against Group Eight. We recognize, however, that the ALJ had the discretion to demand additional argument or evidence to support the Penalty Policy's interpretation and analysis of TSCA § 16, given that the Region was urging him to assess a penalty based on that policy. In other words, the ALJ was under no obligation to accept the factual assertions or legal interpretations in the Penalty Policy at face value, because -- as the ALJ repeatedly emphasized in his decision -- the Penalty Policy has never been subjected to the rule making procedures of the Administrative Procedure Act, and thus does not carry the force of law. Indeed, for that reason the ALJ could simply have considered the Penalty Policy's analytical framework and concluded that, in this particular case, application of the TSCA § 16 criteria in the manner suggested by the Penalty Policy did not yield an "appropriate" penalty. The ALJ could likewise have rejected an "appropriate" penalty generated in accordance with the Penalty Policy, in favor of another "appropriate" penalty better suited to the circumstances of this particular case. *See In re Rybond, Inc.*, RCRA (3008) Appeal No. 95-3, slip op. at 36 (EAB, Nov. 8, 1996), 6 E.A.D. __ ("Under the circumstances of a given violation, reduction of a penalty assessment may be appropriate even if the penalty has been properly calculated in accordance with [an applicable] Penalty Policy.").

***17** But the ALJ did none of those things. He rejected the Region's penalty recommendation based on a perceived failure of proof, concluding that Region V had failed to "go forward" with sufficient evidence to make out a prima facie case in support of its own penalty proposal. He appears to have reasoned that if EPA applies the TSCA § 16 criteria to a respondent in the manner suggested by the PCB Penalty Policy, without first proving each of the Policy's factual "underpinnings" on the record, EPA somehow violates the Administrative Procedure Act -- *even if* the respondent has raised no challenge whatsoever to the Policy's factual underpinnings. *See* Initial Decision at 27. If that premise were valid, it might indeed follow that Region V had to present support (in the form of evidence or argument, as appropriate) for the PCB Penalty Policy in this case as a matter of course, and that the Region's penalty case against Group Eight was deficient, as a matter of law, because the Region presented no such support.

We conclude that the premise on which the ALJ's analysis hinges is simply unfounded. We are not persuaded that the complainant, having used a penalty policy in formulating a proposed penalty, must offer evidentiary support for each and every

factual proposition that is either recited in the policy or implicit in or underlying the policy, in the absence of either a specific challenge to the policy by a respondent or a specific request for such support from the Presiding Officer. The complainant's burden under TSCA § 16 and 40 C.F.R. § 22.24 is only to demonstrate that it "took into account" certain criteria specified in the statute, and that its proposed penalty is "appropriate" in light of those criteria and the facts of the particular violations at issue. To satisfy the complainant's initial burden of going forward, it should ordinarily suffice for the complainant to prove the facts constituting the violations, to establish that each factor enumerated in TSCA § 16 was actually considered in formulating the proposed penalty, and to explain and document with sufficient evidence or argument how the penalty proposal follows from an application of the section 16 criteria to those particular violations.

We conclude, moreover, that proof of adherence to a penalty policy can legitimately form a part of the complainant's prima facie penalty case. Assuming that (as in this case) the policy being cited discusses each of the statutory penalty factors, proof of the Region's adherence to the policy is evidence that the statutory factors were taken into account. And since this particular penalty policy appears to be designed to enhance the fairness and consistency of penalty assessments, [24] proof of adherence to the policy is some evidence of consistency and fairness in enforcement suggesting that, in that sense at least, the proposed penalty is an "appropriate" one.

Here, however, the ALJ criticized Region V for relying too rigidly, or reflexively, on the analytical framework in the PCB Penalty Policy. He said that by proposing a penalty generated in accordance with the Penalty Policy, the Region was merely engaging in a "rote" exercise that effectively assigned to the Penalty Policy a "presumption of validity" to which only duly promulgated rules and regulations are legitimately entitled. Initial Decision at 22. We do not think the criticism was valid.

***18** The ALJ's criticism was rooted in the principle that an agency cannot, consistent with the Administrative Procedure Act, utilize a penalty policy or other policy statement as if the policy were a "rule" issued in accordance with APA "rule making" procedures. [25] The agency must, in some meaningful way, keep an "open mind" about the issues addressed in the policy document, and cannot act as if those issues are no longer subject to debate. For example, EPA was held to have violated that principle in *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988), by denying a RCRA delisting petition on the basis of what was supposed to have been a mere "policy" used to predict the leachability of hazardous constituents; in its decision denying McLouth's petition, EPA had stated that a petitioner's waste "must pass" the test specified in the policy, and that EPA was no longer willing to consider comments on the validity of the policy because the policy had already been "made final." *Id.* at 1321. The court also rebuked EPA for responding to another petitioner's challenge to the merits of the same policy with a "closed-minded and dismissive" recitation that such objections simply would "not be entertained." *Id.*

We readily agree that EPA's adjudicative officers must refrain from treating the PCB Penalty Policy as a rule, and must be prepared "to re-examine the basic propositions" on which the Policy is based, *McLouth*, 838 F.2d at 1321, in any case in which those "basic propositions" are genuinely placed at issue. We are not persuaded, however, that we should therefore prohibit any reliance on the Penalty Policy by the Agency's enforcement staff, either as a tool for developing penalty proposals or to support the "appropriateness" of such proposals in individual cases. Nor are we aware of any basis for concluding that EPA decisionmakers, like those in *United States Telephone Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994), have applied the PCB Penalty Policy so inflexibly as to belie this Board's repeated assurances that the Agency's Presiding Officers are not "bound" by the Policy. No evidence has been presented to us that would suggest such a pattern of inflexible application.

Further, use of a written policy to assist in developing penalty proposals should not be presumed to eliminate the exercise of sound professional judgment from that process; nor should it be presumed to result in penalty proposals that do not fairly reflect the circumstances of a particular violation or a particular violator. To the contrary, fairness in enforcement might well be better served if penalty proposals are developed in a regular and consistent manner, such as by consulting a written policy document, than if those proposals are generated *ad hoc.* [26] So long as the Agency's Presiding Officers (and this Board, as necessary) consider and address challenges raised in individual cases, either to the decision to apply the Penalty Policy to the case at hand, to the Penalty Policy's analysis of the TSCA penalty factors (in general or as applied to a particular set of facts), or to the

Penalty Policy's factual basis, the Agency is not impermissibly engaging in "rote" penalty assessment or otherwise granting to the Penalty Policy the "binding" or "conclusive" effect that is properly reserved only for rules and for adjudicative precedents.

4. *Proceedings on Remand*

***19** During the proceedings before Judge Lotis, neither respondent challenged the PCB Penalty Policy's analysis of the TSCA § 16 criteria, although Region V had made clear, at least since the time of its prehearing exchange, that it would rely on that analysis to support its penalty proposals. Similarly, neither respondent challenged any of the factual propositions underlying the Penalty Policy. The Region therefore had no reason to anticipate or to address challenges of that nature in its evidentiary presentation or in its briefs. In our opinion, it was error for the ALJ to reject a penalty proposal based on the Region's failure to offer evidence that the Region was under no general statutory or regulatory obligation to offer and thus, as far as it knew or had reason to know, was not expected to offer. As we have explained, the ALJ was free to demand further support for the Region's penalty analysis on his own initiative, notwithstanding the absence of any challenge by the respondents. But, although it was entirely permissible for the ALJ to demand such additional evidence, it was error to articulate that demand only after the hearing, when the demand could no longer be satisfied.

For these reasons, we will remand the action against Group Eight for further penalty assessment proceedings before a newly designated Presiding Officer (Judge Lotis having left his position with EPA during the pendency of this Appeal). On remand, the Presiding Officer shall reconsider the penalty assessment in light of this decision, and allow for the presentation of such additional evidence or argument as he or she may deem appropriate. The Presiding Officer shall then issue a decision, Appealable to this Board pursuant to 40 C.F.R. § 22.30, setting forth the amount of the penalty to be assessed against Group Eight.

III. CONCLUSION

The initial decision with respect to Employers Insurance of Wausau is affirmed.

The initial decision with respect to Group Eight Technology, Inc. is vacated insofar as it concludes that the complainant failed to prove the appropriateness of its proposed $76,000 civil penalty. The Agency's enforcement action against Group Eight is remanded to the Presiding Officer for further penalty assessment proceedings consistent with the discussion herein.

So ordered.

Footnotes

1 Section 15 of TSCA, 15 U.S.C. § 2614, makes it unlawful for "any person" to fail or refuse to comply with any EPA regulation governing PCBs. TSCA section 16, 15 U.S.C. § 2615, authorizes EPA to assess civil penalties for such violations administratively in an amount not to exceed $25,000 for each such violation.

2 With its response to the Region's Appeal, Wausau also filed what it termed a "protective cross-Appeal" to preserve, in the event of a decision to reinstate the Region's complaint against Wausau, challenges to certain subsidiary rulings made by the ALJ. Because we do not reinstate the complaint against Wausau, we do not reach any of the issues raised in Wausau's "protective cross-Appeal."

In addition, Group Eight filed an Appeal challenging the ALJ's conclusion that Group Eight had violated the PCB Rule. Group Eight's Appeal was untimely, however, and was dismissed by the Board on that basis by order dated November 28, 1995.

3 As with many of the factual matters in this case, the administrative record is not clear as to when Wausau first became aware of the other four transformers. The first occasion on which the record unmistakably shows Wausau to have become

aware of them is upon its receipt of a December 15, 1987 letter from the demolition contractor at the Group Eight site, Alfonzo Sclafani. Sclafani's letter is quoted at length later in this section of our opinion.

4 Wausau contends that six (rather than three) transformers were sampled for PCBs in September 1987. Wausau asserts that in addition to the three transformers removed from the site and tested, three others were tested at the site (but not removed). Wausau further contends that test results for all six transformers showed PCB concentrations below regulated levels. Wausau notes that six sample analysis sheets were prepared by Environmental Quality Laboratories, Inc., identifying the samples tested as "Oil #1," "Oil #2," "Oil #3," "Oil #4," "Oil #5," and "Oil #6." But as Region V points out, the sample analysis sheets nowhere indicate that each sample came from a different transformer; and indeed, when Marine Pollution Control forwarded those analysis sheets to the MDNR, it described all six samples as having been taken from a group of only three transformers (Serial Nos. R20557, R26697, and R20554). CTE No. 23. Moreover, the demolition contractor for the site, writing during December 1987 in reference to these test results, stated that only three transformers "have been tested negative for PCB's," whereas the other four transformers had yet to be tested and therefore "currently have no disposal status." CTE No. 6.

That dispute has legal significance because untested transformers are required to be handled just as if they were known to be "PCB-contaminated." See 40 C.F.R. § 761.3 ("Oil-filled electrical equipment * * * whose PCB concentration is unknown must be assumed to be PCB-Contaminated Electrical Equipment."). The number of transformers that were left untested in September 1987 -- one or four -- therefore affects whether one penalty or four penalties could have been sought in this action for each storage or disposal requirement allegedly violated. However, because Region V has never proposed to assess multiple penalties (i.e., a penalty for each transformer) for any of the storage or disposal violations alleged in this action, it is unnecessary, for purposes of this Appeal, to decide how many transformers were actually tested in September 1987 and how many were left untested.

5 There are conflicting versions in the record of how Sclafani Trucking came to be hired for this job. Aidenbaum states, in an affidavit, that it was Schrott (i.e., Group Eight) who "solicited a bid from * * * Sclafani Trucking, Inc. * * * for the performance of this demolition work." December 19, 1989 Affidavit of Howard Aidenbaum (CTE No. 1), at ¶ 6. Aidenbaum further states that Aidenbaum himself (and, by clear implication, Wausau) had had no prior relationship or even contact with Sclafani Trucking or with its principal, Alfonzo Sclafani. Id. Schrott, on the other hand, testified that Group Eight would have preferred to use a different demolition contractor but was overruled by Wausau. Schrott states that it was Aidenbaum, on behalf of Wausau, who insisted that Sclafani Trucking be hired for the job. Hearing Transcript at 172.

6 MDNR Exhibit No. 1, at 1. This exhibit is the report prepared by the MDNR on the basis of its January 11, 1989 PCB compliance inspection at the Group Eight site. Although identified in the hearing record as "MDNR Exhibit No. 1," the report was offered into evidence by Wausau. See Hearing Transcript at 117. The MDNR itself has not been a party to these enforcement proceedings.

7 According to the ALJ, it was sufficiently established at the hearing that "'Askerel' is an industry term for dielectric fluid containing concentrated levels of PCBs." Initial Decision at 9. No party to this action has disputed "that the Niagara transformer contained regulated levels of PCBs." Id. See also In re Bell & Howell Co., 1 E.A.D. 811, 821 (JO 1983) (noting that Askerel is a "common tradename[] for PCB dielectric fluid").

8 For purposes of the PCB Rule, a "PCB Transformer" is defined as "any transformer that contains 500 ppm PCB or greater." 40 C.F.R. § 761.3. The Subpart D disposal regulations provide that, subject to exceptions not here relevant, "PCBs at concentrations of 50 ppm or greater must be disposed of in an incinerator which complies with § 761.70." 40 C.F.R. § 761.60(a)(1).

9 Aidenbaum Aff. ¶ 11. It is not clear how K&D came to be involved in these discussions, nor is it clear how (or by whom) K&D was determined to be an appropriate candidate for the job of transporting and disposing of waste fluids from the Group Eight site. According to Aidenbaum's affidavit, K&D's field supervisor, Van Hook, was Alfonzo Sclafani's neighbor -- suggesting, implicitly, that K&D was recommended for this job by Sclafani Trucking -- but Aidenbaum does not indicate the basis for his understanding that there was a preexisting relationship between Sclafani Trucking and K&D. Aidenbaum insists, at all events, that he (and, by clear implication, Wausau) had had no prior relationship or even contact with K&D or with Van Hook. The record contains no further information about K&D, except that: (1) K&D identified itself to EPA and MDNR, in correspondence generated by its attorneys after the events at issue in this

action, as "a licensed transporter" (MDNR Exhibit No. 3, Attachment 4); and (2) Aidenbaum at one point assured EPA that K&D was considered to be an "acceptable" waste disposal contractor by the MDNR (CTE No. 19).

10 Hearing Transcript at 347. Bonace had previously been contacted in reference to that subject by the City of Wyandotte's City Engineer -- who was present during the MDNR's January 11, 1989 PCB compliance inspection conducted at the Group Eight site -- and Bonace had confirmed, in a telephone conversation with the MDNR inspector, that "when [the inspector] was at the site he saw an Askerel PCB transformer and six other oil filled transformers, several [of which] appeared to be leaking oil onto the ground." Id. at 348.

11 The "MID" number mentioned in this letter is presumably the identification number required to be obtained by a Michigan generator of hazardous waste pursuant to the Resource Conservation and Recovery Act.

12 Aidenbaum Aff. ¶ 13.

13 The case before us presents no issue relating to the responsibility of any person for the contamination of the CIW site, under the liability provisions of the Superfund statute (the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 et seq. ["CERCLA"]) or otherwise, nor does it present any other issue under CERCLA. We are aware, however, of previous litigation between Wausau and EPA wherein Wausau claimed reimbursement, pursuant to section 106(b)(2) of CERCLA, 42 U.S.C. § 9606(b)(2), of costs that Wausau incurred while addressing the contamination of the CIW site in response to an EPA order. Wausau's reimbursement claim was denied by EPA, and that denial was ultimately upheld by the Court of Appeals for the Seventh Circuit, for reasons not directly related to Wausau's CERCLA liability or nonliability with respect to the CIW site. See Employers Insurance of Wausau v. Browner, 52 F.3d 656 (7th Cir. 1995), cert. denied, 116 S. Ct. 699 (1996). The court made no factual findings as to the extent of Wausau's involvement in sending the transformer fluids to the CIW facility. Wausau's inability to obtain reimbursement of its CERCLA response costs in that litigation has no bearing on the TSCA issues that are currently before us.

14 Region V expresses some concern that the ALJ's initial decision implies that insurance carriers are "exempt" from TSCA requirements or prohibitions "that apply to everyone else." Appellant's Brief at 20. We think that concern is unfounded. We do not read the initial decision as recognizing such an exemption, nor should anything in our own opinion be construed as endorsing such an exemption.

15 An introductory provision of Part 761, 40 C.F.R. § 761.1(b), states that "[t]his part applies to all persons who manufacture, process, distribute in commerce, use, or dispose of PCBs or PCB Items." But the Agency has never applied that provision literally, to mean that "all of the PCB rules apply to a person who engages in just one of the listed activities." In re City of Detroit, 3 E.A.D. 514, 523 n.18 (CJO 1991). Rather, "it is evident that the regulations on use apply to those who use PCBs; the regulations on storage apply to those who store PCBs; and the regulations on disposal apply to those who dispose of PCBs." Id. at 523. Section 761.1(b) is therefore of limited value in deciding whether particular conduct violates particular requirements or prohibitions of the PCB Rule.

16 In determining who may be subject to a penalty under TSCA in a case involving uncontrolled PCB discharges, the CJO asked which parties could reasonably have been expected to minimize the risk of such uncontrolled discharges. Thus, he observed that applying the disposal rules to the owner of a PCB source would make sense because the owner presumably has "the power to control the handling of the PCBs." City of Detroit, 3 E.A.D. at 525. Even if a spill were caused by vandalism, the owner of the source could reasonably be subject to a disposal penalty because "the owner would normally be responsible for maintaining security at the site of its PCB sources." Id. The interpretation of "disposal" adopted by the CJO in the context of leaks and spills was therefore reasonably related to the apparent objective of the regulations.

17 As the Region acknowledges in its own appellate brief, "[c]omplainant's claim of Wausau's liability * * * is based upon documentary evidence of the events which culminated in the alleged unlawful disposal of PCBs by Wausau, especially an affidavit of Mr. Aidenbaum, the agent of Wausau directly involved in these events." Appellant's Brief at 4 n.2.

18 See supra note 2.

19 The Region also challenges the size of the penalty ($58,000) ultimately assessed by the ALJ against Group Eight in the initial decision, arguing that that penalty amount lacks any articulated, rational relationship to the factors that the Agency is required to consider in assessing a TSCA penalty. In light of our disposition of the Region's principal claim of error, we do not address this alternative basis for the Region's Appeal.

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20 More precisely, the Region's Amended Complaint alleged that Group Eight had violated the storage and disposal requirements of the PCB Rule by its conduct with respect to both the Niagara transformer and two of the Westinghouse transformers -- which, according to the Region, were required to be treated as "PCB-contaminated" because their fluid contents were never tested. Those allegations notwithstanding, however, the Region did not seek multiple penalties for any of the violations that Group Eight allegedly committed with respect to more than one transformer. For example, in regard to Group Eight's alleged use of an inadequate storage facility, the Region proposed to assess a penalty for only one violation even though three allegedly regulated transformers were stored in the facility in question.

Because all of the Region's penalty recommendations were based solely on Group Eight's handling of the Niagara askerel transformer -- whose status as a regulated PCB Transformer is not in dispute, see supra note 7 -- we need not consider whether any of the Westinghouse transformers were subject to regulation under Part 761. See supra note 4 (describing conflicting evidence as to how many of the transformers at the Group Eight site were TSCA-regulated).

21 The statute also provides that no penalty shall exceed $25,000 per violation, and that the assessment of a penalty must be preceded by an opportunity for a hearing in accordance with the Administrative Procedure Act, 5 U.S.C. § 554. TSCA §§ 16(a)(1), 16(a)(2)(A). Neither of those statutory requirements is at issue in this case.

22 Several different types of "rebuttal" can be imagined in connection with the appropriateness of a proposed TSCA penalty. For instance, a respondent might conceivably offer evidence showing that the Region completely overlooked one or more of the penalty factors that it was required by statute to consider. Or the respondent might contend that, despite the Region's consideration of each of the prescribed statutory factors, the proposed penalty is not supported by the Region's analysis of those factors and is therefore not "appropriate." See New Waterbury, 5 E.A.D. at 538-39. Such a contention might take the form of a legal argument concerning the proper interpretation of undisputed facts, or might include both a factual component and a legal/analytical component -- for example, if the respondent were to introduce evidence claimed to show a lack of culpability, and were to argue that that evidence justifies a particular reduction in the size of any penalty that the Presiding Officer might assess. In the case before us, Group Eight presented no evidence or argument whatsoever in relation to the amount of the penalty proposed by Region V.

23 When an administrative agency assesses a civil penalty or other sanction under authority conferred by statute, the agency's choice of a particular sanction -- for example, the size of the civil penalty -- may be set aside on judicial review only if the sanction is "'unwarranted in law' or 'without justification in fact.'" NL Industries v. Dep't of Transportation, 901 F.2d 141, 144 (D.C. Cir. 1990) (quoting Butz, 411 U.S. at 185-86); accord, Bluestone Energy Design, Inc. v. Federal Energy Regulatory Comm'n, 74 F.3d 1288, 1294 (D.C. Cir. 1996). See also Monieson v. Commodity Futures Trading Comm'n, 996 F.2d 852, 858 (7th Cir. 1993) ("When a penalty falls within statutory limits, we review only for an abuse of discretion, asking whether it is rationally related to the offense.").

24 See PCB Penalty Policy at 1 ("The purpose of this PCB Penalty Policy is to ensure that penalties for violations of the various PCB regulations are fair, uniform, and consistent, and that persons will be deterred from committing PCB violations.").

25 For the APA definitions of "rule" and "rule making," see 5 U.S.C. § 551.

26 The D.C. Circuit, for example, has made clear that the development of non-legislative agency guidelines is entirely proper, provided that the issuing agency does not seek to invest those guidelines with "binding effect":

Our holding today in no way indicates that agencies develop written guidelines to aid their exercise of discretion only at the peril of having a court transmogrify those guidelines into binding norms. We recognize that such guidelines have the not inconsiderable benefits of apprising the regulated community of the agency's intentions as well as informing the exercise of discretion by agents and officers in the field. It is beyond question that many such statements are non-binding in nature and would thus be characterized by a court as interpretative rules or policy statements. We are persuaded that courts will appropriately reach an opposite conclusion only where * * * the agency itself has given its rules substantive effect.

Community Nutrition Institute v. Young, 818 F.2d 943, 949 (D.C. Cir. 1987). That court has also squarely disavowed the conclusion, mistakenly adopted by the ALJ in this case, that principles derived from the Administrative Procedure Act require EPA to choose between issuing its PCB Penalty Policy as a rule or, in the alternative, treating the Penalty Policy as "nonexistent," and "a nullity." See Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Administration, 822 F.2d 1105, 1110-11 (D.C. Cir. 1987). Such an all-or-nothing formulation of the APA's requirements

simply "misstates the law." Id. at 1110. Rather, EPA may rely on the Penalty Policy's analysis in deciding individual cases so long as EPA responds, in a non-perfunctory way, to any civil penalty respondent who has "seriously attacked the reasoning" set forth in the Penalty Policy. Id. Mindful of those principles, we observed in DIC Americas, slip op. at 6, that EPA penalty policies usefully assist "Regional enforcement personnel [to] calculate civil penalties * * * fairly and consistently," but that Agency decisionmakers are under "no obligation to adhere to [a] penalty policy in a particular instance."

6 E.A.D. 735 (E.P.A.), 1997 WL 94743

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8 E.A.D. 577 (E.P.A.), 1999 WL 673227

United States Environmental Protection Agency (E.P.A.)

Environmental Appeals Board

IN RE: STEELTECH, LIMITED

*1 Emergency Planning and Community Right to Know Act

Docket No. EPCRA-037-94
EPCRA Appeal No. 98-6
Decided August 26, 1999

FINAL DECISION

Syllabus

This is an Appeal by Steeltech, Limited ("Steeltech") from an Initial Decision, dated May 27, 1998, issued by Chief Administrative Law Judge Susan L. Biro (the "Presiding Officer"). This matter arises out of an administrative enforcement action by the United States Environmental Protection Agency Region V (the "Region") against Steeltech for alleged violations of section 313 of the Emergency Planning and Community Right-To-Know Act ("EPCRA"). By the Initial Decision, the Presiding Officer determined that Steeltech is liable for nine violations of the reporting requirements of EPCRA § 313, and the Presiding Officer assessed a civil penalty of $61,736 for these violations. The Presiding officer based her penalty analysis on the guidance of an Agency penalty policy, the "Enforcement Response Policy for Section 313 of the Emergency Planning and Community-Right-to-Know Act and Section 6607 of the Pollution Prevention Act" (Aug. 10, 1992) (the "ERP").

Steeltech is a corporation that owns a manufacturing facility in Grand Rapids Michigan (the "Facility"). At the Facility, Steeltech used nickel and chromium during calendar years 1989, 1990 and 1992 and, in 1993, used nickel, chromium and cobalt. Nickel, chromium and cobalt are subject to the reporting requirements of EPCRA, which requires manufacturers to file Toxic Chemical Release Inventory Reporting Forms ("Form Rs") reporting their use of certain toxic chemicals. The Form Rs must be filed with the EPA no later than July 1 following the calendar year in which the use of the toxic chemicals exceeded the applicable reporting thresholds. On Appeal, Steeltech has admitted that it failed to file the requisite Form Rs and is liable for nine violations of EPCRA § 313; the only issues raised go to the amount of penalty to be assessed for these violations.

Steeltech raises essentially two general arguments on Appeal. Steeltech argues that the Presiding Officer erred by applying the "formulaic restrictions of the [ERP]" in determining the amount of the penalty and in requiring a showing of "extraordinary circumstances" as a basis for departing from the ERP. Steeltech also argues that, even under the guidance of the ERP, the Presiding Officer erred by failing to grant further reductions to the penalty.
HELD: 1) Although it is not necessary to show "extraordinary circumstances" to justify departing from the ERP, it is appropriate to apply the ERP to the facts of this case and the circumstances do not warrant a deviation from the ERP's guidance. In particular, the following circumstances of this case do not warrant deviation from the ERP: (a) Steeltech's alleged lack of awareness of the EPCRA filing requirements; (b) Steeltech's alleged strained financial condition; and (c) alleged lack of actual harm to the environment. In addition, the guidance of another Agency policy applicable to penalties assessed in settlements ("Incentives for Self-policing: Discovery, Disclosure, Correction, and Prevention of Violations," 60 Fed. Reg. 66,706 (Dec. 22, 1995)) does not provide a basis for departing from the guidance of the ERP in this litigated case

*2 (2) Steeltech has failed to show any clear error in the Presiding Officer's application of the ERP's guidance. In particular, Steeltech has failed to show clear error in the Presiding Officer's decision regarding the amount of penalty reductions to grant for (a) Steeltech's voluntary disclosure of the 1992 and 1993 violations, and (b) Steeltech's favorable "attitude." Steeltech also has failed to show circumstances that would warrant a penalty reduction under the ERP's guidance for "other factors as justice may require."

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.
Opinion of the Board by Judge Reich:

This is an Appeal by Steeltech, Limited ("Steeltech") from an Initial Decision, dated May 27, 1998, and from an Order Denying Motion to Reopen Hearing, dated August 14, 1998, entered by Chief Administrative Law Judge Susan L. Biro (the "Presiding Officer"). This matter arises out of an administrative enforcement action by the United States Environmental Protection Agency Region V (the "Region") against Steeltech for nine alleged violations of section 313 of the Emergency Planning and Community Right-To-Know Act ("EPCRA"), 42 U.S.C. § 11023. By the Initial Decision, the Presiding Officer determined that Steeltech is liable for nine violations of the reporting requirements of EPCRA § 313, and the Presiding Officer assessed a civil penalty of $61,736 for these violations.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

"EPCRA § 313 requires certain facilities to submit annually, no later than July 1 of each year, a Toxic Chemical Release Inventory Reporting Form ("Form R") for each toxic chemical listed under 40 C.F.R. § 372.65 that was manufactured, imported, processed, or otherwise used during the preceding calendar year in quantities exceeding established chemical thresholds." *In re Catalina Yachts, Inc.*, EPCRA Appeal Nos. 98-2 & 98-5, slip op. at 4 (EAB, Mar. 24, 1999), 8 E.A.D. - (footnote omitted) (citing *In re Spang & Co.*, 6 E.A.D. 226, 228 (EAB 1995); *In re K.O. Mfg., Inc.*, 5 E.A.D. 798, 799-800 (EAB 1995)). The reporting threshold relevant to this case is 25,000 pounds of a toxic chemical used at a facility in a calendar year. EPCRA § 313(f)(1)(B)(iii); 40 C.F.R. § 372.25(a). The Agency has the authority to enforce the reporting requirements of section 313 and, at the time of the violations at issue here, was authorized to impose civil penalties of up to $ 25,000 [1] for each failure to file a Form R and for each day that the violation continued. EPCRA § 325(c), 42 U.S.C. § 11045(c).

B. *Factual and Procedural Background*

Steeltech is a corporation that, at all relevant times, had a place of business located at 1252 Phillips Avenue, S.W., Grand Rapids, Michigan (the "Facility"). During the relevant calendar years of 1989 through 1993, Steeltech used nickel, chromium, and cobalt in the manufacture of alloy castings at the Facility. Steeltech used nickel, chromium and cobalt in the following amounts in the indicated calendar years:

1989	Nickel	351,625 lbs.
	Chromium	256,238 lbs.
1990	Nickel	285,890 lbs.
	Chromium	208,335 lbs.
1992	Nickel	283,901 lbs.
	Chromium	189,268 lbs.

1993	Nickel	347,923 Ibs.
	Chromium	231,955 Ibs.
	Cobalt	162,369 Ibs.

***3** Joint Stipulated Facts (Ex 26) ("Stipulations") ¶¶ 15, 17, 22, 26, 31, 33, 39, 42, 48, 51, 54. Nickel, chromium and cobalt are subject to the reporting requirements of EPCRA. EPCRA § 313(c); 40 C.F.R. § 372,65; *see also* Stipulations ¶¶ 9, 10, 11. However, Steeltech did not timely file the required Form Rs reporting its use of nickel, chromium and cobalt in calendar years 1989, 1990, 1992 and 1993. Stipulations ¶¶ 16, 18, 23, 27, 32, 34, 41, 44, 50, 56. As noted above, Steeltech's Form Rs were required to be filed no later than July 1 following the calendar year in which Steeltech's use of these toxic chemicals exceeded the reporting threshold of 25,000 Ibs. *Catalina Yachts*, slip op. at 4, 8 E.A.D. -.

On February 12, 1992, an EPA representative conducted an inspection of the Facility to determine whether Steeltech was in compliance with the EPCRA. Stipulations ¶ 12. Based on that inspection, the Region filed the complaint commencing this matter on September 2, 1994 (the "Complaint"). The Complaint originally alleged four violations for the years 1989 and 1990 (a separate violation was alleged for the failure to file a Form R for each of nickel and chromium in each year). [2] Subsequently, the Region was granted permission to amend the Complaint to allege five additional violations for the years 1992 and 1993 (a separate violation for each of nickel and chromium in 1992 and 1993 and for cobalt in 1993) (the "Amended Complaint"). The parties stipulated that the five violations for 1992 and 1993 had been "voluntarily disclosed" by Steeltech. Stipulations ¶¶ 40, 43, 49, 52, 55.

The Region requested a total penalty of $74,390 for the nine Form R reporting violations alleged to have occurred for calendar years 1989, 1990, 1992 and 1993. [3] The Region's proposed penalty was calculated based upon the guidelines of the Enforcement Response Policy for Section 313 of the Emergency Planning and Community-Right-to-Know Act and Section 6607 of the Pollution Prevention Act (August 10, 1992) (the "ERP"), which was prepared by the Agency's Office of Compliance Monitoring of the Office of Prevention, Pesticides and Toxic Substances. [4]

Steeltech filed answers to both the Complaint and the Amended Complaint alleging, among other things, lack of knowledge or information sufficient to form a belief as to the truth of the allegations as to liability and also raising certain affirmative defenses. Steeltech also requested a hearing. On April 6, 1995, Michael F. Farmer, the former owner of Steeltech, was granted leave to intervene in this action. Mr. Farmer's intervention was based on the fact that, when he sold his stock in Steeltech to its present owners in July 1990, he had entered into an indemnification agreement covering certain environmental liabilities. [5]

In July 1997, the Region filed a motion for accelerated decision as to both liability and penalty on all counts of the Amended Complaint. Both Steeltech and Mr. Farmer filed oppositions to that motion. In August 1997, the Presiding Officer entered an order granting accelerated decision as to liability for the nine Form R reporting violations alleged for calendar years 1989, 1990, 1992, and 1993. [6] The Presiding Officer did not grant accelerated decision as to the amount of the penalty for the nine violations, but instead scheduled an evidentiary hearing, which was held on September 23, 1997. At the hearing, the parties stipulated to the admission into evidence of twenty-three exhibits, including a stipulation of agreed facts. The ERP and the Region's penalty calculation work-sheets showing how the Region arrived at its proposed penalty were among the exhibits admitted into evidence (Exs. 2 and 3, respectively). In addition, testimony was heard from Mr. Farmer and two representatives of Steeltech: (1) James Pews, Steeltech's chief financial officer and vice president of finance; and (2) Gary Salemo, one of the owners of Steeltech. The Region did not call any witnesses to testify on its behalf at the hearing.

***4** After the conclusion of the evidentiary hearing and after consideration of the parties' post-hearing briefs, the Presiding Officer entered the Initial Decision assessing a total penalty of $61,736 for Steeltech's nine violations of EPCRA's Form R reporting requirements. Although the Presiding Officer's penalty assessment is lower than the penalty of $74,390 proposed by

the Region, the Presiding Officer's analysis also followed the guidelines of the ERP. The Presiding Officer disagreed with the Region's proposed penalty with respect to two discretionary adjustments to the gravity-based penalty amount. (The guidelines of the ERP provide first for the calculation of a gravity-based penalty, taking into account factors relating to the seriousness of the violation and the size of respondent's business, and then for adjustments to be made based upon mitigating and/or aggravating circumstances of the particular case.) [7]

First, the Presiding Officer decided to grant a 20% reduction in the gravity component of the penalty for the four violations for years 1989 and 1990 to take into account evidence of Steeltech's cooperative attitude in connection with the inspection of its facility in February 1992. [8] The Region's proposed penalty did not include this reduction.

Second, the Presiding Officer decided to grant Steeltech a larger penalty reduction than had been proposed by the Region for Steeltech's voluntary disclosure of the five violations for the 1992 and 1993. The Region's proposed penalty rationale included a 35% penalty reduction for the 1992 and 1993 violations, with 25% of the reduction on account of Steeltech's voluntary disclosure of the violations and 10% for Steeltech's prompt correction of the violations by filing the required Form Rs. In contrast, the Presiding Officer determined to reduce the gravity-based penalty for the 1992 and 1993 violations by 42%. [9] In arriving at this reduction, the Presiding Officer first observed that, under the ERP's guidance, reductions of up to 50% may be granted for "voluntary disclosure," with the initial 25% of this reduction available for facilities that both voluntarily disclose *and* promptly correct the violations by filing the requisite Form Rs. *See* ERP at 14. The Presiding Officer also observed that there were three criteria relevant to this case [10] for determining whether the second 25% reduction, or a portion thereof, may be granted. These criteria are whether the disclosure is made promptly after the facility discovers the violation, whether the facility takes action to prevent future violations, and whether the facility does not have a history of prior violations. *See id.* at 15. After reviewing these aspects of the ERP's guidance, the Presiding Officer decided to grant Steeltech the 42% penalty reduction, consisting of the initial 25% for Steeltech's voluntary disclosure and prompt remediation of the violations, and an additional 17% for Steeltech's prompt disclosure after discovering the violations and its efforts to prevent future violations. Initial Decision at 15-16. [11] In all other respects, the Presiding Officer agreed with the Region's analysis, explaining her reasons in a detailed discussion comprising the majority of the 23 page Initial Decision.

***5** After the Presiding Officer entered the Initial Decision, Steeltech filed a motion (the "Motion to Reopen") seeking to have the hearing reopened pursuant to 40 C.F.R. § 22.28(a) on the alleged grounds that the Presiding Officer misunderstood the facts relevant to Steeltech's voluntary disclosure. Steeltech argued that an opportunity should be granted for submission of additional evidence, which Steeltech stated would show that it should be granted an even larger reduction for voluntary disclosure. The Region filed an opposition to Steeltech's Motion to Reopen. On August 14, 1998, the Presiding Officer entered an order denying the Motion to Reopen, explaining that because her reason for not granting a larger reduction was based on Steeltech's history of prior violations, the proffered evidence, which only related to the voluntariness of the disclosure, would not change her penalty analysis. *See* Order Denying Motion to Reopen Hearing at 4-5.

Steeltech now has filed its notice of Appeal from both the Initial Decision and the order denying the Motion to Reopen. *See* Brief in Support of Respondent's Appeal of Initial Decision ("Steeltech's Brief") at 2. Steeltech raises essentially two general arguments on Appeal: (1) Steeltech argues that the Presiding Officer erred by applying the "formulaic restrictions of the [ERP]," *id.* at 11-19; and (2) it argues further that, even under the guidance of the ERP, the Presiding Officer erred by failing to grant further reductions to the penalty. *Id.* at 20-28. [12] The Region filed a reply brief in opposition to Steeltech's Appeal. *See* Brief of Appellee ("Region's Brief"). For the following reasons, we reject Steeltech's arguments and affirm the Presiding Officer's penalty assessment.

II. *DISCUSSION*

A. *The Presiding Officer Did Not Err by Relying Upon the ERP in Formulating Her Penalty Analysis*

As its first argument on Appeal, Steeltech contends that the Presiding Officer should have determined the penalty in this case without applying what Steeltech refers to as the "formulaic restrictions" of the ERP. Steeltech's Brief at 11. Noting that the ERP is not a rule and, therefore, does not have the force of law, *id.*, Steeltech argues that the Presiding Officer applied an inappropriately stringent standard for determining whether she would deviate from the guidance of the ERP. *Id.* at 13. In particular, quoting the Initial Decision, Steeltech argues that the Presiding Officer erroneously stated that "extraordinary circumstances" must exist to justify deviation from the ERP's guidelines. *Id.* Steeltech further argues that the appropriate standard, derived from the Board's prior decisions, merely provides that deviation is appropriate where "circumstances warrant." *Id.* (citing *In re DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995)). Steeltech then argues that the circumstances in this case do warrant deviation from the ERP. Specifically, Steeltech argues that its violations are not serious and that mitigating circumstances, such as its self-disclosure of the violations, its efforts to avoid future violations, its lack of awareness of the reporting requirements, employee turn-over and financial difficulty, all warrant a low penalty in this case. *Id.*

***6** The Region, in contrast, argues that the Presiding Officer did not err. It argues that the Presiding Officer had the discretionary authority to apply the ERP in this case and properly exercised that authority. The Region explains as follows:

> The fact that she used the term "extraordinary circumstances" does not affect her decision making authority. All she did through this statement was communicate her decision that there were no circumstances which presented a reason to deviate from the ERP in this case.

Region's Brief at 4. The Region also provides responses to the specific circumstances identified by Steeltech as allegedly justifying a departure from the ERP's guidance.

While we agree that a Presiding Officer need not find "extraordinary circumstances" as a basis for deviation from the ERP, we nevertheless reject Steeltech's contention that the circumstances of this case warrant deviation from the guidance of the ERP. We begin our analysis by reviewing the statutory authority for imposing civil penalties, the applicable Agency penalty policy, and our prior decisions applying both the statute and the penalty policy.

As noted above, the statute authorizes the Agency to impose civil penalties of up to $25,000 for each violation of EPCRA § 313. EPCRA § 325(c), 42 U.S.C. § 11045(c). The statute further provides that each day that the failure to report continues is a separate violation. *Id.* Other than these two parameters, the statute does not provide further guidance for the assessment of penalties for violation of EPCRA § 313. Specifically, EPCRA § 325(c), unlike many civil penalty provisions, does not provide a list of factors to be taken into account in assessing civil penalties. *Woodcrest*, slip op. at 21 & n.11, 7 E.A.D. __. The Agency, however, has prepared the ERP to provide guidance on the assessment of penalties for violations of EPCRA § 313. While Steeltech is correct that the ERP has not been promulgated as a regulation and, therefore, does not have the force of law, pursuant to the applicable regulations, the Presiding Officer was required to consider the ERP's guidance. 40 C.F.R. § 22.27(b) (stating that the presiding officer must consider any civil penalty guidelines or policies issued by EPA under the applicable statute). Although required to consider the ERP's guidance, we have stated that "the EPA's adjudicative officers must refrain from treating the [penalty policy] as a rule, and must be prepared 'to re-examine the basic propositions' on which the policy is based in any case in which those 'basic propositions' are genuinely placed at issue." *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 761 (EAB 1997) (citation omitted). Further, "this Board has repeatedly stated that a Presiding Officer, having considered any applicable civil penalty guidelines issued by the Agency, is nonetheless free not to apply them to the case at hand." *Id.* at 758, citing *DIC Americas*, 6 E.A.D. at 189.

***7** In describing the standard for determining whether to apply the ERP in this case, the Presiding Officer, quoting from the same case relied upon by Steeltech, correctly stated that she had "'the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where circumstances warrant.'" Initial Decision at 10 (quoting *DIC Americas*, 6 E.A.D. at 189). This Board has considered the guidance of the ERP in many cases. *See, e.g., Woodcrest*, slip op. at

23-31, 7 E.A.D. at ___; *Clarksburg Casket*, slip op. at 22, 8 E.A.D. at ___; *In re Spang & Co.*, 6 E.A.D. 226, 242 n.19 (EAB 1995); *see also In re Pacific Refining Company*, 5 E.A.D. 607, 608 & n.2 (EAB 1994) (comparing the 1992 and 1988 versions of the ERP). We have held generally that "a presiding officer may properly refer to such a policy as a means of explaining how he arrived at his penalty determination." *In re Great Lakes Div. Nat'l Steel Corp.*, 5 E.A.D. 355, 374 (EAB 1994) (decided under EPCRA § 104); *accord In re Sandoz, Inc.*, 2 E.A.D. 324, 328 n.11 (CJO 1987). Indeed, "[t]he presiding officer may satisfy his duty of articulating the reasons for his penalty determination by explaining how the facts of the particular case fit the applicable penalty policy." *Great Lakes*, 5 E.A.D. at 374 n.41.

In this case, the Presiding Officer's choice of language in one sentence of her decision implies that she may have applied an inappropriately high standard for deviation from the guidance of the ERP. Specifically, the Presiding Officer stated that "[t]his case presents no *extraordinary circumstances* which would suggest any deviation from the ERP." Initial Decision at 18 (emphasis added). [13] Because the ERP is not a rule, the ERP does not generally restrict the Presiding Officer's discretionary authority and a finding of "extraordinary" circumstances is not required for deviation from the ERP's guidance. [14] Nevertheless, because, as discussed below, we find based on our review of the record that it is appropriate to apply the ERP to these facts and the circumstances do not warrant a deviation from the ERP's guidance, we conclude that the Presiding Officer's reference to "extraordinary circumstances" was not material to the outcome and did not produce a clearly erroneous result.

Steeltech has raised a number of specific circumstances of this case as allegedly warranting deviation from the ERP, none of which we find persuasive. First, we reject Steeltech's argument that its violations were of low gravity due to its lack of awareness of the EPCRA filing requirements. EPCRA is a strict liability statute -- "Congress determined that failure to comply with the reporting requirements of section 313 alone is sufficient for liability and assessment of a civil penalty." *Woodcrest*, slip op. at 30, 7 E.A.D. at __. The ERP specifically states that ignorance of the reporting requirements does not justify mitigation of the penalty:

> ***8** 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. In fact, if a violation is knowing or willful, the Agency reserves the right to assess per day penalties, or take other enforcement action as appropriate.

ERP at 14; [15] *accord In re Catalina Yachts, Inc.*, EPCRA Appeal Nos. 98-2 & 98-5, slip op. at 16-17 (EAB, Mar. 24, 1999), 8 E.A.D. __ (upholding a presiding officer's decision not to reduce a penalty on account of respondent's lack of awareness of the reporting requirements). Thus, the ERP's guidance expressly takes into account the circumstances identified by Steeltech. Accordingly, we reject Steeltech's argument that its ignorance of the reporting requirements are circumstances that warrant a departure from the ERP's guidelines. [16]

Steeltech also argues that its failure to timely file the Form Rs for 1992 and 1993 was "the result of circumstances surrounding the * * * efforts to bring Steeltech into a profitable situation." Steeltech's Brief at 13. It states further that it was "teetering on the edge of bankruptcy" and that "[i]t was absolutely critical for [Steeltech's owner] to focus all of his efforts on sales and marketing to bring in revenues to keep the business going." *Id.* at 13-14. We find this argument to be particularly unpersuasive. Compliance with EPCRA, or any other environmental or safety regulation, is not limited only to those businesses that are experiencing no financial strain; environmental and safety regulations are basic requirements of operating any business in this country. *See, e.g.*, *In re Fisher-Calo Chemicals and Solvents Corp.*, 2 E.A.D. 301 (Adm'r 1987) (concluding in a permit proceeding that even a company operating under bankruptcy court protection must continue to comply with the requirements of the Resource Conservation and Recovery Act); *In re Wheeling-Pittsburgh Steel Corp.*, 2 E.A.D. 79 (CJO 1985) (same in a penalty proceeding). Indeed, Steeltech's argument, rather than providing a basis for mitigation, instead suggests that its owners made a calculated decision to focus exclusively on marketing while neglecting as secondary compliance with applicable environmental and safety

regulations. That kind of disregard of EPCRA's reporting requirements certainly does not constitute circumstances warranting a downward deviation from the ERP's guidance.

We also reject Steeltech's contention that alleged lack of actual harm to the environment warrants departure from the guidelines of the ERP. Steeltech's Brief at 16. Reporting failures are significant because "the failure to report under the EPCRA deprives local communities, states and the federal government of information needed to inform citizens and the local community about the toxic chemicals used by the violator * * * [t]hat deprivation is inherently harmful." *Woodcrest*, slip op. at 31, 7 E.A.D. at ___. Thus, as we held in *Woodcrest*, "it is appropriate that substantial penalties be imposed even if [a respondent] could prove that there was no actual harm [to the environment or health]." *Id.* slip op. at 30, 7 E.A.D. at ___; *see also Clarksburg Casket*, slip op. at 24-25, 8 E.A.D. at ___.

***9** Finally, we reject Steeltech's contention that guidance from another Agency policy, "Incentives for Self-policing: Discovery, Disclosure, Correction, and Prevention of Violations," 60 Fed. Reg. 66,706 (Dec. 22, 1995), should be used in this case to support a penalty reduction of 75 to 100%. Steeltech's Brief at 18. We have held that the Agency's settlement policies, including specifically the "Self-Disclosure Policy," should not be applied in litigated penalty assessments. *In re Bollman Hat Co.*, EPCRA Appeal No. 98-4, slip op. at 14, 17 (EAB, Feb. 11, 1999), 8 E.A.D. ___ (declining to adopt presiding officer's penalty rationale where that rationale was based in part upon application of the Self-Disclosure Policy in a litigated penalty assessment); *In re Harmon Elec., Inc.*, RCRA (3008) Appeal No. 94-4, slip op. at 60 (EAB, Mar. 24, 1997), 7 E.A.D. __, *rev'd on other grounds*, 19 F.Supp. 2d 988 (W.D. Mo. 1998). Accordingly, the guidance of the Self-Disclosure Policy does not provide a basis for departing from the ERP in this case.

For all of the foregoing reasons, we reject Steeltech's contention that the circumstances of this case warrant a departure from the ERP's guidance and we find no error in the fact that the Presiding Officer used that guidance as a framework to explain her penalty rationale.

B. *Steeltech Has Failed to Show any Clear Error in the Presiding Officer's Application of the ERP Guidance*

As its second issue on Appeal, Steeltech argues that if the guidance of the ERP is applied in this case, Steeltech is nevertheless entitled under that guidance to penalty reductions that were not granted by the Presiding Officer. Steeltech identifies three separate categories of penalty reductions that it argues should have been applied in this case. First, Steeltech argues that it should have been granted a 50% penalty reduction for Steeltech's voluntary disclosure of the 1992 and 1993 violations, rather than the 42% granted by the Presiding Officer. Steeltech's Brief at 20-21. Second, Steeltech argues that, for its favorable "attitude," it should have been granted a 30% penalty reduction for all nine violations, rather than the 20% granted by the Presiding Officer for only the 1989 and 1990 violations. *Id.* at 21-24. (Steeltech's third issue on Appeal raising an alleged error in the denial of its Motion to Reopen also relates to this issue and will be discussed in this part of our analysis.) Third, Steeltech argues that it should have been granted a 25% reduction for "other factors as justice may require" in order to take into account the new ownership of Steeltech and Steeltech's alleged "lack of control over the violation," among other circumstances. *Id.* at 24-28. As discussed below, we reject each of these arguments, finding no clear error or abuse of discretion in the Presiding Officer's analysis in applying the ERP's guidance.

1. *Penalty Reductions for Steeltech's Voluntary Disclosure*

***10** The ERP's guidance for "voluntary disclosure" provides for an initial 25% reduction for a violator that, without any prompting from the Agency, voluntarily discloses and promptly corrects its violations by filing the requisite Form Rs, and it provides for an additional reduction of up to 25% where the violator meets certain additional criteria. ERP at 14-15. Here, the Region proposed that the gravity-based penalty for the two 1992 violations and the three 1993 violations be reduced by 35%. The Region proposed that Steeltech should be granted the initial 25% reduction because it voluntarily disclosed the violations and that it should be granted an additional 10% reduction because it promptly filed the missing reports after it disclosed its violations. In contrast, Steeltech argued that it should be granted both the initial 25% reduction and the full amount of the second

25% reduction. Steeltech based its argument upon the parties' stipulations, which stated that Steeltech "voluntarily disclosed" the five violations. Steeltech argued that this language from the parties' stipulations established that it was entitled to the full 50% penalty reduction.

In the Initial Decision, the Presiding Officer questioned whether, under a literal application of the ERP's guidance, Steeltech should even be granted the initial 25% penalty reduction. The Presiding Officer explained as follows:
At the outset it must be noted that the ERP provides that "the Agency will not consider a facility eligible for any voluntary disclosure reductions if the company has been notified of a scheduled inspection or the inspection has begun." As indicated in detail above, Steeltech did not disclose the 1992 and 1993 violations, until after the 1992 inspection occurred and after the original Complaint was filed, albeit the inspection and original Complaint related only to the 1988 and 1989 violations. However, the testimony of Mr. Pews indicates that Steeltech's "voluntary disclosure" was not spontaneous, rather, it merely consisted of his confirmation to EPA of the accuracy of information concerning the existence of the additional violations, information which EPA had previously provided to him. Nevertheless, Complainant, in its enforcement discretion, chose to consider those violations to have been "voluntarily disclosed" within the meaning of the ERP and Complainant's discretion in this instance will not be disturbed.

Initial Decision at 15 (citations and footnotes omitted). As this quote demonstrates, the Presiding Officer determined to grant Steeltech the benefit of the initial 25% penalty reduction even though the Presiding Officer had questions regarding the appropriateness of that reduction. [17]

With respect to the second portion of the voluntary disclosure adjustment, the Presiding Officer disagreed with the Region's analysis. First, the Presiding Officer rejected the Region's rationale for granting a 10% reduction, stating that the Region's proposed reason for the reduction (that Steeltech promptly filed the missing reports) is actually one of the criteria that must be satisfied for eligibility for the initial 25% reduction. Initial Decision at 15-16 (citing ERP at 15). The Presiding Officer, however, decided to grant Steeltech two-thirds of the second 25% reduction because the Presiding Officer concluded that Steeltech satisfied two of the three criteria applicable under the ERP for granting the second part of this penalty reduction. *Id.* at 16. The Presiding Officer determined that Steeltech had promptly disclosed the violations after they were discovered by Steeltech and that it took action to ensure that future violations would not occur. *Id.* The criterion that the Presiding Officer found was not satisfied was that Steeltech had a history of violations. *Id.*

***11** On Appeal, Steeltech argues that the Presiding Officer misapplied the history-of-violation criterion. Steeltech first observes that the ERP guidance provides that the violator must not have a history of violations "for the two reporting years preceding 'the *calendar year in which the violation is disclosed to EPA*."' Steeltech's Brief at 21 (quoting ERP at 15, emphasis added by Steeltech). Second, Steeltech notes that the Presiding Officer, in contrast, found that Steeltech had a history of violations because it "failed to timely file Form Rs for 1990 which is two reporting years preceding the *reporting years* for the violations." Initial Decision at 16 (emphasis added). After noting the different time periods considered for the history-of-violation criterion under the ERP and in the Presiding Officer's analysis, Steeltech argues that the violation for the 1990 reporting year relied upon by the Presiding Officer is not relevant under the ERP because those violations are four reporting years prior to 1994, the calendar year in which Steeltech disclosed the 1992 and 1993 reporting violations. The Region has responded to this argument by, in essence, contending that Steeltech is simply obscuring the fact that "by 1994 [Steeltech] had never been in compliance with EPCRA section 313 requirements for two consecutive reporting years." Region's Brief at 11 (noting that Steeltech had only timely filed the Form Rs for the 1991 calendar year and that it had violated the reporting requirements in all other years prior to 1994).

We reject Steeltech's argument on Appeal regarding the appropriate time period for determining whether it has a history of violations relevant to the voluntary disclosure adjustment factor because it would result in an absurd application of the ERP in this case. In essence, Steeltech is arguing that it did not have a history of violations within the two reporting years preceding the calendar year in which it made its disclosures simply because the only violations within the requisite two years time period were the violations being disclosed, which comprised all of Steeltech's reporting obligations for those two years. Steeltech

apparently contends that the violations being disclosed should not be counted as establishing a history of violations relevant to this adjustment factor. This, however, would allow Steeltech to benefit from a delay in meeting its reporting obligations covering two reporting years. We agree with the Region that it would be absurd under the circumstances of this case for Steeltech to be treated with respect to the 1992 and 1993 violations as if it had a history of full compliance when it clearly was not in compliance during those years and, in fact, complied with EPCRA only once in the five-year period from 1989 through 1993. To the extent that the ERP could be read as leading to a contrary result on the particular facts of this case, we reject such a reading.

We therefore conclude that the Presiding Officer's penalty reduction of only 42%, rather than the full 50% does not represent clear error or an abuse of discretion.

2. *Penalty Reductions for Steeltech's Attitude*

***12** The ERP provides for adjustments to the gravity-based penalty of up to 15% for a respondent's cooperative attitude and up to 15% for a respondent's good faith efforts to comply, for a total "attitude" adjustment of up to 30%. The Presiding Officer determined in this case that Steeltech should receive a penalty reduction for the 1989 and 1990 violations of 20% based on Steeltech's cooperation and good faith efforts to comply with EPCRA. On Appeal, Steeltech argues that it should have been granted the full 30%, not just a 20% reduction, and that the reduction should have been granted for all violations, not just the 1989 and 1990 violations.

a. *Reduction of 30%, as Opposed to 20%*

Steeltech argues that the Presiding Officer's rationale for granting only part of the available reduction failed to consider "the circumstances existing at Steeltech in terms of employee turnover and the necessary focus of significant efforts and resources to keep the company out of bankruptcy." Steeltech's Brief at 22. We reject Steeltech's contention that consideration of employee turnover and Steeltech's strained financial condition shows that the Presiding Officer committed clear error or an abuse of discretion when she decided not to grant the full 30% reduction. As noted above, compliance with the EPCRA, or any other environmental or safety regulation, is not limited only to those businesses that are financially strong; compliance with applicable environmental and safety regulations are basic requirements of operating a business in this country. Steeltech's suggestion that its financial difficulties somehow justify its failure to comply with the EPCRA and evidence its positive "attitude" towards compliance is rejected. To the contrary, as discussed above, this argument suggests an inappropriate disregard for compliance; not a positive attitude that should be rewarded.

b. *Reduction for All Violations, as Opposed to a Reduction for Only the 1989 and 1990 Violations*

Steeltech also argues that the attitude-based penalty reduction should have been granted for all violations, rather than just for the 1989 and 1990 reporting year violations. Under the ERP's guidance, Steeltech would not be entitled to a reduction for attitude with respect to the 1992 and 1993 violations because the Presiding Officer had already granted a penalty reduction for voluntary disclosure for the same violations -- the ERP treats the penalty reductions for attitude and voluntary disclosure as "mutually exclusive." ERP at 16. Steeltech, however, argues that it should be granted both reductions in this case because the Presiding Officer questioned the appropriateness of the mutual exclusivity of the two reductions and only determined not to grant both reductions in this case on other grounds, which Steeltech contends were erroneous. Thus, Steeltech argues that if the Presiding Officer had not erred in her penalty rationale, she would have granted both reductions.

***13** The Presiding Officer, while indicating that she found the rationale for mutual exclusivity to be "questionable," went on to state:

> [S]ince in this case, EPA considered Steeltech's mere confirmation of information told to it by the Agency as "voluntary disclosure," for which I have found Steeltech entitled to a 42% reduction as to five counts, I find an additional adjustment based upon attitude as to those Counts unwarranted.

Initial Decision at 19 n. 25. Steeltech argues that these grounds for not granting both the attitude reduction and voluntary disclosure reduction were in error because the Presiding Officer misunderstood the parties' stipulations regarding Steeltech's voluntary disclosure and because the Presiding Officer did not allow Steeltech an opportunity to supplement the record with further testimony to clarify the Presiding Officer's alleged misunderstanding. Steeltech's Brief at 22-23. [18] We do not need to reach these issues, however, because we disagree with the suggestion that the "voluntary disclosure" reduction and the "attitude" reduction should not be mutually exclusive.

The reason for mutual exclusivity, as stated in the ERP, is that both "attitude" and "voluntary disclosure" "recognize the facility's concern with and action taken toward timely compliance." ERP at 16. That this is so is illustrated by the facts of this case. As discussed above, consideration of the ERP's guidance regarding "voluntary disclosure" resulted in a penalty reduction for the 1992 and 1993 violations taking into account the circumstances of Steeltech's voluntary disclosure of the violations promptly after it discovered them and its prompt correction of the violations, among other circumstances. These same facts and circumstances can also form the basis for an "attitude" adjustment, which takes into account cooperation, good faith efforts to comply and the speed and completeness with which the violator comes into compliance. ERP at 18. Thus, the facts and circumstances that would give rise to reductions under the ERP's guidance for both "voluntary disclosure" and "attitude" overlap in many respects. Because we see no reason for those facts and circumstances to be considered for redundant penalty reductions, we find that it is appropriate for the two categories to be considered "mutually exclusive." Accordingly, we find no clear error or abuse of discretion in the Presiding Officer's decision not to grant Steeltech penalty reductions with respect to the 1992 and 1993 violations for Steeltech's attitude, when she already had reduced those penalties under the rubric of "voluntary disclosure." [19]

3. *Penalty Reductions for Other Factors as Justice May Require*

Steeltech argues that it should have been granted a penalty reduction of 25 nder the ERP's guidance with respect to "other factors as justice may require." Steeltech's Brief at 24-28. Steeltech argues that other factors identified in the ERP relevant to this case are "new ownership for history of prior violations" and "lack of control over the violation." *Id.* These arguments, however, must fail.

***14** The ERP's guidance for the so-called "justice" factor is very brief. It merely states that the relevant facts that may give rise to a reduction under this factor may include: "new ownership for history of prior violations, * * * and lack of control over the violation. * * * Use of this reduction is expected to be rare." ERP at 18. We have had occasion to apply the "justice" factor in other cases and have confirmed that it should be used to reduce the penalty "when the other adjustment factors prove insufficient or inappropriate to achieve justice." *In re Spang & Co.*, 6 E.A.D. 226, 249 (EAB 1995). More recently, we have re-emphasized that "the justice factor comes into play only where application of the other adjustment factors has not resulted in a 'fair and just' penalty." *Catalina Yachts*, slip op. at 22, 8 E.A.D. at __.

Here, Steeltech argues that the ERP's brief statement that an adjustment may be appropriate for "new ownership for history of prior violations" means that Steeltech should be entitled to an adjustment in this case. Steeltech argues first that "[v]iolations unknown to [the new owners] had already occurred at the time they took over operations in July of 1990." Steeltech's Brief at 24. This argument, however, ignores the broader context with which the ERP is concerned.

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To understand the guidance for "justice factor" adjustments based on "new ownership," it is necessary first to understand the reference to "history of prior violations." One of the other adjustment factors available under the ERP's guidance is an upward adjustment for "history of prior violations." ERP at 16-17. The ERP's guidance provides that a "history of prior violations" may give rise to an upward adjustment in the gravity-based penalty because "[t]he penalty matrix is intended to apply to 'first offenders,"' and "[t]he need for such an upward adjustment derives from the violator not having been sufficiently motivated to comply by the penalty assessed for the previous violation." ERP at 16; *see also In re Mobil Oil Corp.*, 5 E.A.D. 490, 519 (EAB 1994) (noting that a history of full compliance does not give rise to a downward adjustment because the gravity-based penalties are intended to apply to first time violators). Thus, it appears that the guidance for adjustments under the so-called "justice factor" recognizes that there may be appropriate circumstances for a company with a history of prior violations to be treated, based on the fact of new ownership, as a first time violator (or to receive a penalty reduction to offset, in whole or part, an increase previously made based on the violation history). In this case, however, because the gravity-based penalties were not increased due to Steeltech's history of violations, [20] it would be inappropriate to allow an off-setting reduction based on the new ownership.

Steeltech also argues, however, that it should receive a justice factor adjustment on the grounds that it is being held liable and assessed a civil penalty for violations that occurred when Steeltech was controlled by Mr. Farmer. The Presiding Officer concluded that no adjustment was required because Mr. Farmer had entered into an indemnity agreement: "Steeltech and its current owners will not have to pay the penalty for Mr. Farmer's misfeasance." Initial Decision at 20. Although Steeltech seeks to raise questions on Appeal regarding Mr. Farmer's ability to honor his indemnification obligations, Steeltech points to no evidence in the record to support its arguments. In addition, while we recognize that there may be circumstances where new, environmentally responsible management should not be burdened by a violation history incurred by a prior management, we do not believe that every change of ownership necessarily should be viewed in this light. [21] Accordingly, we find no error in the Presiding Officer's determination not to grant Steeltech a justice factor penalty adjustment based on "new ownership for history of violations."

***15** We also find no error in the determination not to grant Steeltech a justice factor penalty adjustment based on "lack of control over the violations." The Presiding Officer held that "Steeltech's failure to appropriately train Mr. Wells' replacement and transfer corporate duties does not constitute an understandable and/or excusable 'lack of control' over the violations." Initial Decision at 21. Steeltech argues that the Presiding Officer should have taken into account Steeltech's serious financial condition as affecting its control over the violations. Steeltech's Brief at 25. We disagree. As noted above, the existence of financial strain does not relieve a business of its obligation to comply with environmental and safety regulations and, indeed, the possibility of violations occurring as a result of employee turnover during a period of financial strain may be anticipated. We thus find no error in the Presiding Officer's conclusion that such circumstances do not constitute a "lack of control" justifying a penalty adjustment.

Finally, Steeltech argues that it should be granted a justice-factor adjustment due to the more than two-year delay between the initial discovery of the 1989 and 1990 violations and the filing of the Complaint commencing this action. Steeltech argues that, had the Complaint been filed earlier, it would have been able to seek a penalty reduction on the grounds of inability to pay. Steeltech's Brief at 26-28. We do not find a two-and-a-half year delay in filing the Complaint to warrant a penalty adjustment, [22] and we are not persuaded that Steeltech would have been entitled to an "ability to pay" reduction had the Complaint been filed earlier. Steeltech's evidence on its ability to pay consisted entirely of evidence that, at the time of the 1989 and 1990 violations (but not at any time after the February 12, 1992 inspection), it had annual losses and that, for calendar years 1992 and 1993, it had profits but still had an "accumulated deficit." *Id.* at 26. Such evidence is not sufficient to show a lack of ability to pay: Steeltech had net income in 1992 of $198,085 and net income in 1993 of $138,099, *id.*, totaling approximately five and a half times the amount of the penalty assessed by the Presiding Officer. Moreover, Steeltech does not contend that it has a present inability to pay the penalty.

III. *CONCLUSION*

For the foregoing reasons, we uphold the Presiding Officer's assessment of a civil penalty against Steeltech in the aggregate amount of $61,736 for the nine violations. Steeltech shall pay the full amount of the civil penalty within sixty (60) days of receipt of this final order, unless other wise agreed by the parties. Payment shall be made by forwarding a cashier's check or certified check in the full amount payable to the Treasurer, United States of America at the following address:

EPA- Region V

Regional Hearing Clerk

P.O. Box 70753

Chicago, IL 60673

So ordered.

Footnotes

1 Subsequent to the violations at issue in this case, the Debt Collection Improvement Act of 1996 was enacted directing the Agency to make periodic adjustments of maximum civil penalties to take into account inflation. The Agency has published inflation adjusted maximum penalties at 40 C.F.R. pt. 19.

2 The Complaint also originally alleged two violations for calendar year 1988. However, the Region subsequently abandoned its claims with respect to calendar year 1988 based on statute of limitations considerations, and those claims were formally dismissed by Order dated December 3, 1997.

3 The Region's final penalty request was stated in its post-hearing brief (after it abandoned its request for a finding of the two violations for calendar year 1988 as noted *supra* note 2).

4 The stated purpose of the ERP 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 violations committed; and that persons will be deterred from committing. EPCRA § 313 violations." ERP at 1.

5 The stock of Steeltech was transferred from Mr. Farmer to Gary Salerno and Armand Salerno on July 31, 1990. Stipulations ¶ 2.

6 For case of reference and consistency with both the Initial Decision and the parties' briefs, we will identify the violations by reference to the calendar year in which the toxic chemicals were used, rather than the year in which the Form R disclosing that usage was required to be filed.

7 For a more detailed description of the ERP's guidance, see *In re Clarksburg Casket Co.*, EPCRA Appeal No. 98-8, slip op. at 22 n.22, 23 n.23 (EAB. July 16, 1999), 8 E.A.D. -; *In re Woodcrest Mfg., Inc.*, EPCRA Appeal No. 97-2, slip op. at 23-31 (EAB, July 23, 1998), 7 E.A.D. -; *In re Pacific Refining Co.*, 5 E.A.D. 607, 612-22 (EAB 1994).

8 The unadjusted gravity-based penalty for these four violations totaled $50,288. After granting a 20% reduction to the gravity-based penalty, the Presiding Officer assessed penalties of $40,231 (with fractions rounded to the nearest whole dollar amount) for the four violations in 1989 and 1990. Initial Decision at 22.

9 The unadjusted gravity-based penalty for these five violations totaled $37,079. The Region's proposed penalties for these five violations, with the proposed 35% adjustment to the gravity-based penalty, totaled $24,101. *See* Complainant's Post Hearing Brief at 24-31. After granting a 42% reduction to the gravity-based penalty, the Presiding Officer assessed penalties of $21,505 for these five violations. Initial Decision at 22-23 (the Presiding Officer appears to have rounded to the whole dollar amount on a violation-by-violation basis).

10 The ERP contains a fourth criterion applicable only to "supplier notification violations," which is not relevant to this case. ERP at 15.

11 The Region has not filed an Appeal seeking reversal or other modification of the Presiding Officer's decision granting these more generous penalty reductions.

12 In a third section of its Brief, Steeltech restates its arguments regarding its second Appeal issue focusing specifically on the denial of the Motion to Reopen, which Steeltech contends was in error. Steeltech's Brief at 28-29. Because Steeltech's arguments in the second and third sections of its Brief are redundant, we will address them simultaneously in the second part of our discussion (for the specific discussion of the Motion to Reopen, *see infra* notes 17, 18, 19 and accompanying text).

13 As noted above, the Presiding Officer correctly observed, at the outset of her analysis when describing the standard for departing from the ERP, that she had "'the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where circumstances warrant.'" Initial Decision at 10 (quoting *DIC Americas*, 6 E.A.D. at 189). In contrast, her statement regarding "no extraordinary circumstances" appears to be directed not at the standard for departing from the ERP generally, but instead is directed only to the lack of grounds in this case for deviating from the gravity-based penalties assessed under guidelines of the ERP.

14 As noted above, however, the Presiding Officer is required to consider the ERP and explain her reasons for departing from its guidance. To that extent, the Presiding Officer's discretionary authority is limited by the ERP.

15 This quote shows that, contrary to Steeltech's argument at page 17 of its Brief, the ERP-based penalty is not reserved "for the most recalcitrant violator," but instead is appropriate for the circumstances of this case.

16 In a closely related argument, Steeltech contends that the Agency is somehow responsible for the violations in that "Steeltech's past non-compliance was a result of never being placed on U.S. EPA's regular mailing list to receive forms and information for the EPCRA program." Steeltech's Brief at 15. This argument is rejected because the Agency is under no statutory or regulatory obligation to ensure that regulated entities receive annual mailings regarding their compliance obligations. *In re Chautauqua Hardware Corp.*, 3 E.A.D. 616, 631 & n.20 (CJO 1991) (denying request for discovery regarding EPA's practice or policy of sending notices regarding EPCRA § 313 reporting requirements). Any practice of sending notices to regulated entities and omission of the respondent from that mailing list "does not make [the respondent] less culpable and would not justify a reduction in the penalty assessed." *Id.* 3 E.A.D. at 631.

17 Because Steeltech believed that the Presiding Officer's questioning of the spontaneity of Steeltech's voluntary disclosure was based upon a misunderstanding of both the parties' stipulations and certain hearing testimony, Steeltech filed its Motion to Reopen, seeking to elicit additional testimony to clarify these facts. The Presiding Officer denied that motion stating that the proffered testimony would not change her penalty analysis because she had granted Steeltech the initial 25% reduction in spite of her questions as to Steeltech's spontaneity and that she had based her decision not to grant the full 50% reduction on the unrelated fact that Steeltech had a history of violations, *i.e.*, the 1989 and 1990 violations.

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19 Because our determination regarding the appropriateness of the exclusivity of the "attitude" and "voluntary disclosure" reductions is unrelated to the degree of spontaneity of Steeltech's voluntary disclosure, we reject Steeltech's arguments made in both the second and the third sections of its Brief that it should have been granted an opportunity to supplement the record to establish the spontancity of its disclosures. Such evidence would not change our conclusion that Steeltech should not be granted an "attitude" adjustment when it has already been granted an adjustment of 42% for its "voluntary disclosure."

20 A second context in which violation history may be considered under the ERP is in conjunction with the second 25% downward adjustment made for voluntary disclosure of the violation as a reason not to grant the full amount of the adjustment. ERP at 14-15. In this case, however, the decision not to grant Steeltech the full "voluntary disclosure" reduction was based upon the violations for chemicals used in 1990. The Form Rs disclosing that chemical usage were not due until July 1991 -- a year *after* the new owners took over operations. Because the denial of this reduction was based on this history of violations, no adjustment is needed to avoid injustice in this case.

21 We are mindful that prospective purchasers may be aware that a firm's history of violations may result in increased penalties in the future, and thereby may make corresponding adjustments in the price to be paid for the firm or push for pre-purchase corrections, thereby resulting in market-based incentives for the old owners to continue compliance even when contemplating a sale.

22 Steeltech's argument regarding enforcement delay appears to be tied solely to its alleged loss of a claim for an "ability to pay" reduction. (We have already rejected its arguments that its culpability is lower due to EPA's failure to contact Steeltech regarding Steeltech's reporting responsibilities.) There is no suggestion of facts that might give rise to estoppel, and we do not otherwise find a reduction on this ground to be appropriate. *See In re B.J. Carney Indus., Inc.*, CWA Appeal No. 96-2, slip op. at 50 (EAB, June 9, 1997), 7 E.A.D. __ (rejecting argument that enforcement delay estopped EPA's enforcement of violation).

1 Subsequent to the violations at issue in this case, the Debt Collection Improvement Act of 1996 was enacted directing the Agency to make periodic adjustments of maximum civil penalties to take into account inflation. The Agency has published inflation adjusted maximum penalties at 40 C.F.R. pt. 19.

2 The Complaint also originally alleged two violations for calendar year 1988. However, the Region subsequently abandoned its claims with respect to calendar year 1988 based on statute of limitations considerations, and those claims were formally dismissed by Order dated December 3, 1997.

3 The Region's final penalty request was stated in its post-hearing brief (after it abandoned its request for a finding of the two violations for calendar year 1988 as noted *supra* note 2).

4 The stated purpose of the ERP 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 violations committed; and that persons will be deterred from committing. EPCRA § 313 violations." ERP at 1.

5 The stock of Steeltech was transferred from Mr. Farmer to Gary Salerno and Armand Salerno on July 31, 1990. Stipulations ¶ 2.

6 For case of reference and consistency with both the Initial Decision and the parties' briefs, we will identify the violations by reference to the calendar year in which the toxic chemicals were used, rather than the year in which the Form R disclosing that usage was required to be filed.

7 For a more detailed description of the ERP's guidance, see *In re Clarksburg Casket Co.*, EPCRA Appeal No. 98-8, slip op. at 22 n.22, 23 n.23 (EAB. July 16, 1999), 8 E.A.D. -; *In re Woodcrest Mfg., Inc.*, EPCRA Appeal No. 97-2, slip op. at 23-31 (EAB, July 23, 1998), 7 E.A.D. -; *In re Pacific Refining Co.*, 5 E.A.D. 607, 612-22 (EAB 1994).

8 The unadjusted gravity-based penalty for these four violations totaled $50,288. After granting a 20% reduction to the gravity-based penalty, the Presiding Officer assessed penalties of $40,231 (with fractions rounded to the nearest whole dollar amount) for the four violations in 1989 and 1990. Initial Decision at 22.

9 The unadjusted gravity-based penalty for these five violations totaled $37,079. The Region's proposed penalties for these five violations, with the proposed 35% adjustment to the gravity-based penalty, totaled $24,101. *See* Complainant's Post Hearing Brief at 24-31. After granting a 42% reduction to the gravity-based penalty, the Presiding Officer assessed penalties of $21,505 for these five violations. Initial Decision at 22-23 (the Presiding Officer appears to have rounded to the whole dollar amount on a violation-by-violation basis).

10 The ERP contains a fourth criterion applicable only to "supplier notification violations," which is not relevant to this case. ERP at 15.

11 The Region has not filed an Appeal seeking reversal or other modification of the Presiding Officer's decision granting these more generous penalty reductions.

12 In a third section of its Brief, Steeltech restates its arguments regarding its second Appeal issue focusing specifically on the denial of the Motion to Reopen, which Steeltech contends was in error. Steeltech's Brief at 28-29. Because Steeltech's arguments in the second and third sections of its Brief are redundant, we will address them simultaneously in the second part of our discussion (for the specific discussion of the Motion to Reopen, *see infra* notes 17, 18, 19 and accompanying text).

13 As noted above, the Presiding Officer correctly observed, at the outset of her analysis when describing the standard for departing from the ERP, that she had "'the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where circumstances warrant."' Initial Decision at 10 (quoting *DIC Americas*, 6 E.A.D.

at 189). In contrast, her statement regarding "no extraordinary circumstances" appears to be directed not at the standard for departing from the ERP generally, but instead is directed only to the lack of grounds in this case for deviating from the gravity-based penalties assessed under guidelines of the ERP.

14 As noted above, however, the Presiding Officer is required to consider the ERP and explain her reasons for departing from its guidance. To that extent, the Presiding Officer's discretionary authority is limited by the ERP.

15 This quote shows that, contrary to Steeltech's argument at page 17 of its Brief, the ERP-based penalty is not reserved "for the most recalcitrant violator," but instead is appropriate for the circumstances of this case.

16 In a closely related argument, Steeltech contends that the Agency is somehow responsible for the violations in that "Steeltech's past non-compliance was a result of never being placed on U.S. EPA's regular mailing list to receive forms and information for the EPCRA program." Steeltech's Brief at 15. This argument is rejected because the Agency is under no statutory or regulatory obligation to ensure that regulated entities receive annual mailings regarding their compliance obligations. *In re Chautauqua Hardware Corp.*, 3 E.A.D. 616, 631 & n.20 (CJO 1991) (denying request for discovery regarding EPA's practice or policy of sending notices regarding EPCRA § 313 reporting requirements). Any practice of sending notices to regulated entities and omission of the respondent from that mailing list "does not make [the respondent] less culpable and would not justify a reduction in the penalty assessed." *Id.* 3 E.A.D. at 631.

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19 Because our determination regarding the appropriateness of the exclusivity of the "attitude" and "voluntary disclosure" reductions is unrelated to the degree of spontaneity of Steeltech's voluntary disclosure, we reject Steeltech's arguments made in both the second and the third sections of its Brief that it should have been granted an opportunity to supplement the record to establish the spontancity of its disclosures. Such evidence would not change our conclusion that Steeltech should not be granted an "attitude" adjustment when it has already been granted an adjustment of 42% for its "voluntary disclosure."

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8 E.A.D. 577 (E.P.A.), 1999 WL 673227

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2001 EPA ALJ LEXIS 27

United States Environmental Protection Agency Office of Administrative Law Judges

June 18, 2001

Docket No. EPCRA 09-99-0016

Reporter
2001 EPA ALJ LEXIS 27 *

Gilbert Martin Woodworking Co. d/b/a Martin Furniture, Respondent

Core Terms

violations, factors, reporting, settlement, compliance, Furniture, Environmental, civil penalty, circumstances, chemical, reporting requirements, proposed penalty, facilities, argues, hired, reduction, asserts, appropriate penalty, cooperation, disclosure, contacted, gravity, arrive, toxic chemical, first contact, inappropriate, obligations, confirmed, considers, preparing

Panel: [*1] William B. Moran, United States Administrative Law Judge

Opinion

Initial Decision

In this proceeding under Section 325(c) of Title III of the Superfund Amendments and Reauthorization Act, *42 U.S.C. §§ 11001 et. seq.* (also known as the Emergency Planning and Community Right-to-Know Act of 1986) ("EPCRA"), EPA has alleged, in eight counts, that the Respondent, Gilbert Martin Woodworking Company, d/b/a Martin Furniture, [1] failed to file Toxic Chemical Release Inventory Reporting Forms, better known as "Form R's," for 1994, 1995 and 1996. [2] EPCRA § 313 requires facilities to submit annually, and no later than July 1st of each year, a 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. On November 24, 1999, the Respondent and EPA stipulated as to liability for the counts. [3] EPA seeks a civil penalty of $ 119,946 for these violations.

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[1] EPA filed a motion seeking dismissal of the Complaint as to Gilbert Martin individually. The Court granted the motion on June 20, 2000.

[2] Two toxic chemicals are involved: 1, 1, 1 -Trichlorethane ("TCA") and Methyl isobutyl ketone ("MIBK").

[3] The stipulation also sets forth the number of pounds involved for each chemical in each calendar year at the facilities involved (the El Cajon and the Kearny Mesa facilities), that the threshold amount was exceeded in each instance, and that no Form R was submitted.

[*2]

The Post Hearing Briefs

A. EPA's Arguments

EPA argues that it established a prima facie case in support of the penalty it proposes and that the Respondent failed to rebut that case. It notes that the failure to file Form R's goes to the heart of EPCRA's purpose: "the community's right to know about releases of toxic chemicals." EPA Brief at 16. As to the particular penalty calculation performed in this instance, EPA first maintains that Section 16(a)(2)(B) of the Toxic Substances Control Act ("TSCA") is the appropriate source to consult for EPCRA violations. This source examines the nature, circumstances, extent and gravity of the violation and then considers the violator itself.

Evaluating the violation, it notes **[*3]** that Respondent's required Form R's were not timely filed and were not submitted until after EPA began its March 1998 investigation. By failing to make timely submissions, it argues that the Respondent "deprived both individuals and government organizations of the opportunity to take steps to reduce the risks posed by these releases and thereby, could have resulted in increased risk to the community." *Id.* at 23. Noting that the "circumstances" of the violation takes into account its seriousness, EPA asserts that the failure to report in a timely manner is "the most significant of the violations of Section 313." *Id.* This assessment stems from the public's deprivation of information on "chemical releases which may have a significant affect [*sic*] on public health and the environment." *Id.* at 24. Under the Enforcement Response Policy's ("ERP") "penalty matrix," extent levels and circumstance levels are determined and from these a penalty is derived. In terms of the "extent" factor, EPA considers the quantity of the toxic chemical. This is important because facilities which far exceed the reporting threshold "create a greater potential of exposure to the employees at the **[*4]** facility, the public and the environment." *Id.* Here, EPA observes that in 1994 and 1995, Respondent's usage of 1,1,1-trichloroethane at its El Cajon and Kearny Mesa facilities was more than ten times above the threshold quantity.

In considering the factors involving the nature of the violator, EPA considers a respondent's ability to pay, the penalty's effect on its ability to continue in business, prior history of violations, the degree of culpability and such other factors as justice may require. *Id.* at 25-26. The Respondent has conceded it has the ability to pay the proposed penalty and that a fine of that size would not damage its ability to continue in business. As EPA sees it, the other factors do not impact the penalty calculation either. A prior history of violations, for example, can enhance the penalty, but the absence of any history does not work to reduce a penalty. Similarly, while a knowing violation affords reason to increase the penalty, the absence of a knowing or willful violation does not work to reduce a penalty, as knowledge of the requirements is presumed. EPA made no upward adjustments to the penalty for any of these considerations because it considered **[*5]** each inapplicable to the Respondent. Regarding the last factor, the "as justice may require" consideration, EPA notes that its ERP lists new ownership when considering one's violation history, significant-minor borderline violations and lack of control over the violation, as grounds for reducing a penalty, but it observes that none of these situations are applicable under these facts.

EPA also states that, under the ERP, it also weighs voluntary disclosure, attitude and supplemental environmental projects. In its view none of these apply either. Responding to the assertion that Daren Jorgensen discovered the Form R violations, EPA notes that Jorgensen did not disclose "specifically which chemicals or whether reporting obligations were required" when he spoke with Bill Kerstan on March 11, 1998. *Id.* at 29 (quoting Transcript at 174). Addressing Respondent's suggestion that the disclosure of the existence of its Kearny Mesa Facility to Bill Kerstan affords a basis to reduce the penalty, EPA argues that it should not be considered because EPCRA § 313 reporting is on a facility basis and in the normal course of events, such information ultimately would be discovered during the investigation **[*6]** of the corporation.

In terms of the "attitude adjustment" factor, EPA maintains that Respondent was in fact given credit for this and awarded a reduction under the ERP of $ 16,000. *Id.* at 33. However, this consideration is viable only during settlement. During that phase EPA informed the Respondent of this reduction and the resulting penalty but, from its

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perspective, Respondent never offered any explanation, during settlement, to support its position that a further reduction was warranted, although subsequently it did present information along this line on two occasions during the prehearing exchange phase of the litigation. EPA views the Respondent's lack of a forthcoming attitude during settlement dimly and asks the Court to disapprove of such settlement tactics by not rewarding disclosures which arrive after settlement has failed. *Id.* at 33.

In sum, EPA argues that its adjustment of the gravity based attitude factor, resulting in a $ 23,990 reduction, and the adjustment for cooperation, resulting in an additional reduction of $ 15,994, afford appropriate recognitions of the speed and cooperation Respondent demonstrated in filing its delinquent Form R's for 1993 through **[*7]** 1996. Thus, upon consideration of these deductions in the application of the ERP in this instance, it maintains that the proposed penalty of $ 119,946 is fully supported.

B. Martin Furniture's Arguments

Martin Furniture asserts that the ERP, and hence the penalty EPA derived by using it, should be disregarded in this case because "its use does not result in a penalty that is commensurate with the nature, circumstances, extent and gravity of the EPCRA reporting violations" in this case. Respondent's Reply at 1. Respondent, noting that the Environmental Appeals Board has stated that judges must be prepared to reexamine the basic propositions underlying such penalty policies, contends that the ERP rests upon ensuring that EPCRA § 313 violations are fair, uniform and consistent, that the response is appropriate to the violation committed, and that the action will deter future violations.

Generally, Martin asserts that EPA failed to demonstrate that the ERP produced an appropriate penalty under the particular facts and instead produced a penalty that was not commensurate with the nature, circumstances, extent or gravity of the reporting violations. In fact, Martin argues, the penalty **[*8]** sought by EPA is so disproportionate to the violations that it is manifestly unjust.

As a fundamental matter, Martin takes issue with EPA's use of TSCA statutory factors to derive an appropriate EPCRA § 313 reporting violation. [4] Even accepting EPA's rationale that Congress intended the application of TSCA § 16(a)(2)(B) to be used for EPCRA § 304 does not, Martin maintains, translate into such use for Section 313, even when those factors are used as guidance.

[*9]

Martin Furniture argues that the ERP should be completely disregarded on several grounds. It maintains first that EPA did not follow the ERP, as evidenced by its post-hearing brief admission that it looked primarily to the TSCA statutory penalty factors and only used the ERP after it had applied those factors. This contradicts EPA's pre-hearing exchange posture in which it maintained that it relied solely upon the ERP to arrive at the proposed penalty. Next, Martin contends that EPA's evaluation failed to consider the voluntary steps it had taken to come into compliance with EPCRA before EPA's investigation had commenced. Those steps involved Martin's voluntary cessation of the use of one of the toxic chemicals, its significant reduction of the use of another, and establishing, on its own, verifiable procedures to ensure future EPCRA compliance.

Martin also asserts that the ERP has a fundamental flaw by its consideration of supplemental environmental projects and engaging in settlement discussions as "adjustment factors," while foreclosing their consideration upon appeal. Despite this Agency posture, it observes that EPA went ahead and spoke to these settlement issues, and

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[4] In its Reply Brief, Martin also argues that EPA was misleading because its prehearing exchange materials indicated the proposed penalty was derived by use of the penalty policy whereas the Agency's post-hearing brief shows that the calculation was derived primarily through the TSCA Section 16 penalty factors. The Court agrees that EPA's post-hearing brief places more emphasis on the TSCA factors than the ERP. However, EPA Counsel's characterization of the penalty analysis does not usurp the evidence that, as reflected by Monahan's affidavit, EPA applied the ERP in calculating the penalty. *See* Complainant's Exhibit 1. In addition, while not identical, the ERP factors and the TSCA Section 16 penalty factors have much in common.

-----------------End Footnotes-----------------

its assessment **[*10]** of them, in its post-hearing brief. Last, Martin argues that EPA simply failed to meet its burden of showing that an appropriate penalty was derived under the ERP.

Martin notes that EPCRA § 325(c) does not provide a list of factors to be considered in deriving a civil penalty and instead provides for a maximum penalty of $ 25,000 for each Section 313 violation with each day's failure to report constituting a separate violation. Martin is unaware of any cases which require EPA to evaluate TSCA penalty factors to arrive at an appropriate penalty for EPCRA § 313 reporting violations. It also takes issue with EPA's point that Congress designated TSCA § 16(a)(2)(B) as the source for penalty factors in EPCRA § 304 matters, because this case is an EPCRA § 313 matter. Martin asserts that the EAB has implicitly recognized this distinction by only upholding the use of TSCA penalty factors *as guidance* in EPCRA § 313 matters.

Martin also separately maintains that the Court should depart from the ERP because EPA incorrectly concluded that the violations were not discovered in advance of the EPA investigation but were detected by EPA before any disclosure by Martin. In fact, Martin argues, **[*11]** it had detected the problem prior to EPA's involvement by virtue of its retaining Jorgensen Environmental on or about February 20, 1998. Further, while EPA asserts that it accounted for Martin's prompt compliance as part of the "attitude adjustment," Martin counters that this consideration was flawed because the "attitude adjustment" implicitly assumes that the violation was first discovered during an EPA inspection. In addition, Martin asserts that the compliance reduction does not afford appropriate credit in those situations where a Respondent has taken steps to achieve compliance prior to the EPA inspection. It suggests that EPA's approach, by ignoring Martin's voluntary compliance efforts, conflicts with ensuring that the proposed penalty is fair, uniform and consistent.

Martin also submits that EPA's proposed penalty is flawed because it considered settlement discussions as an "adjustment factor." It contends that EPA's factoring of settlement discussions in proposing the penalty amount, including Martin's cooperation during such discussions, was inappropriate and inconsistent with arriving at a penalty in a fair, uniform and consistent manner.

While conceding that some penalty **[*12]** is due, Martin maintains that the penalty imposed should take into consideration that:

1. It discovered the violations on its own, promptly, voluntarily and through its exercise of due diligence.
2. The violations were discovered voluntarily, prior to any investigation or information request. Consequently, they were not detected in reaction to any known pending enforcement action or complaint and they were reported promptly. Martin highlights that in this regard, upon their detection by Jorgensen Environmental, the violations were corrected within three days and steps were taken to prevent any recurrences. The violations were not part of any repeat pattern of noncompliance.
3. It cooperated fully with EPA and it eliminated the use of one toxic chemical, TCA, and significantly reduced its use of another, MIBK.

Upon consideration of these factors, Martin believes that the penalty imposed should be $ 11,991.

Discussion

A departure from the Penalty Policy is appropriate in this instance.

The Court takes note of the Board's decision *In re Steeltech, Ltd., 8 E.A.D. 577, 1999 WL 673227 (EAB, Aug. 26, 1999)* ("Steeltech"), upholding a penalty of $ 61,736 **[*13]** for nine violations, occurring over a four year period, of the EPCRA Section 313 reporting requirements. In that case, after noting the judge's obligation to consider the ERP's guidance, the Board pointedly observed that the ERP "does not have the force of law." The Board advised that judges "must refrain from treating the [penalty policy] as a rule, and must be prepared 'to re-examine the basic propositions' on which the policy is based . . ." *In re Employers Ins. of Wausau, 6 E.A.D. 735, 761 (EAB, Feb. 11, 1997)*. It also reminded litigants that it has "repeatedly stated" that as long the applicable penalty policy has been considered, the judge is "free to not apply them to the case at hand" where circumstances warrant. This authority to depart from the ERP, because it is not a rule, means that a finding of "extraordinary circumstances" is *not* required to deviate from the policy's guidance.

For the reasons that follow, the Court, having considered the penalty policy, departs from its application in this instance because EPA's evaluation did not consider that the Respondent was already well under way in the process of completing the Form R's at the **[*14]** time EPA began its investigation. Additionally, as independent bases for departure from the ERP, the Court believes that the policy, under the particular facts and circumstances, did not yield a penalty that is appropriate for the violations committed and did not weigh the deterrence achieved as to this Respondent. Further, the Court views EPA's inclusion of its assessment of the Respondent's conduct during settlement negotiations as an inappropriate consideration within the penalty computation.

The events which led to the filing of the Complaint in this matter began with the actions of EPA's Bill Kerstan, who, at the time in issue, was employed with EPA's Toxic Waste Inventory Program in their targeting and enforcement section. Kerstan was examining furniture companies located in south coastal California. His procedure was to determine if the companies were reporters to the program and if not, he would telephone a representative of the company and ask them if they had ever heard of EPCRA, whether they had ever done an inventory of their chemical use and if they had not, request that they examine such use to determine if they met the threshold for reporting. Tr. 39.

Kerstan's first **[*15]** telephone call to the Respondent was on March 10, 1998. At that time he left a message asking to speak with the company representative who handled environmental reporting. Tr. 42, EPA Ex. 3. The following day Kerstan received a call from Daren Jorgensen, the environmental consultant retained by Respondent. Kerstan asked Jorgensen to check to determine whether the Respondent had chemical use which would trigger reporting. Kerstan's notes indicate Jorgensen informed him he would make such a check. EPA Ex. 3. During this first call Jorgensen did not state that he was preparing a Form R for Respondent, rather his March 11th call was to determine the purpose of EPA's contact with the Respondent. Tr. 43. Kerstan's notes do not reveal when the Respondent first contacted Jorgensen nor do they assert that Jorgensen was contacted only after his March 10th call to the Respondent. Kerstan agreed that it was likely that Jorgensen had some sort of agreement with Respondent prior to his March 10th call, but he added that it could have been for other environmental work, and not necessarily EPCRA work. Tr. 55. Following a March 19th conversation between Kerstan and the Respondent's representative, **[*16]** Richard Hartig, the Respondent sent EPA the Form R's the next day. Tr. 59. Kerstan conceded that he "would be surprised" if Jorgensen would have been able to prepare the Form R's and submit them only one day after the March 19th conversation unless the work had already been in progress. Tr. 67.

Although EPA's second witness, Patricia Monahan, [5] acknowledged that she was aware that the facility filed the Form R's on or about March 20, 1998, which was about ten days after Kerstan first contacted Martin Furniture, in her view the only measure of Respondent's conduct was whether the facility had contacted EPA in writing prior to the call from EPA. Tr. 80. Thus, she rejected the notion that the Respondent discovered the violations as a result of its own due diligence in the evaluation of its compliance and concluded there was no voluntary compliance. Tr. 88.

[*17]

When Gilbert Martin, President of Martin Furniture, took the witness stand, he testified that his company hired Jorgensen Environmental ("Jorgensen" or "firm") in July 1997. Tr. 107. The firm's precise duties when first hired were to obtain the permits to allow it to use sprays at their new facility. Tr. 129. Martin stated that the firm was hired specifically to deal with EPCRA compliance issues in February 1998. This assertion is supported by Respondent's Exhibit 5, a letter dated February 16, 1998 from Jorgensen to Hartig, the production manager for the Respondent.

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[5] Respondent's counsel initially objected to Monahan's testimony on the grounds that she lacked personal knowledge of the facts and did not perform the penalty calculation but rather reviewed the work performed by another EPA employee. Monahan was not called as an expert nor as a fact witness, but rather as one who reviewed the calculation with the penalty policy to determine whether the factors were applied in making the proposed penalty. Tr. 70. Her affidavit was admitted, as was the penalty calculation worksheet. Complainant's Exhibits 1 and 2. Consequently, with the affidavit deemed her direct testimony, her live testimony began with cross-examination. Monahan stated that she reviewed the complaint and the penalty calculation that another employee, no longer employed with EPA, had performed.

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The letter reflects a contract offer between Respondent and the firm to review its Form R reporting obligations. Shortly thereafter Respondent accepted the proposal contained in that letter, as evidenced by Respondent's signature, dated February 20, 1998. Tr. 108. Thus, Martin contends that the firm's investigation of its EPCRA compliance was ongoing at the time of EPA's first contact with Martin Furniture and that Jorgensen, not EPA, discovered the problem. Tr. 109 - 110.

Daren Jorgensen, President of Jorgensen Environmental testified that his firm was first hired by the Respondent in June or July of 1997 and that their **[*18]** first job was to evaluate the air quality permitting issues for Martin's two facilities, in dealing with the San Diego Air Pollution Control District. Tr. 133. He confirmed that in mid-February 1998, while dealing with those air quality issues, they were also hired to evaluate Form R applicability to Respondent's business. Discussions on this issue began in January 1998. Tr. 133, 134. This resulted in Respondent's request for the submission of a proposal and the firm presented one on February 16, 1998. Respondent's Exhibit 5. Respondent accepted the proposal (i.e. the offer) on February 20th.

Jorgensen stated that on March 11, 1998 he received a call from Hartig, relating that EPA's Kerstan had called regarding Form R reporting duties for Martin Furniture. Tr. 146. Jorgensen then called Kerstan the next day, March 12th, at which time Kerstan asked whether he knew if Respondent had a Form R reporting obligation. Jorgensen told him then they were in the process of preparing the reports. A second conversation with Kerstan occurred on March 19th during which he gave Kerstan a summary of the Form R reports that he had determined Respondent needed to file. He also told him when the Form **[*19]** R's would actually be filed and agreed to send him an additional copy for his records. [6] Tr. 148.

Jorgensen described the evaluation and preparation of a Form R as a detailed, time-consuming process and supported that assertion with a description of the work involved. Tr. 137 - 139. He stated that it took from February 21st to March 18th to complete the work. Although the Form R's themselves were actually completed on March 20th, the firm's letter to the Respondent, signed by one of Jorgensen's supervising associates, was prepared March 26, 1998. It summarizes the work performed regarding the Form R reporting, and reflects that only two substances required Form R reporting. Tr. 143.

The Court questioned Jorgensen, inquiring whether, given that his firm has been in **[*20]** business since 1988 and that he has been very familiar with the Form R requirements from their inception, it would have been natural for him to immediately connect in his mind Form R requirements with furniture manufacturers. Jorgensen conceded that while it would be on his list of things to address with the furniture manufacturer, it takes time to build up trust with a new client, and consequently dealing with other issues, beyond the initial reason for hiring, cannot be raised immediately. Tr. 169- 171.

As Jorgensen represented that the proposal to perform the Form R work was at least the second proposal the firm had made to the Respondent, with the earlier proposal being related to the aforementioned air quality permitting, the Court required that those records be provided within seven days for inclusion in the record. These records were provided and fully support Jorgensen's testimony.

Hartig, the operations manager for Gilbert Martin, also testified. His duties include responsibility for environmental compliance. It is sufficient to note that his testimony corroborated that of Martin and Jorgensen. Importantly, he related that after the voice mail contact from Kerstan, inquiring **[*21]** whether Gilbert Martin had a Form R reporting requirement, he telephoned Jorgensen to ask about the firm's status on the project and learned that it was underway. He then instructed Jorgensen to call Kerstan. Tr. 184. Hartig also confirmed that it takes a lot of time to dig up all the files to assess Form R obligations and offered that if it had not already been underway they could not have responded so promptly.

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[6] Subsequently Kerstan needed additional records (specific chemical usage information) in order to validate the usage reports reflected in the forms. Jorgensen responded on July 1, 1998, submitting purchase records and MSDSs. Tr. 152. Respondent's Ex. 11.

-----------------End Footnotes-----------------

Based upon the Court's assessment of the testimony and credibility of the witnesses, it is concluded that in fact Respondent was well underway in the process of complying with its Form R reporting requirements. EPA's witnesses conceded that it would not have been likely that the Respondent could have provided the Form R's so rapidly had Martin not already started the process. Respondent's witnesses credibly testified that the process had begun by February 20th and Jorgensen's business records corroborate that this was the case. Yet EPA applied a rigid test to the facts by considering only whether the Respondent had contacted EPA prior to the initial call from Kerstan.

The policy does not anticipate a situation such as that presented here where a Respondent is in the process **[*22]** of complying when an EPA inquiry is initiated. While admittedly a rare occurrence, the evidence confirms that it happened in this instance. To apply such a rigid standard, examining only whether the Respondent made the first contact with the Agency, while ignoring that the Respondent had started the review of its Form R obligations, would produce an enforcement response that is not "appropriate for the violation committed" and thus inconsistent with the policy itself.

As noted, the Court has concluded that, under the facts and circumstances, the penalty derived by EPA under the ERP is excessive and therefore inappropriate. In addition to the finding of fact that the Respondent was already in the midst of complying before EPA's first contact, the proposed penalty did not consider that the Respondent has taken steps to ensure that future violations are not likely to occur by hiring Jorgensen Environmental to prophylactically monitor its chemical usage and to evaluate those chemicals it contemplates using. Given that one of the announced purposes of the ERP is to ensure "deterrence from committing EPCRA § 313 violations," the Respondent's actions to prevent future violations should have **[*23]** been considered. [7]

Further, the Court agrees with Martin Furniture's contention that EPA's assessment of the Respondent's cooperation and preparedness during the settlement process was an inappropriate consideration to include in proposing a penalty. This conclusion rests on two grounds. First, the Court questions the premise that "settlement cooperation" should ever be factored into a proposed penalty, [8] as opposed to a post-calculation consideration. "Attitude" is not factor listed under TSCA Section 16 nor is a Respondent's "conduct" during settlement. Further, as applied here, EPA's statements regarding the Respondent's settlement conduct was conclusory in nature. The agency provided no substance to back up its assertion, describing only in the most general of terms that "during the settlement talks, it was not clear what the basis was for the facility arguing for **[*24]** a lower penalty" and the claim that the Respondent displayed a "shifting sands" approach during settlement. Tr. 79-80, 82.

What criteria should be evaluated in determining [*25] an appropriate penalty?

Having concluded that EPA's application of the policy produced an inappropriate penalty in this instance, it must be determined what criteria should be evaluated in determining an appropriate penalty. Section 325(c) of EPCRA provides little guidance for the appropriate penalty where Section 313 violations are involved. Other than establishing the maximum penalty and providing that each day of noncompliance is a separate violation, the Section does not identify factors to be considered in arriving at the penalty. This was noted by the Board's decision

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[7] There is no suggestion in the ERP that deterrence is limited to other potential violators and does not extend to the respondent in the litigation.

-----------------End Footnotes-----------------

[8] There are indications in support of the impropriety of including "settlement cooperation" in the penalty calculation. By implication, Section 22.19(e)(2) of the Consolidated Rules of Practice with its reference to "penalty calculations for purposes of settlement" implies that a settlement calculation should be apart from that derived under the policy itself. The Environmental Appeals Board seems to agree with this proposition as well. In City of Kalamazoo Water Reclamation Plant, 3 E.A.D. 109 (EAB, Mar. 2, 1990). Chief Judicial Officer McCallum in noting that the City was entitled to know precisely how the penalty was calculated for the violation of the Clean Water Act, observed that the "BEN model *and the amount EPA would accept in settlement did not enter into EPA's penalty calculation.*" (emphasis added).

-----------------End Footnotes-----------------

In re Steeltech Ltd. There, in upholding a penalty of $ 61,736 for nine violations of the EPCRA Section 313 reporting requirements, occurring over a period of four years, it noted that, other than the parameters of the potential for a $ 25,000 civil penalty for each violation and that each day of failure to report is a separate violation, "the statute does not provide further guidance for the assessment of penalties for violation of [that section]," as it "does not provide a list of factors to be taken into account in assessing civil penalties."

Section 325, entitled "Enforcement," presents a curious situation **[*26]** as to penalties because some of its subsections provide specific factors to be considered, either explicitly or through incorporation by reference, while other subsections only articulate the maximum penalty per violation. Subsection (a), entitled "Civil penalties for emergency planning," states only that a civil penalty of not more than $ 25,000 may be imposed for each day in which such violation occurs or such failure to comply continues. Subsection (b), addressing penalties for emergency notification violations, is divided into Class I and II administrative penalties. While the Class I penalty provision sets a per violation limit of $ 25,000, it also spells out the specific criteria to be considered in arriving at the penalty to be assessed, [9] while Class II administrative penalties, although utilizing the $ 25,000 per day limit, incorporates the penalty factors of TSCA Section 16, *15 U.S.C. § 2615*. [10] Subsection (d)(1)(B), addressing trade secret claims that are frivolous, provides for a flat $ 25,000 penalty per claim, while subsection (d)(2), pertaining to disclosure of trade secret information, reverts to a fine with an upper limit of **[*27]** $ 20,000. Last, the subsection involved in this litigation, violations of Subsection (c) reporting requirements, provides the same $ 25,000 upper limit for a penalty, for violations involving Sections 11022 or 11023, while applying a $ 10,000 cap for violations of Sections 11021, 11043(b) or 11042(a)(2), but offers no elaboration as to any criteria to be considered.

[*28]

The fact that Congress spoke with specificity as to the penalty criteria to be applied for some subsections while providing only broad directions as to others, may be construed as an intention to afford broader discretion where Section 313 reporting requirements are involved.

Faced with this lack of specificity for Section 313 violations, both EPA, through its penalty policy and administrative tribunals have relied upon and applied the statutory factors set forth in Section 16 of TSCA, as referenced in EPCRA Section 325(b)(2). [11] Implicitly, the Board has approved the use of these factors for calculating EPCRA Section 313 violations. *In re Catalina Yachts, Inc., 8 E.A.D. 199, 1999 WL 198912 (EAB, Mar. 24, 1999)*, ("Catalina"). These factors are the nature, circumstances, extent and gravity of the violation, and the violator's ability to pay, the penalty's effect on its ability to continue to do business, any history of violations, the degree of culpability, and such other matters as justice may require. [12]

[*29]

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[9] These are "the nature, circumstances, extent and gravity of the violation . . . [and the violator's] ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings . . . and such other matters as justice may require." *42 U.S.C. § 11045 (b)(1)(C)*.

[10] As contrasted with *42 U.S.C. § 11045(b)(1)(C)*, TSCA Section 16 looks to the same penalty criteria except that, in place of "economic benefit or savings," it lists the penalty's "effect on ability to continue to do business." *15 U.S.C. § 2615(a)(2)(B)*

-----------------End Footnotes-----------------

[11] *See also* the initial decision issued by Judge Barbara Gunning *In the Matter of Bituma-Stor, Inc.*, 2001 WL 66547 (ALJ, Mar. 24, 1999).

[12] On appeal the Federal District Court took no issue with the Agency's adoption, as guidance, of the TSCA penalty factors found at *15 U.S.C. § 2615(a)(2)(B)*, for application to EPCRA Form R violations. *Catalina Yachts, Inc. v. United States EPA, 112 F.Supp. 2d 965, (C.D. Cal. 2000)*.

-----------------End Footnotes-----------------

In addition, the federal district courts have noted and not taken issue with EPA's adoption of the TSCA Section 16 factors for Form R violations. *See* Catalina, 112 F. Supp. 2d 965 (C.D.Cal.2000); Steeltech, Ltd. v. United States EPA, 105 F. Supp. 2d 760 (W.D. Mich. 2000).

Following this guidance, this Court also looks to the TSCA Section 16 factors and notes that, even without expressly referring to that section and absent express Congressional direction, a Court would naturally consider the broad factors listed there as inherently relevant to the determination of a civil penalty. [13]

[*30]

Assessment of a Civil Penalty upon consideration of the factors listed in TSCA Section 16.

Several of the factors may be addressed summarily. The "nature" of the violation, the failure to file Form R's for 1994 through 1996, is not in dispute. Similarly, the ability to pay, and the penalty's effect on the Respondent's ability to continue to do business are not issues in this instance, with the Respondent having conceded that EPA's proposed penalty does not call those considerations into play. Remaining for the Court to consider are the circumstances, extent and gravity of the violation, the Respondent's degree of culpability, its history of violations, and such other matters as justice may require. The Board has pointed out that the TSCA Section 16 penalty adjustment factors "*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." [14] Catalina, 1999 WL at *7 (emphasis added).

[*31]

In this context the Court makes the following observations of the particular facts in this case. As noted earlier, it has been found that the Respondent was in fact in the process of complying with its Form R obligations at the time EPA made its first inquiry. [15] It is also clear that EPA had no inkling that there was a second facility when Kerstan made the original call to the Respondent. Kerstan's notes indicate that he first learned on March 19, 1998, by virtue of the Respondent's disclosure, that Martin had another facility in Kearny Mesa. Tr. 46; EPA Ex. 3. Kerstan admitted, after some jousting during cross-examination, that when he contacted the Respondent he did not know there was a Kearny Mesa facility and that his initial contact was only with the El Cajon facility. Tr. 51-52, 65. Jorgensen testified that he told Kerstan that Respondent also had a facility at Kearny Mesa and confirmed that Kerstan was only aware of a El Cajon facility. Tr. 147. Significantly, Kerstan agreed that EPCRA violations are facility specific. [16]

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[13] This view is consistent with the observations made by the United States Court of International Trade in United States v. Complex Machine Works Co. 83 F. Supp. 2d 1307, 23 Ct. Int'l Trade 942 (Ct. Int'l Trade 1999). While that case dealt with violations of customs law, the Court was also faced with a statute which failed to list factors to be applied in determining a civil penalty. The decision, after noting the civil penalty provisions for a host of other federal statutes, including the Clean Water Act, the Resource Conservation and Recovery Act and EPCRA., identified fourteen factors, which in large part reflect the factors enumerated in TSCA Section 16. *Id. at 1315.*

-----------------End Footnotes-----------------

[14] In *Catalina* the Board noted with approval that the judge "clearly was considering the statutory penalty factors in making adjustments not specifically contemplated by the ERP." 1999 WL at *7.

-----------------End Footnotes-----------------

[15] EPA Witness Monahan conceded that she was aware that the Respondent had hired Jorgensen Environmental approximately two to three weeks prior to the telephone call from the EPA inspector. Tr. 87.

[16] Half of the Counts (Counts V-VIII) are derived from the Kearny Mesa facility. As noted, EPA, through Kerstan, did not learn of Kearny Mesa's existence until March 19th and this knowledge came about only through Respondent's disclosure. Given that violations are facility specific, Respondent could have opted to not disclose the Kearny Mesa facility at that time and instead simply submit the Form R's for that facility (as it did) on March 20th. The ERP does not foreclose the eligibility for voluntary disclosure in such a circumstance, as it precludes such eligibility only "if the company has been notified of a scheduled

Q. Violations under E.P.C.R.A. are facility specific, are they not?

A. Yes, they are.

Tr. 51.

[*32]

[*33]

Kerstan admitted that he first determined there had been a reporting violation on March 20, 1998 when the company submitted the Form R's and informed EPA that it had a reporting obligation.

Q Mr. Kerstan, [referring to the date it was determined there was a violation] wasn't this really determined on or about March 20, 1998, when the company submitted the Form R's to you and disclosed that they had an E.P.C.R.A. reporting obligation?

A That would have been true, yes.

Tr. 48.

Further, while the violations have been conceded, consideration of the TSCA § 16 factors cannot overlook that neither Kerstan nor any representative of EPA ever visited either of Respondent's facilities in connection with the EPCRA matter. Tr. 57. In fact, Kerstan never expressed any interest in visiting Respondent's El Cajon facility, admitting that he felt there was no need to do so. He also conceded that a company that is cooperative and supplies the information requested, saves EPA the effort of an inspection visit. Tr. 63.

EPA witness Monahan was also aware that the Agency was relying upon Jorgensen's evaluation of the chemical use data at Respondent's facility. EPA's Kerstan had not requested chemical **[*34]** use data from Respondent until March 19, 1998, which was one day before the Respondent made the Form R reports. Tr. 81. Monahan also admitted that, looking at the single factor of speed in submitting the Form R's, the Respondent used the "utmost speed." Tr. 83.

Given that the Enforcement Response Policy itself identifies "deterrence from committing EPCRA § 313 violations" as one of its purposes, the Court also considers it appropriate to consider the Respondent's actions taken in the wake of the violations [17] under the "other factors as justice may require" factor. To preclude future reporting requirement failures, Jorgensen's firm has been hired to provide regulatory consulting services to Respondent and

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inspection or the inspection has begun, or *the facility* has otherwise been contacted by U.S. EPA for the purpose of determining compliance with EPCRA § 313." ERP at 14 (emphasis added). Thus, within the terms of the ERP, there could have been self-disclosure (i.e. voluntary disclosure) of the Form R's for that facility. Instead, Respondent acted as a good corporate citizen and disclosed the presence of a separate facility. The Court views this as an additional consideration to be weighed under either the circumstances of the violation or the "as justice may require" factor.

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[17] However, one of the mitigating factors advanced by the Respondent is rejected by the Court. Respondent asserted that the elimination of 111 trichloroethane from their facility was prompted by awareness that EPA was working to eliminate it and that the supply would be dwindling. Tr. 188. In dealing with the assertion that Respondent was a "good actor," as reflected by the steps it took to reduce use of M.I.B.K. and to eliminate the use of TCA, EPA noted that there must be an in depth investigation to determine whether the motivation stems from the goodness of the corporation's heart and not actually from some other motivation such as local or state laws or economic considerations prompting the action. Tr. 90. If applicable, such an act would be considered under the "other factors" element. Tr. 92. EPA made no such investigation in this case. However, no investigation was necessary because the Respondent conceded it was aware that 111 Trichloroethane manufacture had been banned on December 31, 1995, and consequently that the cost for the product would go up. Respondent's witness essentially conceded that costs were a consideration and that they anticipated increases coming for the use of the chemical. Tr. 121-125. Accordingly, it is clear that the Respondent's decision regarding use of those chemicals was not totally altruistic.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

evaluate all chemicals it may use, even before they purchase them. Tr. 155. Hartig confirmed that Jorgensen Environmental has been retained on an annual basis to be sure they remain in compliance. Tr. 187.

[*35]

It also seems appropriate to consider under the "other factors" element that, subsequent to the events forming the basis for the complaint, the Respondent has had no Form R reporting duties. Respondent's Ex. 9 (a April 14, 1998 letter from Jorgensen to Hartig reflecting that Martin Furniture had no Form R reporting duties at either plant in 1997); Respondent's Ex. 10 (a June 3, 1999, letter to Hartig with the same conclusion for calendar year 1998: Respondent had no Form R reporting requirements); Tr. 160.

Other aspects of this case merit discussion in the penalty determination context. Although the Board has noted that the penalty derived under the ERP assumes that a respondent may not have actual knowledge of the Section 313 requirements and affirmed a judge's decision not to reduce the penalty further for a respondent's lack of culpability as not "error," it also stated that "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." *Catalina, 1999 WL at *9*. Here, the Respondent, initially a small firm, started literally out of Mr. Martin's garage making unfinished **[*36]** furniture. Given this context, and the Court's acceptance of Martin's contention that it was unaware of the requirement, Respondent's assertion that it did not know of the Form R requirement is credible. In recognition of the regulated community's lack of awareness of these requirements, EPA has conducted outreach programs. *See Pease and Curren, Inc., 1991 EPA ALJ LEXIS 25, 1991 WL 310035 (ALJ, Mar. 13, 1991)*. No evidence of such an outreach effort applicable to this area or class of manufacturers was offered by EPA. In fact, Kerstan explained that part of his duties was to "do inspections of facilities to make sure that they comply *and also to find facilities who may have not been aware of the regulation and not filed Form R*." Tr. 38. (emphasis added).

A further comparison with *Catalina* is appropriate, as the judge in that case found that the Respondent's immediate retention of an individual to assist in preparing the Form R's demonstrated good faith efforts to come into compliance and that the Respondent's speed, taking six months, to submit the forms demonstrated prompt compliance, given that an earthquake disrupted the Respondent's business activities. [18] *Catalina, 1999 WL at *12*. **[*37]** Both of these findings were upheld by the Board on the basis that it found no abuse of discretion on the judge's part. Obviously such considerations are more favorable in this litigation, as demonstrated by the finding that the Respondent had *already* retained Jorgensen to assess its potential Form R reporting responsibilities in advance of EPA's first contact and the fact that it provided the Forms the day after they were requested and within ten days of the Agency's first contact with the Respondent.

Upon consideration of each of the TSCA Section 16 factors, as reflected in the foregoing discussion, it is the Court's determination that, regarding the El Cajon facility, a penalty in the amount of $ 10,000 each is imposed for Counts I and III, $ 5,000 for Count II, and $ 1,300 for Count IV and, regarding the Kearny Mesa facility, a penalty of $ 2,000 each for Counts V and VII, $ 1,300 **[*38]** for Count VI, and $ 200 for Count VIII, for a total penalty amount of $ 31,800. These amounts take into account the Agency's own differentiation of penalties among the Counts and the Court's distinction between penalties at the Kearny Mesa and El Cajon facilities. Under the particular facts and circumstances present, the Court considers the penalty imposed to be appropriate for the violations committed.

ORDER

A civil penalty in the amount of $ 31,800 is assessed against the Respondent, Gilbert Martin Woodworking Company, Inc. Payment of the full amount of the civil penalty assessed shall be made within thirty (30) days after this Initial Decision becomes a final order under *40 C.F.R. § 22.27(c)*. Payment shall be submitted by a certified check or cashier's check payable to the Treasurer, United States of America and mailed to:

Mellon Bank

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[18] This finding was undisturbed, even though the event caused the Respondent's office to close for only a few days.

-----------------End Footnotes-----------------

EPA Region IX
Regional Hearing Clerk
P.O. Box 360863M
Pittsburgh, PA 15251

A transmittal letter identifying the subject case and the EPA docket number, plus the Respondent's name and address must accompany the check. Failure of the Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result **[*39]** in the assessment of interest on the civil penalties.

Pursuant to *40 C.F.R. § 22.27(c)*, this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of the Initial Decision, pursuant to *40 C.F.R. § 22.28(a)*; (2) an appeal to the EAB is taken from it by a party to this proceeding, pursuant to *40 C.F.R. § 22.30(a)*, within thirty (30) days after the Initial Decision is served upon the parties; or (3) the EAB elects, upon its own initiative, under *40 C.F.R. § 22.30(b)*, to review the Initial Decision.

End of Document

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

Federal Register

Tuesday,
April 11, 2000

Part VII

Environmental Protection Agency

Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations; Notice

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6576–3]

Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations

AGENCY: Environmental Protection Agency (EPA, or Agency).

ACTION: Final Policy Statement.

SUMMARY: EPA today issues its revised final policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," commonly referred to as the "Audit Policy." The purpose of this Policy is to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, promptly disclose and expeditiously correct violations of Federal environmental requirements. Incentives that EPA makes available for those who meet the terms of the Audit Policy include the elimination or substantial reduction of the gravity component of civil penalties and a determination not to recommend criminal prosecution of the disclosing entity. The Policy also restates EPA's long-standing practice of not requesting copies of regulated entities' voluntary audit reports to trigger Federal enforcement investigations. Today's revised Audit Policy replaces the 1995 Audit Policy (60 FR 66706), which was issued on December 22, 1995, and took effect on January 22, 1996. Today's revisions maintain the basic structure and terms of the 1995 Audit Policy while clarifying some of its language, broadening its availability, and conforming the provisions of the Policy to actual Agency practice. The revisions being released today lengthen the prompt disclosure period to 21 days, clarify that the independent discovery condition does not automatically preclude penalty mitigation for multi-facility entities, and clarify how the prompt disclosure and repeat violation conditions apply to newly acquired companies. The revised Policy was developed in close consultation with the U.S. Department of Justice (DOJ), States, public interest groups and the regulated community. The revisions also reflect EPA's experience implementing the Policy over the past five years.

DATES: This revised Policy is effective May 11, 2000.

FOR FURTHER INFORMATION CONTACT: Catherine Malinin Dunn (202) 564–2629 or Leslie Jones (202) 564–5123. Documentation relating to the development of this Policy is contained in the environmental auditing public docket (#C–94–01). An index to the docket may be obtained by contacting the Enforcement and Compliance Docket and Information Center (ECDIC) by telephone at (202) 564–2614 or (202) 564–2119, by fax at (202) 501–1011, or by email at docket.oeca@epa.gov. ECDIC office hours are 8:00 am to 4:00 pm Monday through Friday except for Federal holidays. An index to the docket is available on the Internet at www.epa.gov/oeca/polguid/enfdock.html. Additional guidance regarding interpretation and application of the Policy is also available on the Internet at www.epa.gov/oeca/ore/apolguid.html.

SUPPLEMENTARY INFORMATION: This Notice is organized as follows:

I. Explanation of Policy
A. Introduction
B. Background and History
C. Purpose
D. Incentives for Self-Policing
1. Eliminating Gravity-Based Penalties
2. 75% Reduction of Gravity-Based Penalties
3. No Recommendations for Criminal Prosecution
4. No Routine Requests for Audit Reports
E. Conditions
1. Systematic Discovery of the Violation Through an Environmental Audit or a Compliance Management System
2. Voluntary Discovery
3. Prompt Disclosure
4. Discovery and Disclosure Independent of Government or Third-Party Plaintiff
5. Correction and Remediation
6. Prevent Recurrence
7. No Repeat Violations
8. Other Violations Excluded
9. Cooperation
F. Opposition to Audit Privilege and Immunity
G. Effect on States
H. Scope of Policy
I. Implementation of Policy
1. Civil Violations
2. Criminal Violations
3. Release of Information to the Public

II. Statement of Policy—Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention
A. Purpose
B. Definitions
C. Incentives for Self-Policing
1. No Gravity-Based Penalties
2. Reduction of Gravity-Based Penalties by 75%
3. No Recommendation for Criminal Prosecution
4. No Routine Request for Environmental Audit Reports
D. Conditions
1. Systematic Discovery
2. Voluntary Discovery
3. Prompt Disclosure
4. Discovery and Disclosure Independent of Government or Third-Party Plaintiff
5. Correction and Remediation
6. Prevent Recurrence
7. No Repeat Violations
8. Other Violations Excluded
9. Cooperation
E. Economic Benefit
F. Effect on State Law, Regulation or Policy
G. Applicability
H. Public Accountability
I. Effective Date

I. Explanation of Policy

A. Introduction

On December 22, 1995, EPA issued its final policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" (60 FR 66706) (Audit Policy, or Policy). The purpose of the Policy is to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of Federal environmental law. Benefits available to entities that make disclosures under the terms of the Policy include reductions in the amount of civil penalties and a determination not to recommend criminal prosecution of disclosing entities.

Today, EPA issues revisions to the 1995 Audit Policy. The revised Policy reflects EPA's continuing commitment to encouraging voluntary self-policing while preserving fair and effective enforcement. It lengthens the prompt disclosure period to 21 days, clarifies that the independent discovery condition does not automatically preclude Audit Policy credit in the multi-facility context, and clarifies how the prompt disclosure and repeat violations conditions apply in the acquisitions context. The revised final Policy takes effect May 11, 2000.

B. Background and History

The Audit Policy provides incentives for regulated entities to detect, promptly disclose, and expeditiously correct violations of Federal environmental requirements. The Policy contains nine conditions, and entities that meet all of them are eligible for 100% mitigation of any gravity-based penalties that otherwise could be assessed. ("Gravity-based" refers to that portion of the penalty over and above the portion that represents the entity's economic gain from noncompliance, known as the "economic benefit.") Regulated entities that do not meet the first condition—systematic discovery of violations—but meet the other eight conditions are eligible for 75% mitigation of any gravity-based civil penalties. On the criminal side, EPA will generally elect not to recommend criminal prosecution

by DOJ or any other prosecuting authority for a disclosing entity that meets at least conditions two through nine—regardless of whether it meets the systematic discovery requirement—as long as its self-policing, discovery and disclosure were conducted in good faith and the entity adopts a systematic approach to preventing recurrence of the violation.

The Policy includes important safeguards to deter violations and protect public health and the environment. For example, the Policy requires entities to act to prevent recurrence of violations and to remedy any environmental harm that may have occurred. Repeat violations, those that result in actual harm to the environment, and those that may present an imminent and substantial endangerment are not eligible for relief under this Policy. Companies will not be allowed to gain an economic advantage over their competitors by delaying their investment in compliance. And entities remain criminally liable for violations that result from conscious disregard of or willful blindness to their obligations under the law, and individuals remain liable for their criminal misconduct.

When EPA issued the 1995 Audit Policy, the Agency committed to evaluate the Policy after three years. The Agency initiated this evaluation in the Spring of 1998 and published its preliminary results in the **Federal Register** on May 17, 1999 (64 FR 26745). The evaluation consisted of the following components:

- An internal survey of EPA staff who process disclosures and handle enforcement cases under the 1995 Audit Policy;
- A survey of regulated entities that used the 1995 Policy to disclose violations;
- A series of meetings and conference calls with representatives from industry, environmental organizations, and States;
- Focused stakeholder discussions on the Audit Policy at two public conferences co-sponsored by EPA's Office of Enforcement and Compliance Assurance (OECA) and the Vice President's National Partnership for Reinventing Government, entitled "Protecting Public Health and the Environment through Innovative Approaches to Compliance";
- A **Federal Register** notice on March 2, 1999, soliciting comments on how EPA can further protect and improve public health and the environment through new compliance and enforcement approaches (64 FR 10144); and
- An analysis of data on Audit Policy usage to date and discussions amongst EPA officials who handle Audit Policy disclosures.

The same May 17, 1999, **Federal Register** notice that published the evaluation's preliminary results also proposed revisions to the 1995 Policy and requested public comment. During the 60-day public comment period, the Agency received 29 comment letters, copies of which are available through the Enforcement and Compliance Docket and Information Center. (See contact information at the beginning of this notice.) Analysis of these comment letters together with additional data on Audit Policy usage has constituted the final stage of the Audit Policy evaluation. EPA has prepared a detailed response to the comments received; a copy of that document will also be available through the Docket and Information Center as well on the Internet at www.epa.gov/oeca/ore/apolguid.html.

Overall, the Audit Policy evaluation revealed very positive results. The Policy has encouraged voluntary self-policing while preserving fair and effective enforcement. Thus, the revisions issued today do not signal any intention to shift course regarding the Agency's position on self-policing and voluntary disclosures but instead represent an attempt to fine-tune a Policy that is already working well.

Use of the Audit Policy has been widespread. As of October 1, 1999, approximately 670 organizations had disclosed actual or potential violations at more than 2700 facilities. The number of disclosures has increased each of the four years the Policy has been in effect.

Results of the Audit Policy User's Survey revealed very high satisfaction rates among users, with 88% of respondents stating that they would use the Policy again and 84% stating that they would recommend the Policy to clients and/or their counterparts. No respondents stated an unwillingness to use the Policy again or to recommend its use to others.

The Audit Policy and related documents, including Agency interpretive guidance and general interest newsletters, are available on the Internet at www.epa.gov/oeca/ore/apolguid. Additional guidance for implementing the Policy in the context of criminal violations can be found at www.epa.gov/oeca/oceft/audpol2.html.

In addition to the Audit Policy, the Agency's revised Small Business Compliance Policy ("Small Business Policy") is also available for small entities that employ 100 or fewer individuals. The Small Business Policy provides penalty mitigation, subject to certain conditions, for small businesses that make a good faith effort to comply with environmental requirements by discovering, disclosing and correcting violations. EPA has revised the Small Business Policy at the same time it revised the Audit Policy. The revised Small Business Policy will be available on the Internet at www.epa.gov/oeca/smbusi.html.

C. Purpose

The revised Policy being announced today is designed to encourage greater compliance with Federal laws and regulations that protect human health and the environment. It promotes a higher standard of self-policing by waiving gravity-based penalties for violations that are promptly disclosed and corrected, and which were discovered systematically—that is, through voluntary audits or compliance management systems. To provide an incentive for entities to disclose and correct violations regardless of how they were detected, the Policy reduces gravity-based penalties by 75% for violations that are voluntarily discovered and promptly disclosed and corrected, even if not discovered systematically.

EPA's enforcement program provides a strong incentive for compliance by imposing stiff sanctions for noncompliance. Enforcement has contributed to the dramatic expansion of environmental auditing as measured in numerous recent surveys. For example, in a 1995 survey by Price Waterhouse LLP, more than 90% of corporate respondents who conduct audits identified one of the reasons for doing so as the desire to find and correct violations before government inspectors discover them. (A copy of the survey is contained in the Docket as document VIII–A–76.)

At the same time, because government resources are limited, universal compliance cannot be achieved without active efforts by the regulated community to police themselves. More than half of the respondents to the same 1995 Price Waterhouse survey said that they would expand environmental auditing in exchange for reduced penalties for violations discovered and corrected. While many companies already audit or have compliance management programs in place, EPA believes that the incentives offered in this Policy will improve the frequency and quality of these self-policing efforts.

D. Incentives for Self-Policing

Section C of the Audit Policy identifies the major incentives that EPA

provides to encourage self-policing, self-disclosure, and prompt self-correction. For entities that meet the conditions of the Policy, the available incentives include waiving or reducing gravity-based civil penalties, declining to recommend criminal prosecution for regulated entities that self-police, and refraining from routine requests for audits. (As noted in Section C of the Policy, EPA has refrained from making routine requests for audit reports since issuance of its 1986 policy on environmental auditing.)

1. Eliminating Gravity-Based Penalties

In general, civil penalties that EPA assesses are comprised of two elements: the economic benefit component and the gravity-based component. The economic benefit component reflects the economic gain derived from a violator's illegal competitive advantage. Gravity-based penalties are that portion of the penalty over and above the economic benefit. They reflect the egregiousness of the violator's behavior and constitute the punitive portion of the penalty. For further discussion of these issues, see "Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases," 64 FR 32948 (June 18, 1999) and "A Framework for Statute-Specific Approaches to Penalty Assessments," #GM–22 (1984), U.S. EPA General Enforcement Policy Compendium.

Under the Audit Policy, EPA will not seek gravity-based penalties for disclosing entities that meet all nine Policy conditions, including systematic discovery. ("Systematic discovery" means the detection of a potential violation through an environmental audit or a compliance management system that reflects the entity's due diligence in preventing, detecting and correcting violations.) EPA has elected to waive gravity-based penalties for violations discovered systematically, recognizing that environmental auditing and compliance management systems play a critical role in protecting human health and the environment by identifying, correcting and ultimately preventing violations.

However, EPA reserves the right to collect any economic benefit that may have been realized as a result of noncompliance, even where the entity meets all other Policy conditions. Where the Agency determines that the economic benefit is insignificant, the Agency also may waive this component of the penalty.

EPA's decision to retain its discretion to recover economic benefit is based on two reasons. First, facing the risk that the Agency will recoup economic benefit provides an incentive for regulated entities to comply on time. Taxpayers whose payments are late expect to pay interest or a penalty; the same principle should apply to corporations and other regulated entities that have delayed their investment in compliance. Second, collecting economic benefit is fair because it protects law-abiding companies from being undercut by their noncomplying competitors, thereby preserving a level playing field.

2. 75% Reduction of Gravity-based Penalties

Gravity-based penalties will be reduced by 75% where the disclosing entity does not detect the violation through systematic discovery but otherwise meets all other Policy conditions. The Policy appropriately limits the complete waiver of gravity-based civil penalties to companies that conduct environmental auditing or have in place a compliance management system. However, to encourage disclosure and correction of violations even in the absence of systematic discovery, EPA will reduce gravity-based penalties by 75% for entities that meet conditions D(2) through D(9) of the Policy. EPA expects that a disclosure under this provision will encourage the entity to work with the Agency to resolve environmental problems and begin to develop an effective auditing program or compliance management system.

3. No Recommendations for Criminal Prosecution

In accordance with EPA's Investigative Discretion Memo dated January 12, 1994, EPA generally does not focus its criminal enforcement resources on entities that voluntarily discover, promptly disclose and expeditiously correct violations, unless there is potentially culpable behavior that merits criminal investigation. When a disclosure that meets the terms and conditions of this Policy results in a criminal investigation, EPA will generally not recommend criminal prosecution for the disclosing entity, although the Agency may recommend prosecution for culpable individuals and other entities. The 1994 Investigative Discretion Memo is available on the Internet at http://www.epa.gov/oeca/ore/ aed/comp/acomp/a11.html.

The "no recommendation for criminal prosecution" incentive is available for entities that meet conditions D(2) through D(9) of the Policy. Condition D(1) "systematic discovery" is not required to be eligible for this incentive, although the entity must be acting in good faith and must adopt a systematic approach to preventing recurring violations. Important limitations to the incentive apply. It will not be available, for example, where corporate officials are consciously involved in or willfully blind to violations, or conceal or condone noncompliance. Since the regulated entity must satisfy conditions D(2) through D(9) of the Policy, violations that cause serious harm or which may pose imminent and substantial endangerment to human health or the environment are not eligible. Finally, EPA reserves the right to recommend prosecution for the criminal conduct of any culpable individual or subsidiary organization.

While EPA may decide not to recommend criminal prosecution for disclosing entities, ultimate prosecutorial discretion resides with the U.S. Department of Justice, which will be guided by its own policy on voluntary disclosures ("Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator," July 1, 1991) and by its 1999 Guidance on Federal Prosecutions of Corporations. In addition, where a disclosing entity has met the conditions for avoiding a recommendation for criminal prosecution under this Policy, it will also be eligible for either 75% or 100% mitigation of gravity-based civil penalties, depending on whether the systematic discovery condition was met.

4. No Routine Requests for Audit Reports

EPA reaffirms its Policy, in effect since 1986, to refrain from routine requests for audit reports. That is, EPA has not and will not routinely request copies of audit reports to trigger enforcement investigations. Implementation of the 1995 Policy has produced no evidence that the Agency has deviated, or should deviate, from this Policy. In general, an audit that results in expeditious correction will reduce liability, not expand it. However, if the Agency has independent evidence of a violation, it may seek the information it needs to establish the extent and nature of the violation and the degree of culpability.

For discussion of the circumstances in which EPA might request an audit report to determine Policy eligibility, see the explanatory text on cooperation, section I.E.9.

E. Conditions

Section D describes the nine conditions that a regulated entity must

meet in order for the Agency to decline to seek (or to reduce) gravity-based penalties under the Policy. As explained in section I.D.1 above, regulated entities that meet all nine conditions will not face gravity-based civil penalties. If the regulated entity meets all of the conditions except for D(1)—systematic discovery—EPA will reduce gravity-based penalties by 75%. In general, EPA will not recommend criminal prosecution for disclosing entities that meet at least conditions D(2) through D(9).

1. Systematic Discovery of the Violation Through an Environmental Audit or a Compliance Management System

Under Section D(1), the violation must have been discovered through either (a) an environmental audit, or (b) a compliance management system that reflects due diligence in preventing, detecting and correcting violations. Both "environmental audit" and "compliance management system" are defined in Section B of the Policy.

The revised Policy uses the term "compliance management system" instead of "due diligence," which was used in the 1995 Policy. This change in nomenclature is intended solely to conform the Policy language to terminology more commonly in use by industry and by regulators to refer to a systematic management plan or systematic efforts to achieve and maintain compliance. No substantive difference is intended by substituting the term "compliance management system" for "due diligence," as the Policy clearly indicates that the compliance management system must reflect the regulated entity's due diligence in preventing, detecting and correcting violations.

Compliance management programs that train and motivate employees to prevent, detect and correct violations on a daily basis are a valuable complement to periodic auditing. Where the violation is discovered through a compliance management system and not through an audit, the disclosing entity should be prepared to document how its program reflects the due diligence criteria defined in Section B of the Policy statement. These criteria, which are adapted from existing codes of practice—such as Chapter Eight of the U.S. Sentencing Guidelines for organizational defendants, effective since 1991—are flexible enough to accommodate different types and sizes of businesses and other regulated entities. The Agency recognizes that a variety of compliance management programs are feasible, and it will determine whether basic due diligence criteria have been met in deciding whether to grant Audit Policy credit.

As a condition of penalty mitigation, EPA may require that a description of the regulated entity's compliance management system be made publicly available. The Agency believes that the availability of such information will allow the public to judge the adequacy of compliance management systems, lead to enhanced compliance, and foster greater public trust in the integrity of compliance management systems.

2. Voluntary Discovery

Under Section D(2), the violation must have been identified voluntarily, and not through a monitoring, sampling, or auditing procedure that is required by statute, regulation, permit, judicial or administrative order, or consent agreement. The Policy provides three specific examples of discovery that would not be voluntary, and therefore would not be eligible for penalty mitigation: emissions violations detected through a required continuous emissions monitor, violations of NPDES discharge limits found through prescribed monitoring, and violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement. The exclusion does not apply to violations that are discovered pursuant to audits that are conducted as part of a comprehensive environmental management system (EMS) required under a settlement agreement. In general, EPA supports the implementation of EMSs that promote compliance, prevent pollution and improve overall environmental performance. Precluding the availability of the Audit Policy for discoveries made through a comprehensive EMS that has been implemented pursuant to a settlement agreement might discourage entities from agreeing to implement such a system.

In some instances, certain Clean Air Act violations discovered, disclosed and corrected by a company prior to issuance of a Title V permit are eligible for penalty mitigation under the Policy. For further guidance in this area, see "Reduced Penalties for Disclosures of Certain Clean Air Act Violations," Memorandum from Eric Schaeffer, Director of the EPA Office of Regulatory Enforcement, dated September 30, 1999. This document is available on the Internet at www.epa.gov/oeca/ore/apolguid.html.

The voluntary requirement applies to discovery only, not reporting. That is, any violation that is voluntarily discovered is generally eligible for Audit Policy credit, regardless of whether reporting of the violation was required after it was found.

3. Prompt Disclosure

Section D(3) requires that the entity disclose the violation in writing to EPA within 21 calendar days after discovery. If the 21st day after discovery falls on a weekend or Federal holiday, the disclosure period will be extended to the first business day following the 21st day after discovery. If a statute or regulation requires the entity to report the violation in fewer than 21 days, disclosure must be made within the time limit established by law. (For example, unpermitted releases of hazardous substances must be reported immediately under 42 U.S.C. 9603.) Disclosures under this Policy should be made to the appropriate EPA Regional office or, where multiple Regions are involved, to EPA Headquarters. The Agency will work closely with States as needed to ensure fair and efficient implementation of the Policy. For additional guidance on making disclosures, contact the Audit Policy National Coordinator at EPA Headquarters at 202–564–5123.

The 21-day disclosure period begins when the entity discovers that a violation has, or may have, occurred. The trigger for discovery is when any officer, director, employee or agent of the facility has an objectively reasonable basis for believing that a violation has, or may have, occurred. The "objectively reasonable basis" standard is measured against what a prudent person, having the same information as was available to the individual in question, would have believed. It is not measured against what the individual in question thought was reasonable at the time the situation was encountered. If an entity has some doubt as to the existence of a violation, the recommended course is for the entity to proceed with the disclosure and allow the regulatory authorities to make a definitive determination. Contract personnel who provide on-site services at the facility may be treated as employees or agents for purposes of the Policy.

If the 21-day period has not yet expired and an entity suspects that it will be unable to meet the deadline, the entity should contact the appropriate EPA office in advance to develop disclosure terms acceptable to EPA. For situations in which the 21-day period already has expired, the Agency may accept a late disclosure in the exceptional case, such as where there are complex circumstances, including where EPA determines the violation could not be identified and disclosed within 21 calendar days after discovery.

EPA also may extend the disclosure period when multiple facilities or acquisitions are involved.

In the multi-facility context, EPA will ordinarily extend the 21-day period to allow reasonable time for completion and review of multi-facility audits where: (a) EPA and the entity agree on the timing and scope of the audits prior to their commencement; and (b) the facilities to be audited are identified in advance. In the acquisitions context, EPA will consider extending the prompt disclosure period on a case-by-case basis. The 21-day disclosure period will begin on the date of discovery by the acquiring entity, but in no case will the period begin earlier than the date of acquisition.

In summary, Section D(3) recognizes that it is critical for EPA to receive timely reporting of violations in order to have clear notice of the violations and the opportunity to respond if necessary. Prompt disclosure is also evidence of the regulated entity's good faith in wanting to achieve or return to compliance as soon as possible. The integrity of Federal environmental law depends upon timely and accurate reporting. The public relies on timely and accurate reports from the regulated community, not only to measure compliance but to evaluate health or environmental risk and gauge progress in reducing pollutant loadings. EPA expects the Policy to encourage the kind of vigorous self-policing that will serve these objectives and does not intend that it justify delayed reporting. When violations of reporting requirements are voluntarily discovered, they must be promptly reported. When a failure to report results in imminent and substantial endangerment or serious harm to the environment, Audit Policy credit is precluded under condition D(8).

4. Discovery and Disclosure Independent of Government or Third Party Plaintiff

Under Section D(4), the entity must discover the violation independently. That is, the violation must be discovered and identified before EPA or another government agency likely would have identified the problem either through its own investigative work or from information received through a third party. This condition requires regulated entities to take the initiative to find violations on their own and disclose them promptly instead of waiting for an indication of a pending enforcement action or third-party complaint.

Section D(4)(a) lists the circumstances under which discovery and disclosure will not be considered independent. For example, a disclosure will not be independent where EPA is already investigating the facility in question. However, under subsection (a), where the entity does not know that EPA has commenced a civil investigation and proceeds in good faith to make a disclosure under the Audit Policy, EPA may, in its discretion, provide penalty mitigation under the Audit Policy. The subsection (a) exception applies only to civil investigations; it does not apply in the criminal context. Other examples of situations in which a discovery is not considered independent are where a citizens' group has provided notice of its intent to sue, where a third party has already filed a complaint, where a whistleblower has reported the potential violation to government authorities, or where discovery of the violation by the government was imminent. Condition D(4)(c)—the filing of a complaint by a third party—covers formal judicial and administrative complaints as well as informal complaints, such as a letter from a citizens' group alerting EPA to a potential environmental violation.

Regulated entities that own or operate multiple facilities are subject to section D(4)(b) in addition to D(4)(a). EPA encourages multi-facility auditing and does not intend for the "independent discovery" condition to preclude availability of the Audit Policy when multiple facilities are involved. Thus, if a regulated entity owns or operates multiple facilities, the fact that one of its facilities is the subject of an investigation, inspection, information request or third-party complaint does not automatically preclude the Agency from granting Audit Policy credit for disclosures of violations self-discovered at the other facilities, assuming all other Audit Policy conditions are met. However, just as in the single-facility context, where a facility is already the subject of a government inspection, investigation or information request (including a broad information request that covers multiple facilities), it will generally not be eligible for Audit Policy credit. The Audit Policy is designed to encourage regulated entities to disclose violations before any of their facilities are under investigation, not after EPA discovers violations at one facility. Nevertheless, the Agency retains its full discretion under the Audit Policy to grant penalty waivers or reductions for good-faith disclosures made in the multi-facility context. EPA has worked closely with a number of entities that have received Audit Policy credit for multi-facility disclosures, and entities contemplating multi-facility auditing are encouraged to contact the Agency with any questions concerning Audit Policy availability.

5. Correction and Remediation

Under Section D(5), the entity must remedy any harm caused by the violation and expeditiously certify in writing to appropriate Federal, State, and local authorities that it has corrected the violation. Correction and remediation in this context include responding to spills and carrying out any removal or remedial actions required by law. The certification requirement enables EPA to ensure that the regulated entity will be publicly accountable for its commitments through binding written agreements, orders or consent decrees where necessary.

Under the Policy, the entity must correct the violation within 60 calendar days from the date of discovery, or as expeditiously as possible. EPA recognizes that some violations can and should be corrected immediately, while others may take longer than 60 days to correct. For example, more time may be required if capital expenditures are involved or if technological issues are a factor. If more than 60 days will be required, the disclosing entity must so notify the Agency in writing prior to the conclusion of the 60-day period. In all cases, the regulated entity will be expected to do its utmost to achieve or return to compliance as expeditiously as possible.

If correction of the violation depends upon issuance of a permit that has been applied for but not issued by Federal or State authorities, the Agency will, where appropriate, make reasonable efforts to secure timely review of the permit.

6. Prevent Recurrence

Under Section D(6), the regulated entity must agree to take steps to prevent a recurrence of the violation after it has been disclosed. Preventive steps may include, but are not limited to, improvements to the entity's environmental auditing efforts or compliance management system.

7. No Repeat Violations

Condition D(7) bars repeat offenders from receiving Audit Policy credit. Under the repeat violations exclusion, the same or a closely-related violation must not have occurred at the same facility within the past 3 years. The 3-year period begins to run when the government or a third party has given the violator notice of a specific violation, without regard to when the original violation cited in the notice

actually occurred. Examples of notice include a complaint, consent order, notice of violation, receipt of an inspection report, citizen suit, or receipt of penalty mitigation through a compliance assistance or incentive project.

When the facility is part of a multi-facility organization, Audit Policy relief is not available if the same or a closely-related violation occurred as part of a pattern of violations at one or more of these facilities within the past 5 years. If a facility has been newly acquired, the existence of a violation prior to acquisition does not trigger the repeat violations exclusion.

The term "violation" includes any violation subject to a Federal, State or local civil judicial or administrative order, consent agreement, conviction or plea agreement. Recognizing that minor violations sometimes are settled without a formal action in court, the term also covers any act or omission for which the regulated entity has received a penalty reduction in the past. This condition covers situations in which the regulated entity has had clear notice of its noncompliance and an opportunity to correct the problem.

The repeat violation exclusion benefits both the public and law-abiding entities by ensuring that penalties are not waived for those entities that have previously been notified of violations and fail to prevent repeat violations. The 3-year and 5-year "bright lines" in the exclusion are designed to provide regulated entities with clear notice about when the Policy will be available.

8. Other Violations Excluded

Section D(8) provides that Policy benefits are not available for certain types of violations. Subsection D(8)(a) excludes violations that result in serious actual harm to the environment or which may have presented an imminent and substantial endangerment to public health or the environment. When events of such a consequential nature occur, violators are ineligible for penalty relief and other incentives under the Audit Policy. However, this condition does not bar an entity from qualifying for Audit Policy relief solely because the violation involves release of a pollutant to the environment, as such releases do not necessarily result in serious actual harm or an imminent and substantial endangerment. To date, EPA has not invoked the serious actual harm or the imminent and substantial endangerment clauses to deny Audit Policy credit for any disclosure.

Subsection D(8)(b) excludes violations of the specific terms of any order, consent agreement, or plea agreement. Once a consent agreement has been negotiated, there is little incentive to comply if there are no sanctions for violating its specific requirements. The exclusion in this section also applies to violations of the terms of any response, removal or remedial action covered by a written agreement.

9. Cooperation

Under Section D(9), the regulated entity must cooperate as required by EPA and provide the Agency with the information it needs to determine Policy applicability. The entity must not hide, destroy or tamper with possible evidence following discovery of potential environmental violations. In order for the Agency to apply the Policy fairly, it must have sufficient information to determine whether its conditions are satisfied in each individual case. In general, EPA requests audit reports to determine the applicability of this Policy only where the information contained in the audit report is not readily available elsewhere and where EPA decides that the information is necessary to determine whether the terms and conditions of the Policy have been met. In the rare instance where an EPA Regional office seeks to obtain an audit report because it is otherwise unable to determine whether Policy conditions have been met, the Regional office will notify the Office of Regulatory Enforcement at EPA headquarters.

Entities that disclose potential criminal violations may expect a more thorough review by the Agency. In criminal cases, entities will be expected to provide, at a minimum, the following: access to all requested documents; access to all employees of the disclosing entity; assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations; access to all information relevant to the violations disclosed, including that portion of the environmental audit report or documentation from the compliance management system that revealed the violation; and access to the individuals who conducted the audit or review.

F. Opposition to Audit Privilege and Immunity

The Agency believes that the Audit Policy provides effective incentives for self-policing without impairing law enforcement, putting the environment at risk or hiding environmental compliance information from the public. Although EPA encourages environmental auditing, it must do so without compromising the integrity and enforceability of environmental laws. It is important to distinguish between EPA's Audit Policy and the audit privilege and immunity laws that exist in some States. The Agency remains firmly opposed to statutory and regulatory audit privileges and immunity. Privilege laws shield evidence of wrongdoing and prevent States from investigating even the most serious environmental violations. Immunity laws prevent States from obtaining penalties that are appropriate to the seriousness of the violation, as they are required to do under Federal law. Audit privilege and immunity laws are unnecessary, undermine law enforcement, impair protection of human health and the environment, and interfere with the public's right to know of potential and existing environmental hazards.

Statutory audit privilege and immunity run counter to encouraging the kind of openness that builds trust between regulators, the regulated community and the public. For example, privileged information on compliance contained in an audit report may include information on the cause of violations, the extent of environmental harm, and what is necessary to correct the violations and prevent their recurrence. Privileged information is unavailable to law enforcers and to members of the public who have suffered harm as a result of environmental violations. The Agency opposes statutory immunity because it diminishes law enforcement's ability to discourage wrongful behavior and interferes with a regulator's ability to punish individuals who disregard the law and place others in danger. The Agency believes that its Audit Policy provides adequate incentives for self-policing but without secrecy and without abdicating its discretion to act in cases of serious environmental violations.

Privilege, by definition, invites secrecy, instead of the openness needed to build public trust in industry's ability to self-police. American law reflects the high value that the public places on fair access to the facts. The Supreme Court, for example, has said of privileges that, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). Federal courts have unanimously refused to recognize a privilege for environmental audits in the context of government investigations. See, *e.g., United States* v. *Dexter Corp.*, 132 F.R.D. 8, 10 (D.Conn. 1990)

(application of a privilege "would effectively impede [EPA's] ability to enforce the Clean Water Act, and would be contrary to stated public policy.") Cf. In re Grand Jury Proceedings, 861 F. Supp. 386 (D. Md. 1994) (company must comply with a subpoena under Food, Drug and Cosmetics Act for self-evaluative documents).

G. Effect on States

The revised final Policy reflects EPA's desire to provide fair and effective incentives for self-policing that have practical value to States. To that end, the Agency has consulted closely with State officials in developing this Policy. As a result, EPA believes its revised final Policy is grounded in commonsense principles that should prove useful in the development and implementation of State programs and policies.

EPA recognizes that States are partners in implementing the enforcement and compliance assurance program. When consistent with EPA's policies on protecting confidential and sensitive information, the Agency will share with State agencies information on disclosures of violations of Federally-authorized, approved or delegated programs. In addition, for States that have adopted their own audit policies in Federally-authorized, approved or delegated programs, EPA will generally defer to State penalty mitigation for self-disclosures as long as the State policy meets minimum requirements for Federal delegation. Whenever a State provides a penalty waiver or mitigation for a violation of a requirement contained in a Federally-authorized, approved or delegated program to an entity that discloses those violations in conformity with a State audit policy, the State should notify the EPA Region in which it is located. This notification will ensure that Federal and State enforcement responses are coordinated properly.

For further information about minimum delegation requirements and the effect of State audit privilege and immunity laws on enforcement authority, see "Statement of Principles: Effect of State Audit/Immunity Privilege Laws on Enforcement Authority for Federal Programs," Memorandum from Steven A. Herman et al, dated February 14, 1997, to be posted on the Internet under www.epa.gov/oeca/oppa.

As always, States are encouraged to experiment with different approaches to assuring compliance as long as such approaches do not jeopardize public health or the environment, or make it profitable not to comply with Federal environmental requirements. The Agency remains opposed to State legislation that does not include these basic protections, and reserves its right to bring independent action against regulated entities for violations of Federal law that threaten human health or the environment, reflect criminal conduct or repeated noncompliance, or allow one company to profit at the expense of its law-abiding competitors.

H. Scope of Policy

EPA has developed this Policy to guide settlement actions. It is the Agency's practice to make public all compliance agreements reached under this Policy in order to provide the regulated community with fair notice of decisions and to provide affected communities and the public with information regarding Agency action. Some in the regulated community have suggested that the Agency should convert the Policy into a regulation because they feel doing so would ensure greater consistency and predictability. Following its three-year evaluation of the Policy, however, the Agency believes that there is ample evidence that the Policy has worked well and that there is no need for a formal rulemaking. Furthermore, as the Agency seeks to respond to lessons learned from its increasing experience handling self-disclosures, a policy is much easier to amend than a regulation. Nothing in today's release of the revised final Policy is intended to change the status of the Policy as guidance.

I. Implementation of Policy

1. Civil Violations

Pursuant to the Audit Policy, disclosures of civil environmental violations should be made to the EPA Region in which the entity or facility is located or, where the violations to be disclosed involve more than one EPA Region, to EPA Headquarters. The Regional or Headquarters offices decide whether application of the Audit Policy in a specific case is appropriate. Obviously, once a matter has been referred for civil judicial prosecution, DOJ becomes involved as well. Where there is evidence of a potential criminal violation, the civil offices coordinate with criminal enforcement offices at EPA and DOJ.

To resolve issues of national significance and ensure that the Policy is applied fairly and consistently across EPA Regions and at Headquarters, the Agency in 1995 created the Audit Policy Quick Response Team (QRT). The QRT is comprised of representatives from the Regions, Headquarters, and DOJ. It meets on a regular basis to address issues of interpretation and to coordinate self-disclosure initiatives. In addition, in 1999 EPA established a National Coordinator position to handle Audit Policy issues and implementation. The National Coordinator chairs the QRT and, along with the Regional Audit Policy coordinators, serves as a point of contact on Audit Policy issues in the civil context.

2. Criminal Violations

Criminal disclosures are handled by the Voluntary Disclosure Board (VDB), which was established by EPA in 1997. The VDB ensures consistent application of the Audit Policy in the criminal context by centralizing Policy interpretation and application within the Agency.

Disclosures of potential criminal violations may be made directly to the VDB, to an EPA regional criminal investigation division or to DOJ. In all cases, the VDB coordinates with the investigative team and the appropriate prosecuting authority. During the course of the investigation, the VDB routinely monitors the progress of the investigation as necessary to ensure that sufficient facts have been established to determine whether to recommend that relief under the Policy be granted.

At the conclusion of the criminal investigation, the Board makes a recommendation to the Director of EPA's Office of Criminal Enforcement, Forensics, and Training, who serves as the Deciding Official. Upon receiving the Board's recommendation, the Deciding Official makes his or her final recommendation to the appropriate United States Attorney's Office and/or DOJ. The recommendation of the Deciding Official, however, is only that—a recommendation. The United States Attorney's Office and/or DOJ retain full authority to exercise prosecutorial discretion.

3. Release of Information to the Public

Upon formal settlement, EPA places copies of settlements in the Audit Policy Docket. EPA also makes other documents related to self-disclosures publicly available, unless the disclosing entity claims them as Confidential Business Information (and that claim is validated by U.S. EPA), unless another exemption under the Freedom of Information Act is asserted and/or applies, or the Privacy Act or any other law would preclude such release. Presumptively releasable documents include compliance agreements reached under the Policy (see Section H) and descriptions of compliance management systems submitted under Section D(1).

Any material claimed to be Confidential Business Information will be treated in accordance with EPA regulations at 40 CFR Part 2. In determining what documents to release, EPA is guided by the Memorandum from Assistant Administrator Steven A. Herman entitled "Confidentiality of Information Received Under Agency's Self-Disclosure Policy," available on the Internet at www.epa.gov/oeca/sahmemo.html.

II. Statement of Policy—Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations

A. Purpose

This Policy is designed to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of Federal environmental requirements.

B. Definitions

For purposes of this Policy, the following definitions apply:

"Environmental Audit" is a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.

"Compliance Management System" encompasses the regulated entity's documented systematic efforts, appropriate to the size and nature of its business, to prevent, detect and correct violations through all of the following:

(a) Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits, enforceable agreements and other sources of authority for environmental requirements;

(b) Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;

(c) Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;

(d) Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;

(e) Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and

(f) Procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's compliance management system to prevent future violations.

"Environmental audit report" means the documented analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning, the environmental audit.

"Gravity-based penalties" are that portion of a penalty over and above the economic benefit, *i.e.*, the punitive portion of the penalty, rather than that portion representing a defendant's economic gain from noncompliance.

"Regulated entity" means any entity, including a Federal, State or municipal agency or facility, regulated under Federal environmental laws.

C. Incentives for Self-Policing

1. No Gravity-Based Penalties

If a regulated entity establishes that it satisfies all of the conditions of Section D of this Policy, EPA will not seek gravity-based penalties for violations of Federal environmental requirements discovered and disclosed by the entity.

2. Reduction of Gravity-Based Penalties by 75%

If a regulated entity establishes that it satisfies all of the conditions of Section D of this Policy except for D(1)—systematic discovery—EPA will reduce by 75% gravity-based penalties for violations of Federal environmental requirements discovered and disclosed by the entity.

3. No Recommendation for Criminal Prosecution

(a) If a regulated entity establishes that it satisfies at least conditions D(2) through D(9) of this Policy, EPA will not recommend to the U.S. Department of Justice or other prosecuting authority that criminal charges be brought against the disclosing entity, as long as EPA determines that the violation is not part of a pattern or practice that demonstrates or involves:

(i) A prevalent management philosophy or practice that conceals or condones environmental violations; or

(ii) High-level corporate officials' or managers' conscious involvement in, or willful blindness to, violations of Federal environmental law;

(b) Whether or not EPA recommends the regulated entity for criminal prosecution under this section, the Agency may recommend for prosecution the criminal acts of individual managers or employees under existing policies guiding the exercise of enforcement discretion.

4. No Routine Request for Environmental Audit Reports

EPA will neither request nor use an environmental audit report to initiate a civil or criminal investigation of an entity. For example, EPA will not request an environmental audit report in routine inspections. If the Agency has independent reason to believe that a violation has occurred, however, EPA may seek any information relevant to identifying violations or determining liability or extent of harm.

D. Conditions

1. Systematic Discovery

The violation was discovered through:

(a) An environmental audit; or

(b) A compliance management system reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations. The regulated entity must provide accurate and complete documentation to the Agency as to how its compliance management system meets the criteria for due diligence outlined in Section B and how the regulated entity discovered the violation through its compliance management system. EPA may require the regulated entity to make publicly available a description of its compliance management system.

2. Voluntary Discovery

The violation was discovered voluntarily and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement. For example, the Policy does not apply to:

(a) Emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;

(b) Violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring; or

(c) Violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement, unless the audit is a component of agreement terms to implement a comprehensive environmental management system.

3. Prompt Disclosure

The regulated entity fully discloses the specific violation in writing to EPA within 21 days (or within such shorter time as may be required by law) after the entity discovered that the violation has, or may have, occurred. The time at which the entity discovers that a violation has, or may have, occurred begins when any officer, director, employee or agent of the facility has an objectively reasonable basis for believing that a violation has, or may have, occurred.

4. Discovery and Disclosure Independent of Government or Third-Party Plaintiff

(a) The regulated entity discovers and discloses the potential violation to EPA prior to:

(i) The commencement of a Federal, State or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity (where EPA determines that the facility did not know that it was under civil investigation, and EPA determines that the entity is otherwise acting in good faith, the Agency may exercise its discretion to reduce or waive civil penalties in accordance with this Policy);

(ii) Notice of a citizen suit;

(iii) The filing of a complaint by a third party;

(iv) The reporting of the violation to EPA (or other government agency) by a "whistleblower" employee, rather than by one authorized to speak on behalf of the regulated entity; or

(v) imminent discovery of the violation by a regulatory agency.

(b) For entities that own or operate multiple facilities, the fact that one facility is already the subject of an investigation, inspection, information request or third-party complaint does not preclude the Agency from exercising its discretion to make the Audit Policy available for violations self-discovered at other facilities owned or operated by the same regulated entity.

5. Correction and Remediation

The regulated entity corrects the violation within 60 calendar days from the date of discovery, certifies in writing that the violation has been corrected, and takes appropriate measures as determined by EPA to remedy any environmental or human harm due to the violation. EPA retains the authority to order an entity to correct a violation within a specific time period shorter than 60 days whenever correction in such shorter period of time is feasible and necessary to protect public health and the environment adequately. If more than 60 days will be needed to correct the violation, the regulated entity must so notify EPA in writing before the 60-day period has passed. Where appropriate, to satisfy conditions D(5) and D(6), EPA may require a regulated entity to enter into a publicly available written agreement, administrative consent order or judicial consent decree as a condition of obtaining relief under the Audit Policy, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required.

6. Prevent Recurrence

The regulated entity agrees in writing to take steps to prevent a recurrence of the violation. Such steps may include improvements to its environmental auditing or compliance management system.

7. No Repeat Violations

The specific violation (or a closely related violation) has not occurred previously within the past three years at the same facility, and has not occurred within the past five years as part of a pattern at multiple facilities owned or operated by the same entity. For the purposes of this section, a violation is:

(a) Any violation of Federal, State or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or

(b) Any act or omission for which the regulated entity has previously received penalty mitigation from EPA or a State or local agency.

8. Other Violations Excluded

The violation is not one which (a) resulted in serious actual harm, or may have presented an imminent and substantial endangerment, to human health or the environment, or (b) violates the specific terms of any judicial or administrative order, or consent agreement.

9. Cooperation

The regulated entity cooperates as requested by EPA and provides such information as is necessary and requested by EPA to determine applicability of this Policy.

E. Economic Benefit

EPA retains its full discretion to recover any economic benefit gained as a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage over regulated entities that do comply. EPA may forgive the entire penalty for violations that meet conditions D(1) through D(9) and, in the Agency's opinion, do not merit any penalty due to the insignificant amount of any economic benefit.

F. Effect on State Law, Regulation or Policy

EPA will work closely with States to encourage their adoption and implementation of policies that reflect the incentives and conditions outlined in this Policy. EPA remains firmly opposed to statutory environmental audit privileges that shield evidence of environmental violations and undermine the public's right to know, as well as to blanket immunities, particularly immunities for violations that reflect criminal conduct, present serious threats or actual harm to health and the environment, allow noncomplying companies to gain an economic advantage over their competitors, or reflect a repeated failure to comply with Federal law. EPA will work with States to address any provisions of State audit privilege or immunity laws that are inconsistent with this Policy and that may prevent a timely and appropriate response to significant environmental violations. The Agency reserves its right to take necessary actions to protect public health or the environment by enforcing against any violations of Federal law.

G. Applicability

(1) This Policy applies to settlement of claims for civil penalties for any violations under all of the Federal environmental statutes that EPA administers, and supersedes any inconsistent provisions in media-specific penalty or enforcement policies and EPA's 1995 Policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations."

(2) To the extent that existing EPA enforcement policies are not inconsistent, they will continue to apply in conjunction with this Policy. However, a regulated entity that has received penalty mitigation for satisfying specific conditions under this Policy may not receive additional penalty mitigation for satisfying the same or similar conditions under other policies for the same violation, nor will this Policy apply to any violation that has received penalty mitigation under other policies. Where an entity has failed to meet any of conditions D(2) through D(9) and is therefore not eligible for penalty relief under this Policy, it may still be eligible for penalty

relief under other EPA media-specific enforcement policies in recognition of good faith efforts, even where, for example, the violation may have presented an imminent and substantial endangerment or resulted in serious actual harm.

(3) This Policy sets forth factors for consideration that will guide the Agency in the exercise of its enforcement discretion. It states the Agency's views as to the proper allocation of its enforcement resources. The Policy is not final agency action and is intended as guidance. This Policy is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. As with the 1995 Audit Policy, EPA may decide to follow guidance provided in this document or to act at variance with it based on its analysis of the specific facts presented. This Policy may be revised without public notice to reflect changes in EPA's approach to providing incentives for self-policing by regulated entities, or to clarify and update text.

(4) This Policy should be used whenever applicable in settlement negotiations for both administrative and civil judicial enforcement actions. It is not intended for use in pleading, at hearing or at trial. The Policy may be applied at EPA's discretion to the settlement of administrative and judicial enforcement actions instituted prior to, but not yet resolved, as of the effective date of this Policy.

(5) For purposes of this Policy, violations discovered pursuant to an environmental audit or compliance management system may be considered voluntary even if required under an Agency "partnership" program in which the entity participates, such as regulatory flexibility pilot projects like Project XL. EPA will consider application of the Audit Policy to such partnership program projects on a project-by-project basis.

(6) EPA has issued interpretive guidance addressing several applicability issues pertaining to the Audit Policy. Entities considering whether to take advantage of the Audit Policy should review that guidance to see if it addresses any relevant questions. The guidance can be found on the Internet at www.epa.gov/oeca/ore/apolguid.html.

H. Public Accountability

EPA will make publicly available the terms and conditions of any compliance agreement reached under this Policy, including the nature of the violation, the remedy, and the schedule for returning to compliance.

I. Effective Date

This revised Policy is effective May 11, 2000.

Dated: March 30, 2000.

Steven A. Herman,

Assistant Administrator for Enforcement and Compliance Assurance.

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2002 WL 1472043 (E.P.A.)

United States Environmental Protection Agency (E.P.A.)

Office of the Administrator

IN THE MATTER OF: GCA CHEMICAL CORPORATION, RESPONDENT

*1 Toxic Substance Control Act

Docket No: TSCA-4-2000-0130
June 18, 2002

Initial Decision

This is an action under the Toxic Substances Control Act ("TSCA"), Section 16(a), 15 U.S.C. § 2615(a), for violations of the Inventory Update Rule ("IUR") as promulgated under TSCA Section 8(a) and set forth at 40 CFR Part 710. The Respondent, GCA Chemical Corporation, is charged with two counts of failing to file Form U's for two chemicals [1] on or before January 31, 1999, for the Company's corporate year ending August 25, 1998. [2] EPA filed a Motion for Accelerated Decision on liability for the two counts on March 30, 2001. The Respondent did "not contest that the two violations did in fact occur." GCA Prehearing Exchange at ¶3. The Motion was granted on May 9, 2001. Therefore the only issue at hand is the appropriate penalty for the violations. EPA proposed a penalty of $37,400.

At the conclusion of the trial, [3] the Complainant was asked to brief the legislative history of the statutory penalty factors. Tr. 134. In its brief, Complainant states that there is little legislative history regarding the factors. EPA Brief at 3. The Senate Bill and House Amendment contain the same statutory factors which are currently in TSCA Section 16(a). These factors were characterized as "relevant factors." H.R. Conf. Rep. No. 94-1679, 94th Cong. 2nd Sess., "Joint Explanatory Statement of the Committee of Conference," (Sept. 23, 1976), at 92, reprinted in USCAN 4577.

According to the Senate Report:

> In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation as well as the violator's ability to pay, his ability to continue to do business, his history of prior violations and his degree of culpability.

S. Rep. No. 94-698, 94th Cong. 2nd Sess. 14,26, reprinted in 1976 USCAN 4504, 4516.

The Conference Substitute for Section 16 states in part,
The Administrator shall assess the amount of civil penalties up to $25,000 per day per violation; however, the Administrator must take in to account such factors as the gravity and extent of the violation, the ability to pay of the person held in violation, and any prior history of violations under this Act.

H.R. Conf. Rep. No. 94-1679, at 93, reprinted in USCAN 4578.

The final version of the statute reads in 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.

15 U.S.C. § 2615 (2001).

***2** The penalty assessment is also governed by the "Consolidated Rules" which places the burden on EPA to show that the relief is appropriate. 40 C.F.R. § 22.24. EPA must demonstrate that it "took into account'" certain criteria specified in the statute and that the penalty is appropriate in light of those criteria and the facts of the violation. *See* In Re Employers Insurance of Wausau and Group Eight Technology, Inc., 6 EAD 735, 760 (Feb. 11, 1997).

EPA's argument

EPA's proposed penalty is derived from its policy interpretation of the statutory criteria as reflected in the Penalty Policy. The violation in this case is the failure to report two chemicals as required under the TSCA Inventory Update Rule.[4] Tr. at 5. In 1977, EPA promulgated a rule pursuant to TSCA Section 8(a) which required manufacturers to report information on chemical substances imported or produced during that year. This enabled EPA to compile a database which was necessary for "establishing a profile of the chemical industry, monitoring chemical substances in the environment, and setting Agency priorities for implementing other provisions of TSCA." 42 Fed. Reg. 64571, 64572 (Dec. 23, 1977). This rule was updated in 1986 by the Inventory Update Rule which required the submission of data for certain chemical substances every four years to ensure that the database is current. Tr. 23; 40 CFR § 710.33.

The first criteria in determining the penalty is the nature of the violation. According to EPA's Verne George, the nature of the violation speaks to the hazard assessment.[5] He testified that a violation such as this hinders the Agency's ability to conduct "hazard analysis or risk analysis." Tr. 79. The TSCA Guidelines describe "hazard assessment" as being used " to develop and gather the information necessary to intelligently weigh and assess the risks and benefits presented by particular chemical substances." Ex. 12 at 5; 45 Fed. Reg. at 59771. This function is important because it provides information to various agencies which regulate chemicals so that exposure to a chemical and its impact on health and the environment can be monitored and evaluated. Ex. 11 at 19. As stated in the Penalty Policy, this impacts the Agency's ability to set priorities and initiate any necessary action. Ex. 11 at 18. The harm arises from the fact that, without the reporting, the Agency would not have the information to make the risk analysis. Tr. 75. Mr. George testified that while the failure of one small company to report a hundred thousand pounds may not seem significant, if ten small companies did the same there would be over a million pounds of chemicals unaccounted. Tr. 89. It is in this context that the risk assessment becomes important.

***3** The next two criteria are the circumstances and extent of the violation. The Penalty Policy categorizes, by 'levels,' the circumstances and extent of each violation. According to the Penalty Policy, failure to report and keep records is considered a circumstance Level 1 violation. Ex. 11 at 9. Mr. George testified that he evaluated the circumstance according to the policy and that this produced a Level 1 designation. Level 1 is the most serious circumstance level and takes into account the Agency's inability to perform its risk analysis. Tr. 75. EPA cites two cases in which ALJs have agreed with the penalties proposed by EPA for non-reporting under the IUR. In Re: DIC Americas, Inc. TSCA-II-8(a)-90-0109 (Dec. 30, 1993), TSCA Appeal No. 94-2 6 EAD 184, (Sept. 27, 1995)("DIC"); In Re: Hanlin Chemicals,- West Virginia, Inc. Docket Nos. IF&R-III-425-C; TSCA-III-651; EPCRA-III-091 (Nov. 9, 1995) ("Hanlin"). In both cases the ALJs found that non-reporting constituted a Level 1 violation. DIC, 6 EAD at 187; Hanlin at *17. The court takes note of these cases but, as the facts and circumstances of the present case differs from them, they are not useful here. While both concerned the failure to file Form U's, the companies in Hanlin and DIC

were aware of the Form U requirements. In Hanlin, the company was also dealing with insecticide and EPCRA violations in the complaint in addition to the TSCA violations. It had filed a Form U for some chemicals but had under-reported the quantities involved and, for others it completely failed to include the chemicals. [6] Hanlin at *30. In DIC, the company failed to include five chemicals on their IUR. [7] DIC at 186.

EPA argues that GCA failed to act with due diligence and therefore the penalty is appropriate. EPA Brief at 10. It notes that the Respondent failed to report any information on two chemical substances as required by the IUR. Tr. 125; Complaint ¶¶ 12, 25, 31. Rather, these violations were discovered during a random inspection of the Respondent's Brandenton, Florida facility. Ex. 7. The Respondent had been importing the same chemicals since it began doing business in 1976 and was unaware of the IUR and the reporting requirements under TSCA. Tr. 122-4; 127. EPA observes that the Respondent never hired an environmental consultant or attorney to audit for environmental compliance. Tr. 127.

Mr. George confirmed that, in applying the 'extent level' under the Penalty Policy, these violations were classified as 'significant.' Tr. 76. The extent factor is intended to "reflect[] the extent of potential harm to EPA's hazard/risk assessment process." Ex. 11 at 22. The policy delineates three levels of extent: 'major,' 'significant' and 'minor.' All violations of the IUR are designated as 'significant' in extent. George explained this classification, stating that these violations are 'significant,' as opposed to 'major,' because although there is harm to the regulatory program there is no actual harm to humans or the environment. Tr. 76.

***4** Under the Penalty Policy, the gravity of the violation is determined by the Penalty Matrix, which compares the circumstances and extent to arrive at a penalty. Tr. 77; Ex. 11 at 8. George testified that since he determined that the circumstance was 'Level 1' and the extent 'significant,' the chart indicated that a penalty of $18,700 was appropriate. Tr. 77. In its brief, EPA again cites to phrases in the Hanlin and DIC decisions in support of its argument that non-reporting is a "serious" and "significant" violation. *See* EPA Brief at 11. However, in both of these cases, the ALJ's merely reiterated the Enforcement Response Policy's ("ERP") finding that IUR non-reporting is a serious violation. DIC at *8; Hanlin at *37. The ALJs then followed the ERP in setting the penalty. Id.

According to Mr. George, the resulting gravity penalty has the potential to be either increased or decreased, based on the Respondent's culpability. Tr. 78. The willfulness of the violation and the control the company had over the violation are considered under this factor. In this case, there was no indication that the violations were willfully committed so the penalty was not increased. However, in EPA's view, there was evidence that the company had control over the violation. Accordingly the determination that GCA had "control" eliminated the need for the agency to reduce the penalty when it evaluated culpability. Tr. 78.

EPA also cites to K-I Chemicals in support of its claim that GCA, unlike the company in K-I, made no effort to comply with the IUR. In the Matter of K-I Chemical, USA, Inc., TSCA-09-92-0018 (June 7, 1995)("K-I"). However, EPA sought essentially the same penalty as here, proposing $17,000 for each Form U count. Both companies only employed four people. K-I was well aware of the Form U requirement but, in submitting the form U, it supplied figures reflecting the company's four year import average. As one example of the consequence of this, it reported a 220,000 lbs. import quantity, when 335,344 lbs. was actually imported. The ALJ noted that "*each case must be evaluated on its own in deciding the proper penalty*" *and that the* "*formalistic constraints of a penalty policy should be avoided where in the interests of justice the policy fails to adapt to the factual situation presented* ..." (emphasis added). Concluding that the policy's "automatic reflex" in assigning all circumstance level 2 IUR violations as "major extent" violations, the court noted that "unlike most 'major extent' violations, the IUR data does not primarily contain information on known risks to human health and the environment." Accordingly the court classified the violations as "circumstance level 2" and "significant." This reduced each count to $13,000. Then, proceeding to culpability, the court noted that a 15% adjustment can be made upon considering a respondent's good faith efforts to comply, the promptness of its corrective action, and the assistance given to the agency to minimize any harm to the environment caused by the violation. Applying this, the judge made a second reduction of 15 % off each count. Finally, the judge evaluated the "other factors that justice may require" criterion, finding that the company was the "antithesis of an egregious violator and, looking to the "totality

of the evidence and adjustment factors," the ALJ further reduced the penalty, imposing a *total* of $15,000 for the violations. Here, GCA was not aware of the Form U requirements. Additionally, while the court stated that K-I, as a regulated business, "had a duty to comply as required," GCA did comply with all other aspects of TSCA except for the IUR requirement. K-I at *21. Thus, GCA was not ignoring TSCA. Rather, it attempted to comply with TSCA, but was unaware of this requirement.

***5** A penalty can also be adjusted upon consideration of the prior history of violations and a violator's ability to pay a penalty. Mr. George testified that he considered GCA's prior history of violations in the penalty calculation in that a review of EPA's database and enforcement tracking system did not show any history of non-compliance with TSCA Section 8. Tr. 78. EPA contends that the Penalty Policy is designed for first time offenders; therefore this criterion moves only in an upward direction. Accordingly there is an increase in the penalty if there is a history of violations, but no reduction for a previously spotless record. Ex. 11 at 17; Tr. 79. Therefore, there was no increase for this factor.

While ability to pay is a factor that is considered under the penalty policy, Mr. George testified that he did not adjust the penalty for this factor. [8] EPA practice is to assume that the Respondent has the ability to pay unless the Respondent presents information to support an inability to pay claim. [9] At trial, EPA presented a Dunn & Bradstreet report for GCA Chemicals in support of this issue. GCA also agreed that ability to pay is not an issue. Ex. 10; Tr. 81.

Finally, the penalty also can be adjusted for "such matters as justice my require." While EPA did not adjust the penalty for this, it has made several contentions regarding this factor. Tr. 87 First, the Agency argues that the penalty was calculated in accordance with its nationally issued policy which produces consistent penalty assessments for similar violations. Tr. 118; Second, responding to GCA's contention that the penalty should reflect the company's small size, EPA argues that the size of the business does not excuse noncompliance. EPA Brief at 16;citing In the Matter of RIDCO Casting Co., Docket No. TSCA-82-1089, 1983 EPA ALJ LEXIS 1, * 20 (Dec. 28, 1983)(finding that size does not excuse ignorance of the law). It notes that the Respondent was aware of some TSCA importing requirements and yet made no effort to ensure that it was in compliance with all of its provisions. Tr. 123 - 4, 126, 88. Further, it asserts that GCA was not subject to any other environmental regulations and thus was not faced with a variety of EPA reporting requirements. Rather, from EPA's perspective, GCA had the information readily available, and simply failed to file the form. Tr. 125. EPA argues that the fact that GCA could have easily complied with TSCA but failed to do so weighs against any reduction in the penalty.

Respondent's argument

While GCA does not dispute the importance of the TSCA program, it asserts that Congress intended severe penalties only for those cases in which there is an intentional disregard for the TSCA program or in instances where negligence or carelessness has created a significant risk to human health and the environment. The company is "puzzled" that many of the other environmental statutes and penalty policies which address actual environmental harm do not contain mandatory penalties for violations. Yet it notes there is a mandatory penalty for a violation involving a database of over 14,000, chemicals which is only updated on a cyclical basis every four years. GCA Brief at 6. GCA views this as contrary to what would be expected since the statutes and penalty policies appear to be more lenient when there is actual environmental harm than instances when the focus is upon information gathering. [10] GCA Brief at 6. Since there was no actual environmental harm involved here, GCA believes the proposed penalty is higher than warranted.

***6** GCA also argues that it is unreasonable that, except for an ability to decide not to file a complaint in the first place, the Agency lacks the discretion within the ERP to seek anything other than a significant penalty. While there is no language in TSCA directing EPA to create a rule for evaluating the penalty factors, the Agency follows the ERP as if it were a rule. George's testimony shows how he followed the ERP in formulating the penalty rather than looking at the statutory criteria. Tr.70. GCA argues that this is inconsistent with Congress' intent. The company does not argue against the need for guidelines but disagrees with the mandatory application of the policy which automatically classifies all potential violations of the IUR and provides a penalty, regardless of the circumstances, virtually without any room for modification.

Rather than a "child's pegboard where each IUR violation has the same shape that can fit in only one hole," GCA argues that, as in Bell & Howell Company, Doc. No. TSCA-V-C-033, 034, 035, 1 E.A.D. 811 (Dec. 2, 1983), the penalty matrix should be seen as points along a continuum. In that decision, the EAB recognized that it is impossible to use mathematical precision in assessing penalties. Bell at *24. The EAB viewed the amounts in the matrix "as benchmarks along a continuum" which the Presiding Officer must use in taking into account some of factors of the case to determine the appropriate penalty. Id. GCA argues that the circumstances of the situation should therefore be evaluated in deciding whether a penalty is appropriate and the amount to be imposed.

GCA also argues that the Agency's small business policy, which only confers a benefit or advantage to businesses that self-disclose a violation, is inconsistent with Congress's intent. [11] The 1996 Small Business Regulatory Enforcement Fairness Act ("SBREFA") requires executive agencies to develop a program or policy to reduce or waive civil penalties for small businesses. 5 U.S.C. §601. This includes, but is not limited to, violations self-reported or discovered by a program of compliance assistance or auditing by the Agency or a state. Id. However, EPA's policy is limited to small businesses which self-disclose violations or participate in the Agency's voluntary compliance assistance program. *See* EPA's April 11, 2000, Small Business Policy available at http://es.epa.gov/oeca/smbusi.html. GCA argues that the program should not be limited to self-reporting because many small businesses do not have the resources to subscribe to periodicals or hire attorneys to provide awareness of regulatory obligations. Unlike before the inspection, GCA is now aware of its IUR responsibilities. It also asserts that if a company does not learn of the compliance assistance programs until *after* an inspection then the EPA "assistance" comes too late. GCA contends that the SBREFA policy provides no additional assistance than was already available under the 1995 Self-Policing Policy. Thus, GCA argues that because EPA's SBREFA policy fails to comply with the statute, the failure provides a reasoned basis for the presiding officer to deviate from the ERP in this instance. [12]

*7 The Respondent also argues that the penalty in this case, because it is so large, acts as punishment rather than as a deterrence to future violations. GCA Brief at 10. GCA cites to cases in which both the EAB and various Administrative Law Judges have found that TSCA penalties are intended to serve as deterrents and be remedial rather than punitive. *See* In the Matter of Ray Birnbaum Scrap Yard, Docket No. TSCA-PCB-VIII-01-01, 5 E.A.D. 120 (EAB March 7, 1994); Briggs & Stratton Corp., TSCA Appeal No. 81-1 (Feb. 4, 1981); In the matter of Bell & Howell Co., Docket No. TSCA-V-C-033, 034, 035 (Dec. 2, 1983). [13] GCA argues that they are now aware of the TSCA requirements and do not need such a heavy penalty to deter future violations. [14] They have made changes to their recordkeeping practices to help ensure that there will be no future violations. Tr. 124.

Additionally, GCA questions how EPA fairly can determine that the penalty is sufficient to deter a violation when it does not consider the size of the business in determining the penalty. GCA Reply Brief at 3. They observe that the ability of a $37,400 penalty to deter a small business from committing a violation is far greater than the same penalty on a larger corporation. Tr. 16. Thus, GCA argues that the penalty is disproportionate in light of their size. While acknowledging that the size of the business is not a criterion that must be addressed, it contends that the size of the business should be factor even if the violator has not asserted an inability to pay where the penalty is so substantial compared to its other costs. The company points out that the proposed penalty is more than they pay in rent for an entire year and almost as much as the company pays each year for medical coverage for its owner and three employees. [15] GCA Reply Brief at 3.

Finally, GCA cites to the statute which states that the Agency has the authority to "compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed." 15 U.S.C.§ 2615(a)(2)(c). However, the proposed penalty is only a proposal and need not be followed by the Presiding Officer. [16]

Discussion

A departure from the Penalty Policy is appropriate in this instance.

While it is clear that EPA has adhered to the Penalty Policy, following the dictates of its inflexible framework, the Court has determined that application of the policy to the facts of this case would not result in an appropriate penalty. The Court takes note that the Environmental Appeals Board ("EAB") has placed the adherence to penalty policies in perspective. The Board's decision In re Steeltech, Ltd., 1999 WL 673227 (EAB, Aug. 26, 1999) ("Steeltech"), upholding a penalty of $ 61,736 for nine violations, occurring over a four year period, of the EPCRA Section 313 reporting requirements, provides one example among many. In that case, after noting the judge's obligation to consider the ERP's guidance, the Board emphasized that the ERP "does not have the force of law." The Board has also advised that judges "must refrain from treating the [Penalty Policy] as a rule, and must be prepared 'to re-examine the basic propositions' on which the policy is based . . .": In re Employers Ins. of Wausau, 6 E.A.D. 735, 761 (EAB, Feb. 11, 1997). Pointedly, the Board has "repeatedly stated" that as long the applicable Penalty Policy has been considered, the judge is "free to not apply [it] to the case at hand" where circumstances warrant. Additionally, this authority to depart from the ERP, because it is not a rule, means that a finding of "extraordinary circumstances" is not required to deviate from the policy's guidance. Gilbert Martin Woodworking Co. d/b/a Martin Furniture, Docket No. EPCRA 09-99-0016 (June 18, 2001). For the reasons that follow, the Court, having considered the Penalty Policy, departs from its application in this instance. The Court believes that the Policy, under the particular facts and circumstances, did not yield a penalty that is appropriate for the violations committed and therefore a departure from the Penalty Policy is warranted.

***8** The reasons for this conclusion are as follows. The Policy in issue addresses reporting and recordkeeping violations under TSCA Sections 8, 12, and 13. In *every* instance an IUR violation is designated as a Level 1 (i.e. most serious) circumstance and as "significant" for the extent level. When placed on the penalty matrix, these considerations produce the same penalty for every IUR violation, regardless of the circumstances surrounding the violation. As George testified, for all the TSCA Section 8 penalty calculations that he has done, he has *always* arrived at $18,700. Tr. 95-97. The fact that EPA assesses this amount for *every* violation indicates that it has not considered the statutory criteria as applied to this case but instead has robotically filled in the blanks on the penalty calculation worksheet. Thus, the Court re-examines this basic proposition of the policy. Although the Court accepts that a goal of the Penalty Policy is to provide consistent enforcement, the uniform application of a single penalty assessment methodology, regardless of the facts and circumstances of each case, can produce results contrary to the statutory criteria in a given instance and the Court has determined that has occurred here. While uniformity and consistency have their place in penalty computations, those objectives must not interfere with a fair evaluation of each of the statutory factors in each case. Here, as all such violations inevitably result in the same penalty assessment, the individual criteria were not fairly evaluated. No analysis was made for each violation. Rather, the Policy, at least for IUR violations, operates as an edict, with no genuine case specific calculation made. Instead, the Policy levies the same $18,700 penalty for all evaluations of the circumstances and extent.

This unvarying approach is further exemplified by the Policy's disregard for the facts surrounding the violation in any context other than under "as justice may require." As applied under the policy, the "nature & circumstances" of the violation deal only with the particular chemical that was involved and the section of the statute violated, rather than the totality of the events or circumstances surrounding the violation. Moreover, under the policy, the "as justice may require" factor does not fully allow for the inclusion of the circumstances of the case. [17] Thus, it only considers whether there was a voluntary disclosure, checks to make sure that the penalty is not less than the economic benefit, and evaluates whether there has been an exposure reduction. None of these EPA-recognized "other justice factors" pertain here. Ex. 11 at 15-16.

Although, EPA emphasizes in its brief the importance the IUR has on the Agency's ability to assess hazards, as mentioned, the Policy does not differentiate among the different hazardous chemicals present, in determining the penalty. Rather, under the Policy, the failure to report *any* chemical receives the same assessment. Tr. 93; Ex. 11 at 9. The two chemicals involved in this matter were Tris and Ethanone and it is true that EPA did present evidence concerning these chemicals. [18] However, the point of this evidence was unclear. Further, and more significantly, it is clear from the Complaint that there was no consideration given to the particular chemicals involved with the failure to file the Form U when the penalty was proposed. The only conclusion that can be drawn is that Tris & Ethanone, indeed *all* chemicals, are given the same weight under the policy.

***9** As with the policy's undifferentiating approach towards the seriousness of the chemical, the amount of chemical is also irrelevant to the penalty calculation, once the threshold for reporting is reached. Thus the quantity of the chemical only triggers the reporting requirement. Tr. 51. As revealed by the inspection report, GCA imported the Tris and Ethanone in excess of 100,000 pounds. Ex. 7. According to the Federal Regulations, anyone who imports a chemical which is on the master inventory and reaches the reportable amount, must file the Form U. [19] 40 C.F.R. §§ 710.25 & 710.28. As George testified, once that threshold is met, the amount does not matter in the penalty calculation. Accordingly, under the policy, the penalty would be the same regardless of the amount involved. Tr. 114. This is because under the Policy, once the threshold amount is reached, all failures to report are deemed the most serious ("Level 1") as to circumstance and extent. George testified that for every chemical that requires a Form U, the failure to submit the form would be considered significant under the extent. Tr. 95. For this reason, as George admitted, everyone who fails to file a Form U gets an $18,700 penalty per chemical. Tr. 105. This means that the policy makes no differentiation if one imported 506,920 lbs. [20] of Tris or 3,506,920 lbs, a penalty result that seems at odds with the underlying objective of tracking the quantities of chemicals entering commerce.

Assessment of a Civil Penalty upon consideration of the factors listed in TSCA Section 16.

The EAB has pointed out that the TSCA section 16 factors need not be compartmentalized so long as it is clear that the statutory factors are considered. *See* In re: Catalina Yachts, Inc, EPCRA Appeal Nos. 98-2 & 98-5, 1999 EPA App. LEXIS 7, * 23 (March 24, 1999). A number of these factors may be addressed summarily. The "nature" of the violation, the failure to file Form U's for the reporting period from August 1998 through January 1999, is not in dispute. It is also undisputed that this is the first time GCA has been charged with a violation of TSCA or any other environmental statute. Tr. 78. Similarly, the ability to pay, and the penalty's effect on the Respondent's ability to continue to do business are not issues in this instance. [21] Tr. 81. Remaining for the Court to consider are the circumstances, extent and gravity of the violation, the Respondent's degree of culpability and such other matters as justice may require.

The Penalty Policy declares that it looks at the circumstances of the violation in light of "the probability that harm will result from a *particular* violation." EPA Ex. 11 at 9. In this case, the violation affects the Agency's ability to assess harms and risks to humans and the environment. The Agency and other entities rely on the information obtained through the IUR for hazard assessment and in establishing testing and regulatory priorities. Ex. 11 at 19. The Agency considers the information in the IUR as the only reliable source of production/importation volume information for organic chemicals. Ex 11 at 19. Thus, it is clear that this is a not an insignificant violation of TSCA. However, once the violation was discovered, it only took GCA six days to submit the information. [22] Tr.116. While the Agency was deprived of this information, the problem was quickly corrected.

***10** GCA has been in compliance with all the other applicable sections of TSCA. It was aware that TSCA applied to them because it subscribed to the Chemical Abstract Service, ("CAS") which informed them of *some* of the regulatory requirements for importing these chemicals. Tr. 123. However, the CAS did not alert them to the Section 8 reporting requirements. Tr. 124. It is determined that GCA was attempting to comply with TSCA but did not realize that the Section 8 reporting requirements applied to them. Nevertheless, GCA had the information available at hand and was able to submit it promptly. As discussed earlier, George testified that the response was the most rapid he had ever encountered. Tr. 117. Based on the evidence presented at trial, it is clear that the company had maintained accurate records but was not aware of this one aspect of their environmental reporting responsibilities. The Court does not agree with EPA's perspective that because GCA was aware of some TSCA obligations, this fact should be turned against them by concluding that it demonstrates GCA should have been aware of all of its TSCA obligations. It is appropriate to distinguish GCA from a Respondent who had set out to violate the statute or utterly failed to investigate their regulatory obligations. The fact that GCA is a small company which did not have someone designated to ensure environmental compliance, coupled with the fact that they were in compliance with all other regulations shows that it simply failed to fully investigate all of its regulatory obligations. The Board has stated that "in some situations, a person's lack of actual knowledge of a regulatory requirement might appropriately be considered in mitigation of a penalty." Catalina Yachts at * 30. Since the Respondent was otherwise in compliance with TSCA and other environmental regulations, failure to recognize only one aspect, the Section 8 reporting provisions, is taken into consideration in the penalty.

Based on the testimony, it is clear that the Respondent was very cooperative in turning over the documents quickly and attempting to reach settlement. After discovering a violation, EPA has the discretion not to file a complaint. While the Respondent's quick turnaround in suppling the required documents would surely be an instance where EPA could have used this discretion, that did not occur. Tr. at 131. If GCA had discovered the violation on its own and voluntarily disclosed it, it could have been eligible for anywhere between a 25% to 100% reduction in the penalty. Ex.11 at 15. However, this disclosure must be made before the Complaint is filed. Id. While the violation was discovered by the Agency, thus precluding the application of the Self Disclosure Policy, it is appropriate that the prompt submission of the documents should have some effect on the penalty. [23]

It is also appropriate to consider that there were only two chemicals involved in this violation. While the inspection initially identified four chemicals, after talking with GCA, the Agency agreed that only two were subject to the IUR. Tr. 66. This shows that even EPA can be uncertain about determining which chemicals require reporting. As mentioned, there was no risk of direct harm to any GCA employees since the four employees in the office never handle or even see the chemicals they import. However, the court recognizes that TSCA is not only concerned about the immediate harm but also the potential harm these chemicals can cause. While these chemicals are not stored at a GCA facility, they are brought into the country and must be accounted for in hazard planning. Tr. 128. EPA needs to know how much of the chemicals on the Chemical Update System are in the country. The obligation to report does not depend on the characteristic of the chemical which must be reported. Once the threshold for reporting has been reached, the regulations do not differentiate between failures to report larger or smaller amounts of chemicals that are not reported; it is considered one violation for each chemical. Tr. 93.

***11** There are a number of facts in this case which, when considered under "such other factors as justice may require," serve to reduce the penalty. First, EPA did not consider the fact that GCA was able to produce the documents within six days of the inspection. Tr. 116. GCA had the information available but did not know that they needed to report it. Tr. 125. Although Mr. George testified that this fact was considered under "attitude," this was not reflected in the penalty calculation worksheet but rather was considered only for settlement purposes. [24] Ex. 13; Tr. 117. This fact should have been given weight in the penalty calculation. [25] GCA kept records on the chemicals they imported and was in compliance with other sections of TSCA. Tr. 125. For example, Ms. Bernarding testified that GCA uses a chemical abstract service ("CAS") to make sure that the chemicals they import are listed under TSCA. Tr. 123. However, this service only informs as to the proper registration requirement to import the chemical. Tr. 123. While GCA has never hired an attorney [26] or a consultant to ensure environmental compliance, it is clear that the company was attempting to comply with environmental regulations. Pointing to its retention of this service, Respondent argues that this violation was not intentional but as a result of a misunderstanding of the statute. [27] Ms. Bernarding stated that the Respondent was unaware that, for the IUR, an importer has to follow the same requirements as a manufacturer. [28] Tr. 124. The Penalty Policy does not take into account whether a small company is aware of the Form U requirement, nor does it consider the problems small companies face in becoming aware of the requirements. Tr. 120. While lack of knowledge does not create an exemption from compliance, GCA's rapid response to the EPA investigation demonstrates that it was not trying to hide anything from EPA but rather, due to lack of awareness, failed to report it as required. Mr. George testified that the six day response was the most rapid EPA has ever had from a company. Tr. 117. Thus it is clear that the Respondent had the information but did not realize that it needed to be reported. The prompt response should therefore be taken into account in the penalty.

The Court also notes, as the Respondent argues, that a small company would have difficultly determining if it must comply with the IUR requirement. If a company does not produce, manufacture or have OSHA compliance considerations, there is no notification from EPA regarding the IUR. [29] Tr. 44. Mr. Walker testified that the requirements are listed in the Federal Register and on EPA's web site, [30] and that a company would have to look up the chemicals it imports on the Agency's web site to learn of the IUR. Tr. 43, 45. [31] While companies are expected to be aware of their regulatory obligations, the evidence is clear that this is not an easy task to accomplish. Particularly for a first time violator, in assessing a penalty, the theoretical duty of complete awareness must be tempered by the reality of vast and complex reporting obligations that small companies must face.

***12** The fact that GCA does not actually handle the chemicals also merits some consideration in the gravity of the violation. Ms. Bernarding testified that GCA is a small office employing four people. Tr. 125. None of GCA's four employees touch or have any contact with the chemicals; they only import them and sell them. Tr. 128. Nor do they store these chemicals. Id. While paperwork violations are important to the TSCA regulatory program, it should be noted that the violations did not involve exposures to chemicals and that the other requirements of TSCA, such as proper importing, were met.

While size of the business is not a factor under the statute, in a particular case it may be appropriate to consider it under the "other matters as justice may require" factor. [32] There is no argument that the company can pay the proposed penalty, however, GCA has argued that the penalty is not fair in light of the circumstances. [33] EPA has argued that the size of the business is irrelevant because it has already been considered in the threshold for reporting. It notes that the threshold for reporting differs for each company depending on their earnings. In this case, since GCA's earning fell within the category which covers between 4 and 40 million dollars, it is required to report all chemicals over 100,000 pounds. Ex. 10; 40 C.F.R. §§ 710.29, 704.3. EPA also asserts that large companies are typically fined higher penalties because they are subject to more than one environmental statutes, have numerous facilities and produce more goods. EPA Reply Brief at 13; citing In the Matter of EI DuPont De Nemours & Co., TSCA-III-731(March 30, 1998) ("DuPont TSCA"), Partial Accelerated Decision; In Re: EI DuPont De Nemours & Co., FIFRA Appeal No. 98-2 (April 3, 2000)("DuPont FIFRA"). However, the cases cited do not support EPA's position. DuPont TSCA was a Partial Accelerated decision in which no penalty was assessed for violating the TSCA pre-manufacturing regulations. The second case, DuPont FIFRA, concerned the Federal Insecticide, Fungicide, Rodenticide Act (FIFRA) and was remanded for further proceedings. Obviously, DuPont is a very large corporation with numerous facilities, while GCA only employs four people. Tr. 125.

One purpose of a penalty is to deter people from violating the law and persuade them to take precautions to prevent future non-compliance. In Re: Rogers Corp., TSCA Appeal No. 98-1 (Nov. 28, 2000) at Fn 19, *quoting* US EPA General Enforcement Policy #GM021, Policy on Civil Penalties (Feb. 17, 1984). It is difficult to determine a company's ability to comply with environmental regulations simply by calculating the amount of its sales. As in this case, a company may have large sales but not be able to afford to hire a dedicated environmental manager. Resp. Reply Brief at 2. As GCA argues, the cost of hiring an attorney or subscribing to the Federal Register can be a burden on a small company. [34] For this reason, GCA's TSCA compliance responsibilities are handled by Ms. Bernarding. GCA notes that there was no intent to violate TSCA. Ms. Bernarding testified that GCA was in compliance with all other TSCA requirements but, as mentioned, the CAS system, which it relied upon for regulatory information, did not alert the company to the Section 8 requirements. Tr. 123. Since GCA is a very small company, it neglected to investigate whether they were in compliance with regulations not listed on the CAS report. However, since the inspection, GCA has begun earmarking each chemical it imports so that now they will be reported as required. Tr. 125. This action shows that they are working to prevent future violations.

***13** Upon consideration of each of the TSCA Section 16 factors, as reflected in the foregoing discussion, it is the Court's determination that a penalty in the amount of $3,300 per count is imposed for Counts I and II, for a total penalty amount of $6,600. Under the particular facts and circumstances present, the Court considers the penalty imposed to be appropriate for the violations committed.

ORDER

A civil penalty in the amount of $ 6,600 is assessed against the Respondent, GCA Chemical Corporation. Payment of the full amount of the civil penalty assessed shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c). Payment shall be submitted by a certified check or cashier's check *payable to* the **Treasurer, United States of America** and mailed to:
United States Environmental Protection Agency

Region IV

Patricia A. Bullock, Regional Hearing Clerk

Atlanta Federal Center

61 Forsyth Street, S.W.

Atlanta, Georgia 30303

A transmittal letter identifying the subject case and EPA docket number, plus the Respondent's name and address must accompany the check. Failure of the Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalties.

Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of the Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the EAB is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.30(a), within thirty (30) days after the Initial Decision is served upon the parties; or (3) the EAB elects, upon its own initiative, under 40 C.F.R. § 22.30(b), to review the Initial Decision.

William B. Moran
United States Administrative Law Judge

Footnotes

1 The two chemicals involved are: 2,3-epoxy propyl isocyanurate (hereinafter "Tris") and 2 Hydroxy-1,2-diphenyl (hereinafter "Ethanone"). Even though the Form U may have space for numerous chemicals, each chemical constitutes a separate violation. *See* In the Matter of Atlas Refinery, Inc., Doc. No. TSCA-02-99-9142, 2000 EPA ALJ LEXIS 12, *27 (Feb. 16, 2000).

2 In its Prehearing Exchange, the Respondent stated that it would not contest the assertion that the two violations had in fact occurred, but would limit its evidence at hearing to the appropriateness of the penalty. *See* GCA Prehearing Exchange at ¶3.

3 EPA filed on June 28, 2001, an unopposed Motion to Conform Transcript to Proceedings, correcting various transcript errors. The Motion is GRANTED.

4 A stated purpose of TSCA is that "adequate data should be developed with respect to the effect of chemical substances and mixtures on health and the environment and that the development of such data should be the responsibility of those who manufacture and those who process such chemical substances and mixtures." 15 U.S.C. § 2601(b)(1).

5 Mr. George is a compliance officer with EPA Region 4, Air Pesticide and Toxic Substances Division. He conducted the inspection of the GCA facility, calculated the penalty and conducted conference calls with the Respondent in attempts to settle the matter. Tr. 57-61.

6 The judge in Hanlin had problems with the Enforcement Policy, noting, among other concerns, that the Policy made "no distinction ... with respect to the relative toxicity or exposure risks of the specific chemicals involved, a concern shared by the Court. The judge also was perplexed that the Agency deemed inaccurate reporting to be more equally serious with non-reporting, and as a consequence he reduced the penalty the Agency sought for the inaccurate Form U's from the $17,000 sought to $3,000, while keeping the non-reporting violations as proposed. It cannot be presumed that the judge would have treated the two counts for non-reporting violations in the same manner had those been the

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only matters before him. For example, as contrasted with GCA's conduct, Hanlin took *six months* after the inspection to submit the Form U for the non-reported chemicals. Further, unlike the four person operation at GCA, Hanlin had over 200 employees at its chemical manufacturing facility.

7 Although the judge in DIC adopted the Agency's penalty proposal, the Environmental Appeals Board determined that the judge did not abdicate the responsibility to make an independent judgment on the appropriate penalty. While noting that the judge has a responsibility to "consider" any penalty policy guidelines, the EAB also stated "... obviously that duty carries with it no obligation to adhere to the penalty policy in particular instances." Thus, the fact that a judge adopted the Agency's proposed penalty in a particular case has no bearing on the appropriateness of adopting the policy in this case.

8 Mr. George testified that some other factors did not apply to the facts in this case. For example, self-disclosure is usually considered, however, it is not an issue because the violations were not self-disclosed. Tr. 82. Also not applicable were risk reduction measures. Since GCA employees had no actual contact with the chemicals, there was no risk to be reduced. Tr. 82.

9 For example, under the RCRA Penalty Policy, "the burden to demonstrate inability to pay rests on the Respondent. . . . If the Respondent fails to fully provide sufficient information [to meet this burden] then . . . enforcement personnel should disregard this factor in adjusting the penalty. *See* In re: Bil-Dry Corporation, Docket No. RCRA-III-264, Appeal No. 98-4, 2001 EPA App. LEXIS 1, *80, citing RCRA Civil Penalty Policy (Oct. 1990) at 36.

10 While each TSCA violation must be taken on its own terms, and the Court does so here, the Respondent is correct that on occasion EPA has been more lenient in the face of actual environmental harm. For example, in Hodag Chemical Corporation, TSCA-V-C-025-88, November 16, 1988, 1988 WL 236332, the respondent was charged with failing to develop and maintain PCB records, failing to mark its heat transfer system with a PCB label, and failing to reduce the concentration of PCBs in that system. Despite the "recognized threat that PCBs pose to the environment and human health," and the fact that respondent's heat transfer system was used in manufacturing products for use in the production of cosmetics and food products, presenting the risk that, through leakage, a direct avenue for PCBs to enter the human body could be created, EPA sought a total penalty for the three counts of $15,500.

11 The Respondent points out that while the Agency stated in its Notice of Violation that the company may have rights under SBREFA, the letter did not contain a citation to the Act nor did the Agency's counsel or the Agency's Small Business Offices's web page cite the Act. Ex. 4. Additionally, they argue that repeated attempts to contact the SBO for assistance went unanswered. GCA Brief at 7. When asked at trial, George stated that he never received a call from Karen Brown or anyone else from EPA's Office of Small Business Ombudsman. Tr. 112. He was also unaware if Ms. Brown contacted Ms. Kono or another EPA attorney regarding the case. Id.

12 The Court notes that the1996 SBREFA, which amended the 1980 Regulatory Flexibility Act, was intended to reduce the impact of regulations on small businesses. Included among its objectives was the establishment of programs "which allow for the reduction or waiver of civil penalties for small entities under conditions where the violator demonstrates good faith efforts to correct violations and comply with the law." U.S. Small Business Regulatory Enforcement Fairness Act Fact Sheet (1997) (EPA No. 100-F-96-038). SBREFA anticipated a reduction in civil penalties under certain mitigating circumstances where no serious health, safety or environmental threats were presented and the small business has not been subject to multiple enforcement actions by the agency. 10 Cornell J.L. & Pub. Pol'y 63, *78. EPA has advised Congress that it is "aggressively marketing" its reduction program to smaller businesses. EPA Rep. to Congress: The Small Business Regulatory Enforcement Fairness Act Section 223 Penalty Reduction Program for Small Entities. (March 1998).

EPA has issued various policies in the wake of SBREFA. *See* Interim Policy on Compliance Incentives for Small Businesses, 61 F.R. 27984, June 3, 1996 ("Interim Policy") and Small Business Compliance Policy, 65 F.R. 19630, April 11, 2000 ("Final Policy"). The Final Policy states that it is intended to promote small business compliance by "providing incentives for voluntary discovery, prompt disclosure and prompt correction of violations." *Id.* A small business is one with a hundred or fewer employees. Among other aspects, this policy provides for "up to 100% reduction of the gravity component of the penalty for violations discovered .... during government sponsored on-site compliance assistance activities. To qualify, a business must generally "correct a violation within 180 days of its discovery ..." and have no prior noncompliance history. In addition the violation must not have caused any actual serious harm, present an imminent and substantial danger to public health or involve criminal conduct. *Id.* at 19630, 19633. Finally, as applicable here,

the violation cannot have been discovered through an inspection. *Id.* at 19633. Thus, under EPA policy, GCA failed to qualify for the penalty reduction because the violations were detected during an inspection.

While the Court cannot apply the Small Business Compliance Final Policy because the violations were discovered during an inspection, it does not preclude consideration of the circumstances under the "other factors as justice may require" factor. Indeed, the EPA Penalty Policy for TSCA Section 16 violations effectively concedes this by noting that "[o]ther case-by-case adjustments may also be warranted under the 'as justice may require' language. ("TSCA Penalty Policy") 45 FR 59770, *59771. GCA is among the smallest of the small companies addressed under SBREFA, having only four employees under a policy that considers up to one hundred employees as a "small" business. EPA has also conceded that the violation, relating solely to data gathering, did not cause any actual serious harm nor present any public health danger. Obviously, no criminal conduct was involved. Further, it is admitted that GCA had no prior noncompliance history. Last, not only was GCA well within the 180 days the policy deems a rapid correction, but it's correction was relatively instant, occurring only six days after it was informed of the violation.

13 While these decisions do hold that the TSCA penalty is not intended to punish, they are PCB cases and therefore are not directly on point. In Birmbaum the ALJ found that adherence to the guidelines regarding an inability to pay would lead to an unjust result. While in Briggs, the Presiding Officer decided not to reduce the penalty.

14 In their brief, the Respondent suggests that given the circumstances and the penalty factors, a $2000 for each of the two chemicals that were not reported on the form would be an appropriate penalty.

15 The court must note, however, that this statement, while asserted in GCA's Brief, is unsupported by the record evidence.

16 "[T]he Presiding Officer is not bound by any Penalty Policy, but rather by the statutory penalty criteria, a Presiding Officer may reject a proposed penalty, even if that penalty is calculated in accordance with the Penalty Policy." In re Employers Ins. of Wausau, 6 E.A.D. 735, 756 (EAB 1997). "A presiding officer has the discretion either to adopt the rationale of an applicable Penalty Policy where appropriate or to deviate from it where the circumstances warrant. DIC, 6 E.A.D. at 189.

17 The EAB has held that TSCA requires taking into account equitable concerns and allows the ALJ to be concerned with fairness when calculating the penalty. TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(b); In re: Spitzer Great Lakes Ltd., Docket No. TSCA-V-C-082-92, TSCA Appeal No. 99-3, 2000 EPA App. LEXIS 20, *34 (June 30, 2000); In re: Johnson Pacific, Inc., Docket No. FIFRA-09-0691-C-89-56, FIFRA Appeal No. 93-4, 1995 EPA App. LEXIS 4; *18, 5 E.A.D. 696 (Feb. 2, 1995)

18 According to John Walker, Ethanone, which is the same an Benzoin, has been known to cause dermatitis and is rapidly absorbed through the skin. Tr. 27. Ex. 9. Walker is the Director of EPA's TSCA Interagency Testing Committee, which is an independent advisory committee that makes recommendations to the EPA Administrator about chemicals that need to be tested under TSCA. Walker related that there have been studies concerning Ethanone reported under the TSCA section 8(d). Tr. 27. It is also regulated under the Clean Air Act. Tris was reported in the Chemical Update System in 1990. Tr. 29. The MSDS form in the record does not distinguish between the powder and pellet forms of Tris. Tr. 38. TSCA Section 8(e) studies submitted from other companies show that it causes gene mutations and allergic eczema in humans. Tr. 29. Mr. Walker discussed the studies and stated that, in certain circumstances, the industry is required to submit studies under TSCA 8(e) and 8(d). Under 8(d) the studies for certain chemicals are required; however they are only mandatory under 8(e) if the industry decides the studies or the information present a substantial risk. Tr. 47. While the record included this information, it amounted to a hodgepodge of information without any explanation of its significance or relevance to the penalty.

19 A small business is not required to report. 40 CFR § 710.29. The Regulations define a small business as a company whose sales do not exceed $4 million regardless of the quantity they produce or a company whose sales are less than $40 but do not produce more than 100,000 pounds of a substance. 40 C.F.R. § 710.3.

20 Mr. George testified that GCA imported 506,920 pounds of Tris. Tr. 114.

21 While the Respondent does not raise an inability to pay defense, it does argue that the penalty is disproportionate given the size of their business. This argument will therefore be considered under "other factors as justice may require."

22 GCA was notified on March 14 , 2000 of the violation and submitted the IUR form on March 20, 2001. Ex. 4 & 6

23 As noted at trial, Mr. George did no favor for GCA by alerting them to the IUR requirements. He had an obligation to inform them of their reporting requirements. The $37,400 bill that followed the advice refutes the notion that GCA received any favor from EPA. Tr. 130.

24 There are indications in support of the impropriety of including "settlement cooperation" in the penalty calculation. By implication, Section 22.19(e)(2) of the Consolidated Rules of Practice with its reference to "penalty calculations for purposes of settlement" implies that a settlement calculation should be apart from that derived under the policy itself. The Environmental Appeals Board seems to agree with this proposition as well. In Re City of Kalamazoo Water Reclamation Plant, 3 E.A.D. 109 (Mar. 2, 1990). While the Respondent's cooperation during the settlement may not be considered in calculating the initial penalty, EPA may offer a reduced penalty during settlement negotiations if it feels it is warranted by the Respondent's cooperation.

25 "Attitude" is not factor listed under TSCA Section 16 nor is a Respondent's "conduct" during settlement. Gilbert Martin at *24. However, the Respondent's actions and conduct throughout its dealing with EPA and filing the Form U shortly after discovery of the violation should be considered under the "as justice may require" factor. As Mr. George admitted, GCA was cooperative throughout the entire process even though the settlement process was unsuccessful. Tr. 104. For example, during the inspection Mr. George at first identified four chemicals thought to be subject to TSCA. Tr. 65. Mr. George conducted a number of conference calls with GCA in an attempt to settle the matter. As a result, they were able to agree that two of the chemicals GCA imports in fact were not subject to IUR reporting. Tr. 66. Additionally, GCA never disputed that the violations occurred and worked with EPA to try to reach a fair settlement. GCA Prehearing Exchange at ¶3; Tr. 65.

26 Mr. George testified that he initially discussed settlement with Ms. Bernarding and Mr. Haughey. Tr. 64. Ms. Bernarding also testified that she consulted an attorney, Mr. Haughey and received the forms to comply with TSCA from him. It is unclear in what capacity Mr. Haughey worked for GCA. Tr. 126.

27 Bernarding disclosed that neither she nor anyone at GSA has read TSCA in its entirety. She only reviewed the sections referenced in the audit after the enforcement action was filed. Tr. 126.

28 Ms. Bernarding was not the only witness unsure of the manufacturer and importer requirements. Mr. Walker testified that he was unsure if a manufacturer who bought the Tris from GCA would also have to report every four years. He said that it would appear to be redundant for both to report but he was unsure who would be responsible. Tr. 41. Later, Mr. George clarified EPA's position, stating that unless there was an agreement between the importer and the customer, the importer is responsible for reporting under TSCA. Tr. 88.

29 The Agency referred to Exhibit 6 which is a letter from the Agency to GCA dated March 28, 2000 acknowledging receipt of the TSCA Form U. The bottom of this letter directs the recipient to the Agency's web site for reporting assistance. However, as pointed out at trial, this letter was sent nearly four months *after* the EPA inspection.

30 However, only chemicals which are imported or produced over a million pounds are listed on EPA's web site. Tr. 43.

31 Bernarding testified that the company subscribes to the Chemical Abstract Service which informs them of the reporting requirements for each of the chemicals they import. Tr. 123. The CAS system only tell you that you meet the proper TSCA registration requirements. Id. However, a reasonable person should have investigated further to see that no other TSCA requirements apply.

32 The TSCA Penalty Policy for Sections 8, 12 & 13 does not discuss size of business, the TSCA Penalty Policy for Residential Lead-Based Paint Hazard Reduction Act of 1992 includes "size of business" under "other factors as justice may require." *See also*, In Re Billy Yee, Docket No. TSCA-7-99-0009, 2000 EPA ALJ LEXIS 51, *8 (June 6, 2000).

33 The Respondent has asserted that the proposed penalty is more than they pay a year in rent but there is not support for this statement in the record. GCA Reply Brief at 3. In its Brief, the Respondent also argues that EPA's Penalty Policy violates SBREFA. GCA Brief at 7. The only information in the record concerning SBREFA is the attachment to the Notice of Violation of the TSCA and Notice of Opportunity to Show Cause letter sent March 14, 2001. Ex. 4. This attachment lists the web pages and phone numbers to receive information on compliance assistance. Ex. 4. GCA maintains that it tried to contact EPA Small Business offices for assistance but their phone calls were not returned. GCA Brief at 7. Since there is no information in the record to support these allegations, this aspect of GCA's SBREFA contentions can not be considered in determining the penalty.

34 GCA consulted an attorney who supplied the forms needed to comply with TSCA Section 8. Tr. 126.

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March 9, 2020

Thomas Petroleum, LLC
201 N. Rupert Street
Fort Worth, TX 76107-1432

Re: Revaluation of 2012 and 2013 TRI Calculations

Conservative estimates were initially used to determine reportable amounts for TRI reporting years 2012 and 2013 as noted below. Some chemicals reported on TRI forms submitted for Thomas' facilities for these reporting years were reevaluated. Recalculation of reportable threshold amounts based on this reevaluation results in the following modifications to reported amounts. All modifications resulted in lesser volumes. Because conservative estimates were initially used, no underestimated amounts reported have been identified.

Ethylene Glycol

Ethylene glycol volumes were conservatively estimated at 80% concentration. Looking at typical concentrations in the various brands of antifreeze products, most products contained 50% ethylene glycol. Using this more realistic estimate of ethylene glycol for the reevaluation, in three instances the amount of this chemical which was reported on Form R would have qualified for reporting on Form A: Hobbs (2013), Laredo (2013), and Victoria (2013).

As you were previously advised, had more detailed calculations been used in 2012 and 2013, the volume of ethylene glycol at Robstown in 2012 and Broussard in 2012 and 2013 would have been less than 10 times the reporting threshold.

Zinc Compounds

Zinc compounds are contained in some motor oil and lube oil products. For reports submitted in 2012 and 2013 zinc volumes were determined based on a conservative assumption of 2% zinc content in all products. Reevaluation of the zinc-compound calculations, based on actually reported concentrations from respective Safety Data Sheets (SDS) rather than the aggregate 2%-for-all-lube-oils method, was performed. This method gives a more realistic calculation of zinc amounts and results in volumes below the TRI reporting threshold at the following facilities for the years(s) indicated:
Victoria (2012), LaGrange (2012), Laredo (2012), Permian (2012), Hobbs (2012), Tyler (2012), Arkansas (2012), Bridgeport (2012), Lafayette (2012 & 2013), Beaumont (2012 & 2013), San Benito (2012 & 2013).

Do not hesitate to contact me about the above information.

Blaine Zwahlen, PE
Z Engineering and Environmental Services, Inc.

U.S. Department of Justice
Criminal Division

Evaluation of Corporate Compliance Programs

Guidance Document

Updated: April 2019

U.S. Department of Justice
Criminal Division

Evaluation of Corporate Compliance Programs

(Updated April 2019)

Introduction

The "Principles of Federal Prosecution of Business Organizations" in the Justice Manual describe specific factors that prosecutors should consider in conducting an investigation of a corporation, determining whether to bring charges, and negotiating plea or other agreements. JM 9-28.300. These factors include "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision" and the corporation's remedial efforts "to implement an adequate and effective corporate compliance program or to improve an existing one." JM 9-28.300 (citing JM 9-28.800 and JM 9-28.1000). Additionally, the United States Sentencing Guidelines advise that consideration be given to whether the corporation had in place at the time of the misconduct an effective compliance program for purposes of calculating the appropriate organizational criminal fine. *See* U.S.S.G. §§ 8B2.1, 8C2.5(f), and 8C2.8(11). Moreover, the memorandum entitled "Selection of Monitors in Criminal Division Matters" issued by Assistant Attorney General Brian Benczkowski (hereafter, the "Benczkowski Memo") instructs prosecutors to consider, at the time of the resolution, "whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal controls systems" and "whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future" to determine whether a monitor is appropriate.

This document is meant to assist prosecutors in making informed decisions as to whether, and to what extent, the corporation's compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution (e.g., monitorship or reporting obligations).

Because a corporate compliance program must be evaluated in the specific context of a criminal investigation, the Criminal Division does not use any rigid formula to assess the effectiveness of corporate compliance programs. We recognize that each company's risk profile and solutions to reduce its risks warrant particularized evaluation. Accordingly, we make an individualized determination in each case. There are, however, common questions that we may ask in the course of making an individualized determination. As the Justice Manual notes, there are three "fundamental questions" a prosecutor should ask:

U.S. Department of Justice
Criminal Division

Evaluation of Corporate Compliance Programs

(Updated April 2019)

1. "Is the corporation's compliance program well designed?"
2. "Is the program being applied earnestly and in good faith?" In other words, is the program being implemented effectively?
3. "Does the corporation's compliance program work" in practice?

See JM § 9-28.800.

In answering each of these three "fundamental questions," prosecutors may evaluate the company's performance on various topics that the Criminal Division has frequently found relevant in evaluating a corporate compliance program. The sample topics and questions below form neither a checklist nor a formula. In any particular case, the topics and questions set forth below may not all be relevant, and others may be more salient given the particular facts at issue.[1] Even though we have organized the topics under these three fundamental questions, we recognize that some topics necessarily fall under more than one category.

I. Is the Corporation's Compliance Program Well Designed?

The "critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct." JM 9-28.800.

Accordingly, prosecutors should examine "the comprehensiveness of the compliance program," JM 9-28.800, ensuring that there is not only a clear message that misconduct is not tolerated, but also policies and procedures – from appropriate assignments of responsibility, to training programs, to systems of incentives and discipline – that ensure the compliance program is well-integrated into the company's operations and workforce.

A. Risk Assessment

The starting point for a prosecutor's evaluation of whether a company has a well-designed compliance program is to understand the company's business from a commercial perspective, how the company has identified, assessed, and defined its risk profile, and the degree to which the program devotes appropriate scrutiny and resources to the spectrum of risks.

Prosecutors should consider whether the program is appropriately "designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business" and "complex regulatory environment[]." JM 9-28.800.[2] For example, prosecutors should consider whether the company has analyzed and addressed the varying risks presented by, among other factors, the location of its operations, the industry sector, the competitiveness

of the market, the regulatory landscape, potential clients and business partners, transactions with foreign governments, payments to foreign officials, use of third parties, gifts, travel, and entertainment expenses, and charitable and political donations.

Prosecutors should also consider "[t]he effectiveness of the company's risk assessment and the manner in which the company's compliance program has been tailored based on that risk assessment" and whether its criteria are "periodically updated." *See, e.g.*, JM 9-47-120(2)(c); U.S.S.G. § 8B2.1(c) ("the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement [of the compliance program] to reduce the risk of criminal conduct").

Prosecutors may credit the quality and effectiveness of a risk-based compliance program that devotes appropriate attention and resources to high-risk transactions, even if it fails to prevent an infraction in a low-risk area. Prosecutors should therefore consider, as an indicator of risk-tailoring, "revisions to corporate compliance programs in light of lessons learned." JM 9-28.800.

- ☐ **Risk Management Process** – What methodology has the company used to identify, analyze, and address the particular risks it faces? What information or metrics has the company collected and used to help detect the type of misconduct in question? How have the information or metrics informed the company's compliance program?

- ☐ **Risk-Tailored Resource Allocation –** Does the company devote a disproportionate amount of time to policing low-risk areas instead of high-risk areas, such as questionable payments to third-party consultants, suspicious trading activity, or excessive discounts to resellers and distributors? Does the company give greater scrutiny, as warranted, to high-risk transactions (for instance, a large-dollar contract with a government agency in a high-risk country) than more modest and routine hospitality and entertainment?

- ☐ **Updates and Revisions** – Is the risk assessment current and subject to periodic review? Have there been any updates to policies and procedures in light of lessons learned? Do these updates account for risks discovered through misconduct or other problems with the compliance program?

B. <u>Policies and Procedures</u>

Any well-designed compliance program entails policies and procedures that give both content and effect to ethical norms and that address and aim to reduce risks identified by the company as part of its risk assessment process. As a threshold matter, prosecutors should examine whether the company has a code of conduct that sets forth, among other things, the

company's commitment to full compliance with relevant Federal laws that is accessible and applicable to all company employees. As a corollary, prosecutors should also assess whether the company has established policies and procedures that incorporate the culture of compliance into its day-to-day operations.

- ☐ **Design** – What is the company's process for designing and implementing new policies and procedures, and has that process changed over time? Who has been involved in the design of policies and procedures? Have business units been consulted prior to rolling them out?

- ☐ **Comprehensiveness** – What efforts has the company made to monitor and implement policies and procedures that reflect and deal with the spectrum of risks it faces, including changes to the legal and regulatory landscape?

- ☐ **Accessibility** – How has the company communicated its policies and procedures to all employees and relevant third parties? If the company has foreign subsidiaries, are there linguistic or other barriers to foreign employees' access?

- ☐ **Responsibility for Operational Integration** – Who has been responsible for integrating policies and procedures? Have they been rolled out in a way that ensures employees' understanding of the policies? In what specific ways are compliance policies and procedures reinforced through the company's internal control systems?

- ☐ **Gatekeepers** – What, if any, guidance and training has been provided to key gatekeepers in the control processes (*e.g.*, those with approval authority or certification responsibilities)? Do they know what misconduct to look for? Do they know when and how to escalate concerns?

C. <u>Training and Communications</u>

Another hallmark of a well-designed compliance program is appropriately tailored training and communications.

Prosecutors should assess the steps taken by the company to ensure that policies and procedures have been integrated into the organization, including through periodic training and certification for all directors, officers, relevant employees, and, where appropriate, agents and business partners. Prosecutors should also assess whether the company has relayed information in a manner tailored to the audience's size, sophistication, or subject matter expertise. Some companies, for instance, give employees practical advice or case studies to address real-life scenarios, and/or guidance on how to obtain ethics advice on a case-by-case basis as needs arise.

Prosecutors should also assess whether the training adequately covers prior compliance incidents and how the company measures the effectiveness of its training curriculum.

Prosecutors, in short, should examine whether the compliance program is being disseminated to, and understood by, employees in practice in order to decide whether the compliance program is "truly effective." JM 9-28.800.

- ☐ **Risk-Based Training** – What training have employees in relevant control functions received? Has the company provided tailored training for high-risk and control employees, including training that addresses risks in the area where the misconduct occurred? Have supervisory employees received different or supplementary training? What analysis has the company undertaken to determine who should be trained and on what subjects?

- ☐ **Form/Content/Effectiveness of Training** – Has the training been offered in the form and language appropriate for the audience? Is the training provided online or in-person (or both), and what is the company's rationale for its choice? Has the training addressed lessons learned from prior compliance incidents? How has the company measured the effectiveness of the training? Have employees been tested on what they have learned? How has the company addressed employees who fail all or a portion of the testing?

- ☐ **Communications about Misconduct** – What has senior management done to let employees know the company's position concerning misconduct? What communications have there been generally when an employee is terminated or otherwise disciplined for failure to comply with the company's policies, procedures, and controls (*e.g.*, anonymized descriptions of the type of misconduct that leads to discipline)?

- ☐ **Availability of Guidance** – What resources have been available to employees to provide guidance relating to compliance policies? How has the company assessed whether its employees know when to seek advice and whether they would be willing to do so?

D. Confidential Reporting Structure and Investigation Process

Another hallmark of a well-designed compliance program is the existence of an efficient and trusted mechanism by which employees can anonymously or confidentially report allegations of a breach of the company's code of conduct, company policies, or suspected or actual misconduct. Prosecutors should assess whether the company's complaint-handling process includes pro-active measures to create a workplace atmosphere without fear of retaliation, appropriate processes for the submission of complaints, and processes to protect whistleblowers. Prosecutors should also assess the company's processes for handling

investigations of such complaints, including the routing of complaints to proper personnel, timely completion of thorough investigations, and appropriate follow-up and discipline.

Confidential reporting mechanisms are highly probative of whether a company has "established corporate governance mechanisms that can effectively detect and prevent misconduct." JM 9-28.800; *see also* U.S.S.G. § 8B2.1(b)(5)(C) (an effectively working compliance program will have in place, and have publicized, "a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation").

- ☐ **Effectiveness of the Reporting Mechanism** – Does the company have an anonymous reporting mechanism, and, if not, why not? How is the reporting mechanism publicized to the company's employees? Has it been used? How has the company assessed the seriousness of the allegations it received? Has the compliance function had full access to reporting and investigative information?

- ☐ **Properly Scoped Investigations by Qualified Personnel** – How does the company determine which complaints or red flags merit further investigation? How does the company ensure that investigations are properly scoped? What steps does the company take to ensure investigations are independent, objective, appropriately conducted, and properly documented? How does the company determine who should conduct an investigation, and who makes that determination?

- ☐ **Investigation Response** – Does the company apply timing metrics to ensure responsiveness? Does the company have a process for monitoring the outcome of investigations and ensuring accountability for the response to any findings or recommendations?

- ☐ **Resources and Tracking of Results** – Are the reporting and investigating mechanisms sufficiently funded? How has the company collected, tracked, analyzed, and used information from its reporting mechanisms? Does the company periodically analyze the reports or investigation findings for patterns of misconduct or other red flags for compliance weaknesses?

E. <u>Third Party Management</u>

A well-designed compliance program should apply risk-based due diligence to its third-party relationships. Although the degree of appropriate due diligence may vary based on the size

and nature of the company or transaction, prosecutors should assess the extent to which the company has an understanding of the qualifications and associations of third-party partners, including the agents, consultants, and distributors that are commonly used to conceal misconduct, such as the payment of bribes to foreign officials in international business transactions.

Prosecutors should also assess whether the company knows its third-party partners' reputations and relationships, if any, with foreign officials, and the business rationale for needing the third party in the transaction. For example, a prosecutor should analyze whether the company has ensured that contract terms with third parties specifically describe the services to be performed, that the third party is actually performing the work, and that its compensation is commensurate with the work being provided in that industry and geographical region. Prosecutors should further assess whether the company engaged in ongoing monitoring of the third-party relationships, be it through updated due diligence, training, audits, and/or annual compliance certifications by the third party.

In sum, a company's third-party due diligence practices are a factor that prosecutors should assess to determine whether a compliance program is in fact able to "detect the particular types of misconduct most likely to occur in a particular corporation's line of business." JM 9-28.800.

- ☐ **Risk-Based and Integrated Processes** – How has the company's third-party management process corresponded to the nature and level of the enterprise risk identified by the company? How has this process been integrated into the relevant procurement and vendor management processes?

- ☐ **Appropriate Controls** – How does the company ensure there is an appropriate business rationale for the use of third parties? If third parties were involved in the underlying misconduct, what was the business rationale for using those third parties? What mechanisms exist to ensure that the contract terms specifically describe the services to be performed, that the payment terms are appropriate, that the described contractual work is performed, and that compensation is commensurate with the services rendered?

- ☐ **Management of Relationships** – How has the company considered and analyzed the compensation and incentive structures for third parties against compliance risks? How does the company monitor its third parties? Does the company have audit rights to analyze the books and accounts of third parties, and has the company exercised those rights in the past? How does the company train its third party relationship

managers about compliance risks and how to manage them? How does the company incentivize compliance and ethical behavior by third parties?

- **Real Actions and Consequences** – Does the company track red flags that are identified from due diligence of third parties and how those red flags are addressed? Does the company keep track of third parties that do not pass the company's due diligence or that are terminated, and does the company take steps to ensure that those third parties are not hired or re-hired at a later date? If third parties were involved in the misconduct at issue in the investigation, were red flags identified from the due diligence or after hiring the third party, and how were they resolved? Has a similar third party been suspended, terminated, or audited as a result of compliance issues?

F. Mergers and Acquisitions (M&A)

A well-designed compliance program should include comprehensive due diligence of any acquisition targets. Pre-M&A due diligence enables the acquiring company to evaluate more accurately each target's value and negotiate for the costs of any corruption or misconduct to be borne by the target. Flawed or incomplete due diligence can allow misconduct to continue at the target company, causing resulting harm to a business's profitability and reputation and risking civil and criminal liability.

The extent to which a company subjects its acquisition targets to appropriate scrutiny is indicative of whether its compliance program is, as implemented, able to effectively enforce its internal controls and remediate misconduct at all levels of the organization.

- **Due Diligence Process** – Was the misconduct or the risk of misconduct identified during due diligence? Who conducted the risk review for the acquired/merged entities and how was it done? What is the M&A due diligence process generally?

- **Integration in the M&A Process** – How has the compliance function been integrated into the merger, acquisition, and integration process?

- **Process Connecting Due Diligence to Implementation** – What has been the company's process for tracking and remediating misconduct or misconduct risks identified during the due diligence process? What has been the company's process for implementing compliance policies and procedures at new entities?

II. Is the Corporation's Compliance Program Being Implemented Effectively?

Even a well-designed compliance program may be unsuccessful in practice if implementation is lax or ineffective. Prosecutors are instructed to probe specifically whether a compliance program is a "paper program" or one "implemented, reviewed, and revised, as appropriate, in an effective manner." JM 9-28.800. In addition, prosecutors should determine "whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts." JM 9-28.800. Prosecutors should also determine "whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it." JM 9-28.800; *see also* JM 9-47.120(2)(c) (criteria for an effective compliance program include "[t]he company's culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated").

A. Commitment by Senior and Middle Management

Beyond compliance structures, policies, and procedures, it is important for a company to create and foster a culture of ethics and compliance with the law. The effectiveness of a compliance program requires a high-level commitment by company leadership to implement a culture of compliance from the top.

The company's top leaders – the board of directors and executives – set the tone for the rest of the company. Prosecutors should examine the extent to which senior management have clearly articulated the company's ethical standards, conveyed and disseminated them in clear and unambiguous terms, and demonstrated rigorous adherence by example. Prosecutors should also examine how middle management, in turn, have reinforced those standards and encouraged employees to abide by them. *See* U.S.S.G. § 8B2.1(b)(2)(A)-(C) (the company's "*governing authority* shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight" of it; "[*h*]*igh-level personnel* ... shall ensure that the organization has an effective compliance and ethics program" (emphasis added)).

- ☐ **Conduct at the Top** – How have senior leaders, through their words and actions, encouraged or discouraged compliance, including the type of misconduct involved in the investigation? What concrete actions have they taken to demonstrate leadership in the company's compliance and remediation efforts? How have they modelled proper behavior to subordinates? Have managers tolerated greater compliance risks in pursuit of new business or greater revenues? Have managers encouraged employees to act unethically to achieve a business objective, or impeded compliance personnel from effectively implementing their duties?

- ☐ **Shared Commitment** – What actions have senior leaders and middle-management stakeholders (*e.g.*, business and operational managers, finance, procurement, legal, human resources) taken to demonstrate their commitment to compliance or compliance personnel, including their remediation efforts? Have they persisted in that commitment in the face of competing interests or business objectives?

- ☐ **Oversight** – What compliance expertise has been available on the board of directors? Have the board of directors and/or external auditors held executive or private sessions with the compliance and control functions? What types of information have the board of directors and senior management examined in their exercise of oversight in the area in which the misconduct occurred?

B. Autonomy and Resources

Effective implementation also requires those charged with a compliance program's day-to-day oversight to act with adequate authority and stature. As a threshold matter, prosecutors should evaluate how the compliance program is structured. Additionally, prosecutors should address the sufficiency of the personnel and resources within the compliance function, in particular, whether those responsible for compliance have: (1) sufficient seniority within the organization; (2) sufficient resources, namely, staff to effectively undertake the requisite auditing, documentation, and analysis; and (3) sufficient autonomy from management, such as direct access to the board of directors or the board's audit committee. The sufficiency of each factor, however, will depend on the size, structure, and risk profile of the particular company. "A large organization generally shall devote more formal operations and greater resources . . . than shall a small organization." Commentary to U.S.S.G. § 8B2.1 note 2(C). By contrast, "a small organization may [rely on] less formality and fewer resources." *Id.* Regardless, if a compliance program is to be truly effective, compliance personnel must be empowered within the company.

Prosecutors should evaluate whether "internal audit functions [are] conducted at a level sufficient to ensure their independence and accuracy," as an indicator of whether compliance personnel are in fact empowered and positioned to "effectively detect and prevent misconduct." JM 9-28.800. Prosecutors should also evaluate "[t]he resources the company has dedicated to compliance," "[t]he quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk," and "[t]he authority and independence of the compliance function and the availability of compliance expertise to the board." JM 9-47.120(2)(c); *see also* JM 9-28.800 (instructing prosecutors to evaluate whether "the directors established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law"); U.S.S.G. § 8B2.1(b)(2)(C) (those with "day-to-day operational

responsibility" shall have "adequate resources, appropriate authority and direct access to the governing authority or an appropriate subgroup of the governing authority").

- ☐ **Structure** – Where within the company is the compliance function housed (e.g., within the legal department, under a business function, or as an independent function reporting to the CEO and/or board)? To whom does the compliance function report? Is the compliance function run by a designated chief compliance officer, or another executive within the company, and does that person have other roles within the company? Are compliance personnel dedicated to compliance responsibilities, or do they have other, non-compliance responsibilities within the company? Why has the company chosen the compliance structure it has in place?

- ☐ **Seniority and Stature** – How does the compliance function compare with other strategic functions in the company in terms of stature, compensation levels, rank/title, reporting line, resources, and access to key decision-makers? What has been the turnover rate for compliance and relevant control function personnel? What role has compliance played in the company's strategic and operational decisions? How has the company responded to specific instances where compliance raised concerns? Have there been transactions or deals that were stopped, modified, or further scrutinized as a result of compliance concerns?

- ☐ **Experience and Qualifications** – Do compliance and control personnel have the appropriate experience and qualifications for their roles and responsibilities? Has the level of experience and qualifications in these roles changed over time? Who reviews the performance of the compliance function and what is the review process?

- ☐ **Funding and Resources** – Has there been sufficient staffing for compliance personnel to effectively audit, document, analyze, and act on the results of the compliance efforts? Has the company allocated sufficient funds for the same? Have there been times when requests for resources by compliance and control functions have been denied, and if so, on what grounds?

- ☐ **Autonomy** – Do the compliance and relevant control functions have direct reporting lines to anyone on the board of directors and/or audit committee? How often do they meet with directors? Are members of the senior management present for these meetings? How does the company ensure the independence of the compliance and control personnel?

- ☐ **Outsourced Compliance Functions** – Has the company outsourced all or parts of its compliance functions to an external firm or consultant? If so, why, and who is responsible for overseeing or liaising with the external firm or consultant? What level of access does the external firm or consultant have to company information? How has the effectiveness of the outsourced process been assessed?

C. Incentives and Disciplinary Measures

Another hallmark of effective implementation of a compliance program is the establishment of incentives for compliance and disincentives for non-compliance. Prosecutors should assess whether the company has clear disciplinary procedures in place, enforces them consistently across the organization, and ensures that the procedures are commensurate with the violations. Prosecutors should also assess the extent to which the company's communications convey to its employees that unethical conduct will not be tolerated and will bring swift consequences, regardless of the position or title of the employee who engages in the conduct. *See* U.S.S.G. § 8B2.1(b)(5)(C) ("the organization's compliance program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct").

By way of example, some companies have found that publicizing disciplinary actions internally, where appropriate, can have valuable deterrent effects. At the same time, some companies have also found that providing positive incentives – personnel promotions, rewards, and bonuses for improving and developing a compliance program or demonstrating ethical leadership – have driven compliance. Some companies have even made compliance a significant metric for management bonuses and/or have made working on compliance a means of career advancement.

- ☐ **Human Resources Process** – Who participates in making disciplinary decisions, including for the type of misconduct at issue? Is the same process followed for each instance of misconduct, and if not, why? Are the actual reasons for discipline communicated to employees? If not, why not? Are there legal or investigation-related reasons for restricting information, or have pre-textual reasons been provided to protect the company from whistleblowing or outside scrutiny?

- ☐ **Consistent Application** – Have disciplinary actions and incentives been fairly and consistently applied across the organization? Are there similar instances of misconduct that were treated disparately, and if so, why?

- ☐ **Incentive System** – Has the company considered the implications of its incentives and rewards on compliance? How does the company incentivize compliance and ethical behavior? Have there been specific examples of actions taken (*e.g.*, promotions or awards denied) as a result of compliance and ethics considerations? Who determines the compensation, including bonuses, as well as discipline and promotion of compliance personnel?

III. Does the Corporation's Compliance Program Work in Practice?

The Principles of Federal Prosecution of Business Organizations require prosecutors to assess "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision." JM 9-28.300. Due to the backward-looking nature of the first inquiry, one of the most difficult questions prosecutors must answer in evaluating a compliance program following misconduct is whether the program was working effectively at the time of the offense, especially where the misconduct was not immediately detected.

In answering this question, it is important to note that the existence of misconduct does not, by itself, mean that a compliance program did not work or was ineffective at the time of the offense. *See* U.S.S.G. § 8B2.1(a) ("[t]he failure to prevent or detect the instant offense does not mean that the program is not generally effective in preventing and deterring misconduct"). Indeed, "[t]he Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees." JM 9-28.800. Of course, if a compliance program did effectively identify misconduct, including allowing for timely remediation and self-reporting, a prosecutor should view the occurrence as a strong indicator that the compliance program was working effectively.

In assessing whether a company's compliance program was effective at the time of the misconduct, prosecutors should consider whether and how the misconduct was detected, what investigation resources were in place to investigate suspected misconduct, and the nature and thoroughness of the company's remedial efforts.

To determine whether a company's compliance program is working effectively at the time of a charging decision or resolution, prosecutors should consider whether the program evolved over time to address existing and changing compliance risks. Prosecutors should also consider whether the company undertook an adequate and honest root cause analysis to understand both what contributed to the misconduct and the degree of remediation needed to prevent similar events in the future.

For example, prosecutors should consider, among other factors, "whether the corporation has made significant investments in, and improvements to, its corporate compliance

program and internal controls systems" and "whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future." Benczkowski Memo at 2 (observing that "[w]here a corporation's compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution, a monitor will not likely be necessary").

A. Continuous Improvement, Periodic Testing, and Review

One hallmark of an effective compliance program is its capacity to improve and evolve. The actual implementation of controls in practice will necessarily reveal areas of risk and potential adjustment. A company's business changes over time, as do the environments in which it operates, the nature of its customers, the laws that govern its actions, and the applicable industry standards. Accordingly, prosecutors should consider whether the company has engaged in meaningful efforts to review its compliance program and ensure that it is not stale. Some companies survey employees to gauge the compliance culture and evaluate the strength of controls, and/or conduct periodic audits to ensure that controls are functioning well, though the nature and frequency of evaluations may depend on the company's size and complexity.

Prosecutors may reward efforts to promote improvement and sustainability. In evaluating whether a particular compliance program works in practice, prosecutors should consider "revisions to corporate compliance programs in light of lessons learned." JM 9-28.800; *see also* JM 9-47-120(2)(c) (looking to "[t]he auditing of the compliance program to assure its effectiveness"). Prosecutors should likewise look to whether a company has taken "reasonable steps" to "ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct," and "evaluate periodically the effectiveness of the organization's" program. U.S.S.G. § 8B2.1(b)(5). Proactive efforts like these may not only be rewarded in connection with the form of any resolution or prosecution (such as through remediation credit or a lower applicable fine range under the Sentencing Guidelines), but more importantly, may avert problems down the line.

- ☐ **Internal Audit** – What is the process for determining where and how frequently internal audit will undertake an audit, and what is the rationale behind that process? How are audits carried out? What types of audits would have identified issues relevant to the misconduct? Did those audits occur and what were the findings? What types of relevant audit findings and remediation progress have been reported to management and the board on a regular basis? How have management and the board followed up? How often does internal audit conduct assessments in high-risk areas?

- ☐ **Control Testing** – Has the company reviewed and audited its compliance program in the area relating to the misconduct? More generally, what testing of controls, collection and analysis of compliance data, and interviews of employees and third-parties does the company undertake? How are the results reported and action items tracked?

- ☐ **Evolving Updates** – How often has the company updated its risk assessments and reviewed its compliance policies, procedures, and practices? Has the company undertaken a gap analysis to determine if particular areas of risk are not sufficiently addressed in its policies, controls, or training? What steps has the company taken to determine whether policies/procedures/practices make sense for particular business segments/subsidiaries?

- ☐ **Culture of Compliance** – How often and how does the company measure its culture of compliance? Does the company seek input from all levels of employees to determine whether they perceive senior and middle management's commitment to compliance? What steps has the company taken in response to its measurement of the compliance culture?

B. <u>Investigation of Misconduct</u>

Another hallmark of a compliance program that is working effectively is the existence of a well-functioning and appropriately funded mechanism for the timely and thorough investigations of any allegations or suspicions of misconduct by the company, its employees, or agents. An effective investigations structure will also have an established means of documenting the company's response, including any disciplinary or remediation measures taken.

- ☐ **Properly Scoped Investigation by Qualified Personnel** – How has the company ensured that the investigations have been properly scoped, and were independent, objective, appropriately conducted, and properly documented?

- ☐ **Response to Investigations** – Have the company's investigations been used to identify root causes, system vulnerabilities, and accountability lapses, including among supervisory manager and senior executives? What has been the process for responding to investigative findings? How high up in the company do investigative findings go?

C. Analysis and Remediation of Any Underlying Misconduct

Finally, a hallmark of a compliance program that is working effectively in practice is the extent to which a company is able to conduct a thoughtful root cause analysis of misconduct and timely and appropriately remediate to address the root causes.

Prosecutors evaluating the effectiveness of a compliance program are instructed to reflect back on "the extent and pervasiveness of the criminal misconduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program, and revisions to corporate compliance programs in light of lessons learned." JM 9-28.800; *see also* JM 9-47.120(3)(c) ("to receive full credit for timely and appropriate remediation" under the FCPA Corporate Enforcement Policy, a company should demonstrate "a root cause analysis" and, where appropriate, "remediation to address the root causes").

Prosecutors should consider "any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program." JM 98-28.800; *see also* JM 9-47-120(2)(c) (looking to "[a]ppropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred" and "any additional steps that demonstrate recognition of the seriousness of the misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risk").

- ☐ **Root Cause Analysis** – What is the company's root cause analysis of the misconduct at issue? Were any systemic issues identified? Who in the company was involved in making the analysis?

- ☐ **Prior Weaknesses** – What controls failed? If policies or procedures should have prohibited the misconduct, were they effectively implemented, and have functions that had ownership of these policies and procedures been held accountable?

- ☐ **Payment Systems** – How was the misconduct in question funded (*e.g.*, purchase orders, employee reimbursements, discounts, petty cash)? What processes could have prevented or detected improper access to these funds? Have those processes been improved?

- ☐ **Vendor Management** – If vendors were involved in the misconduct, what was the process for vendor selection and did the vendor undergo that process?

- ☐ **Prior Indications** – Were there prior opportunities to detect the misconduct in question, such as audit reports identifying relevant control failures or allegations, complaints, or investigations? What is the company's analysis of why such opportunities were missed?

- ☐ **Remediation** – What specific changes has the company made to reduce the risk that the same or similar issues will not occur in the future? What specific remediation has addressed the issues identified in the root cause and missed opportunity analysis?

- ☐ **Accountability** – What disciplinary actions did the company take in response to the misconduct and were they timely? Were managers held accountable for misconduct that occurred under their supervision? Did the company consider disciplinary actions for failures in supervision? What is the company's record (*e.g.*, number and types of disciplinary actions) on employee discipline relating to the types of conduct at issue? Has the company ever terminated or otherwise disciplined anyone (reduced or eliminated bonuses, issued a warning letter, etc.) for the type of misconduct at issue?

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[1] Many of the topics also appear in the following resources:

- Justice Manual ("JM")
  - JM 9-28.000 Principles of Federal Prosecution of Business Organizations, Justice Manual ("JM"), *available at* https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations.
  - JM 9-47.120 FCPA Corporate Enforcement Policy, *available at* https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.
- Chapter 8 – Sentencing of Organizations - United States Sentencing Guidelines ("U.S.S.G."), *available at* https://www.ussc.gov/guidelines/2018-guidelines-manual/2018-chapter-8#NaN.

- Memorandum entitled "Selection of Monitors in Criminal Division Matters," issued by Assistant Attorney General Brian Benczkowski on October 11, 2018, *available at* https://www.justice.gov/criminal-fraud/file/1100366/download.
- Criminal Division corporate resolution agreements, *available at* https://www.justice.gov/news (DOJ's Public Affairs website contains press releases for all Criminal Division corporate resolutions which contain links to charging documents and agreements).
- A Resource Guide to the U.S. Foreign Corrupt Practices Act ("FCPA Guide") published in November 2012 by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.
- Good Practice Guidance on Internal Controls, Ethics, and Compliance adopted by the Organization for Economic Co-operation and Development ("OECD") Council on February 18, 2010 *available at* https://www.oecd.org/daf/anti-bribery/44884389.pdf.
- Anti-Corruption Ethics and Compliance Handbook for Business ("OECD Handbook") published in 2013 by OECD, United Nations Office on Drugs and Crime, and the World Bank *available at* https://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf.

[2] As discussed in the Justice Manual, many companies operate in complex regulatory environments outside the normal experience of criminal prosecutors. JM 9-28.000. For example, financial institutions such as banks, subject to the Bank Secrecy Act statute and regulations, require prosecutors to conduct specialized analyses of their compliance programs in the context of their anti-money laundering requirements. Consultation with the Money Laundering and Asset Recovery Section is recommended when reviewing AML compliance. *See* https://www.justice.gov/criminal-mlars. Prosecutors may also wish to review guidance published by relevant federal and state agencies. *See* Federal Financial Institutions Examination Council/Bank Secrecy Act/Anti-Money Laundering Examination Manual, *available at* https://www.ffiec.gov/bsa_aml_infobase/pages_manual/manual_online.htm).

Code of Ethics and Business Conduct

Adopted February 1, 2006, updated June 26, 2017

Table of Contents

Purpose 1
Accountability and Responsibility 1
Reporting Non-compliance 1
Dignity, Respect and Fairness 2
Equal Opportunity 2
Workplace Harassment and Violence 2
Workplace Bullying 2
Hours of Work 3
Environmental, Health and Safety 4
Fraternization and Employee Relationships Policy 4
- **Employee Relationships** 4
- **Fraternization** 4

Alcohol/Substance Abuse 5
Gifts and Entertainment 6
Political Activities 7
External Communications 7
Protecting PTL Assets and Brand Name 7
Business Records and Communications 7
Conflicts of Interest and Corporate Opportunities 8
Fair Dealing 9
Purchasing Practices 9
Computer Applications and Software 9
- **System Integrity** 9
- **System Security** 10
- **Personal Use of PTL Technology** 10
- **E-Mail Policy** 11
- **Social Media Policy** 11

The Letter and Spirit 12
Getting Help 13
Questions 13
Other Resources 13

Ethics Hotline 13
Reporting Illegal or Unethical Conduct 13
Our Values 14
Acknowledgement 15

CODE OF ETHICS AND BUSINESS CONDUCT

PURPOSE

The purpose of the *Code of Ethics and Business Conduct* ("*Code*") is to communicate Pilot Thomas Logistics' ("PTL") commitment to high ethical standards and reinforce prompt and consistent actions in the maintenance of and compliance with those standards. One of the most important assets of PTL is the trust and confidence of our customers, PTL employees ("Team Members") and of the general public. PTL expects and demands honesty, integrity, discretion and professionalism in both business and personal conduct from all of its Team Members across all business operating platforms. Therefore, we must apply these standards in both letter and spirit in our everyday activities. Where the letter of the *Code* is not specific, the spirit should prevail. When in doubt about what to do, ask yourself this question:

Would I be proud to explain my actions to my family or fellow Team Members — or to thousands of people around the world on tonight's news broadcast without hesitation?

Stating these standards here does not inevitably lead to ethical conduct. You, our valued Team Member, must continue to understand, support and abide by these standards to enable PTL to achieve our business objectives.

Accountability and Responsibility

Each of us must live by this *Code*. Violators of the *Code* are subject to appropriate discipline, up to and including dismissal from PTL and prosecution under the law. Any waiver of the provisions of this *Code* requires the review and written approval of the President of PTL. Any waiver of the provisions of this *Code* for the benefit of PTL's senior officers, Directors, Team Members or members of the board of managers requires the review and written approval of PTL's audit committee or board of managers.

Reporting Non-compliance

PTL is concerned about protecting its employees and providing an avenue for Team Members to voice their concerns. If you have any knowledge of a violation of this *Code* you have an affirmative obligation to report it to your supervisor, manager or to another appropriate person within PTL. You may report violations knowing that PTL will

not allow retaliation for reporting concerns in good faith. Reporting in good faith means that you provide all the information you have to the proper person within PTL, and you believe your information to be true. Retaliation for good faith reporting is, in and of itself, a violation of this *Code*. Failure to report a violation may result in disciplinary action, up to and including termination. See the G*etting Help* section of this *Code* for more information on how you can report non-compliance situations.

Dignity, Respect and Fairness

You and your ideas create value and success for PTL. We must value and respect the unique character and contribution of each Team Member and customer. Treating each other with dignity, respect and fairness is the foundation of good business conduct. The use of grossly disrespectful, offensive or profane language toward a supervisor, subordinate or co-worker is insubordination and will not be tolerated. Failing to treat each other with dignity, respect and fairness is damaging to an effective work environment and could be grounds for termination.

Equal Opportunity

PTL is committed to providing equal employment opportunities. Discriminating against any Team Member or person with whom we do business on the basis of age, race, religion, sex, disability, national origin or any other legally protected status is not permitted and is subject to disciplinary action, up to and including termination.

Workplace Harassment and Violence

Harassment and violence in the workplace are strictly prohibited and are grounds for immediate termination from PTL. Conduct that creates an unwelcome or uncomfortable situation or hostile work environment, such as: unwelcome advances; requests for sexual favors; inappropriate comments; innuendo; jokes; intimidation; bullying; physical contact; sexual gestures; sexually suggestive or abusive talk; and offensive texts, emails, images and files, are all forms of workplace harassment. Team Members should avoid any actions or words that might be interpreted by another as harassment. Threats of violence by one Team Member against another Team Member are prohibited, as this also constitutes harassment.

Sexual harassment is unlawful under Federal and State laws. Sexual harassment is a form of misconduct that constitutes a serious offense and subjects offenders to disciplinary action, up to and including termination. For a means to report such behavior refer to the *Getting Help* section of this *Code*.

Workplace Bullying

PTL does not tolerate bullying in the workplace under any circumstances. Workplace bullying is behavior that harms, intimidates, offends, degrades or humiliates

a co-worker, subordinate, or supervisor, whether in private or in front of other Team Members, vendors, clients, customers, or other third parties. Any Team Member caught bullying while at work will be subject to disciplinary action, up to and including termination. Examples of workplace bullying include, but are not limited to: unwarranted or invalid criticism; blame without factual justification; exclusion or social isolation; name calling; being sworn at; shouted at; or being humiliated regardless of the communication method.

PTL believes all employees should be able to work in a bully-free environment. For a means to report such behavior refer to the *Getting Help* section of this *Code*.

Hours of Work

All hourly Team Members must clock in and out for their schedule shifts. For non-management Team Members and hourly managers, this confirms the number of hours worked during the applicable work week and provides PTL with correct information for calculation of wages. Team Members have the opportunity each week to review and verify the accuracy of their time records and are expected to do so. **Team Members should review his/her time records weekly and electronically acknowledge same to insure accuracy. If a Team Member disagrees with his/her time entries and/or disputes the accuracy of his/her time records, he/she should report the issue to his/her supervisor within twenty-four (24) hours. The Team Member is also given the opportunity during the electronic verification process to note any objections**. If a Team Member believes that he/she is not being paid for time worked during the workweek, he/she should immediately contact his/her supervisor, Region Manager, local HR Manager or the **844-814-5933** number. PTL will investigate any concerns brought to its attention and strive to correct any errors with respect to the reporting of time and payment of wages.

PTL wants its employees to be paid in accordance with the law for all hours worked and takes allegations regarding working off the clock or not being paid overtime very seriously. Asking someone to work off the clock, forcing someone to do so or altering time records to avoid paying for hours worked or overtime is strictly prohibited and anyone found to have done so shall be terminated. Any Team Member who has knowledge that a Team Member is or has refused to adhere to this provision should report such knowledge to his/her supervisor, Region Manager, local HR Manager, the Chief Legal Officer or the **1-844-814-5933** number immediately.

With respect to Team Members, PTL understands that times may arise that an off the clock Team Member may feel compelled to help in order to complete a task before his/her shift begins or break is over. While PTL greatly appreciates each Team Member's willingness to help when needed, PTL cannot allow any Team Member to work without being paid for the time spent doing so. Team Members should always clock in before performing any work. If it is impossible for a Team Member to clock in prior to beginning to work, he/she should document his/her start date and time in writing, submit the documentation to management so PTL's time records can be updated and then review

his/her timecard each week to ensure any and all necessary changes have been made. Team Members found to have negligently, willingly or intentionally worked off the clock without documenting the time worked and following the procedures noted herein shall be subject to disciplinary action, up to and including termination.

Environmental, Health and Safety

PTL is committed to complying with all Federal, State and local environmental laws, rules and regulations. In addition, PTL is committed to providing a healthy and safe workplace. Each Team Member is responsible for observing all of the environmental, health and safety laws, rules and regulations that apply to any area in which we work or job that we perform. Each Team Member is responsible for taking all precautions to protect ourselves and our fellow Team Members from an accident, injury or unsafe condition. Additionally, each Team Member must promptly report to their supervisor or other appropriate person within PTL conditions that evidence noncompliance with environmental laws, rules and/or regulations and conditions that are unhealthy or unsafe. Furthermore, each Team Member must take steps to correct those conditions immediately so as to prevent harm or danger to any customers, fellow Team Members or the general public.

Fraternization and Employee Relationships Policy

Employee Relationships

PTL discourages Team Members from dating or entering into consensual social relationships with other Team Members. If such a relationship is entered into, PTL cautions Team Members not to let such relationships affect their job performance. Team Member relationships are allowed provided: both parties mutually and voluntarily consent to the social or dating relationship, disclose the relationship in writing to each Team Member's local HR Manager; the social or dating relationship does not breach corporate values or this *Code*; the social or dating relationship does not involve a supervisor and direct or indirect subordinate (refer to the fraternization policy below in this *Code*); and the social or dating relationship does not affect or appear to affect judgment or performance of duties of involved Team Members and those Team Members' co-workers; and/or the social or dating relationship does not negatively impact the common good of PTL.

Fraternization

Fraternization is most commonly thought of as an intimate, sexual or romantic relationship, including the appearance or implication of such a relationship, between a supervisor (includes all leadership positions from shift supervisor on up) and subordinate. It also includes personal or outside business relationships between a supervisor and subordinate that crosses the boundary of the supervisor and subordinate

working relationship. Such relationships tend to lead to accusations of discrimination, harassment or the perception of favoritism.

Personal relationships include, but are not limited to: regular non-business social interactions, dating, cohabitation and any type of sexual relationship. Business relationships include, but are not limited to: loaning and borrowing money and business partnerships. PTL strictly prohibits such personal and business relationships between a supervisor and a subordinate of PTL. To report a relationship prohibited in this *Code* see the *Getting Help* section of this *Code*.

The personal and business relationships described above between salaried or hourly managers/supervisors and hourly Team Members are prohibited. Any Team Member desiring to enter into a personal or business relationship with a supervising or subordinate Team Member must disclose such relationship in writing to his/her local HR Manager and may be subject to reassignment, demotion, or transfer so as to proceed with any such personal or business relationship. Failure of a Team Member to properly disclose such relationship will result in disciplinary action, up to and including termination.

Team Members who do not have a supervisor/subordinate status that choose to enter into any social, dating, personal or business relationships must comply with the following:

- Review PTL's policy prohibiting workplace harassment and conflict of interest as set forth in this *Code*; and

- Behave professionally at all times, avoiding indiscreet behavior while at the workplace or while on Company time or business including refraining from public displays of sexual affection, sexual innuendo, suggestive comments and sexually oriented joking.

If the individuals involved in a relationship that can be perceived as fraternization fail to self-report it immediately, it can result in discipline, up to and including termination. If such a relationship is self-reported in good faith, PTL will make decisions in the best interest of PTL including reassignment, demotion, transfer, or separating Team Members where appropriate, in instances involving fraternization or personal or business relationships.

If a subordinate employee attempts to initiate a potentially inappropriate relationship with a supervisor, it is the responsibility of the supervisor to make sure the above policy is followed and to contact a PTL Human Resource Manager for assistance with the policy.

Alcohol/Substance Abuse

PTL is committed to a safe workplace free of substance abuse. That commitment is jeopardized when any PTL Team Member illegally uses drugs on or off the job, comes to work under the influence, possesses, distributes or sells drugs in the workplace, or abuses drugs or alcohol on the job. The use, possession, or distribution of alcohol or illegal drugs while engaged in work for PTL or in/on PTL premises is strictly prohibited. It is also a violation of this *Code* to operate a company owned or rented vehicle under the influence of alcohol or drugs, regardless of how slight. Team Members are encouraged to confidentially seek treatment for alcohol and substance abuse problems. Team Members are also encouraged to report instances of violation of this policy and the specific policy contained in the Team Member handbook through the reporting channels found at the end of this *Code.*

Gifts and Entertainment

The exchange of gifts, meals and entertainment is a common practice in business, and can help us build better relationships with customers, vendors and other business allies. One principle is clear and common: no gift, favor, or entertainment should be accepted or provided if it will obligate, appear to obligate, or is intended to obligate or unduly influence PTL and/or the Team Member receiving the gift, favor or entertainment. Consider what other Team Members will think about a Team Member receiving such gift, favor or entertainment and what kind of example such receipt might be setting. The types of gifts and entertainment that are appropriate to give or receive as a PTL Team Member depends on many factors. If the gift, meal or entertainment in question is lavish or frequent, or unusual for the receiving Team Member's job, it is probably not acceptable. If a Team Member is in the middle of negotiations or bid evaluations, extra care is required. PTL Team Members shall not request or solicit personal gifts, favors, entertainment or services. PTL Team Members may never offer or accept gifts of cash or cash equivalents such as securities.

Acceptance of meals, refreshments, travel arrangements, accommodations or entertainment, all of reasonable value, in the course of a meeting to hold a bona fide business discussion or to foster better business relations is permissible under the following guidelines:

- When the expense involved would be payable by PTL as a reasonable business expense if it were not paid by the other party; or

- When gifts, services, travel or entertainment exceeding $100 in value has received approval by the Team Member's immediate supervisor and from one of the following officers: PTL's President, Chief Financial Officer, Senior Vice President of Sales, Senior Vice President of Human Resources or General Counsel; or

- When gifts, services, travel and entertainment do not exceed $100 in value.

Political Activities

Many governments have laws prohibiting or regulating corporate contributions to political parties, campaigns or candidates in the form of cash or the use of PTL facilities, aircraft, automobiles, computers, mail services or personnel. Team Members who communicate with government officials on issues that affect PTL should contact the Legal Department to ensure that such activities fully comply with the law and that PTL's lobbying efforts are coordinated. We respect the right of each of our Team Members to participate in the political process and to engage in political activities of his or her choosing. While involved in their personal civic and political affairs, however, Team Members must at all times make clear that their views and actions are their own, and not those of PTL. Team Members may not use PTL resources to support their choice of political parties, causes or candidates.

External Communications

Communications about PTL with those outside PTL require a unique understanding of legal and media issues. To ensure professional handling, refer requests for information by the media or the public to the Executive Assistant to the President and refer legal requests to the Legal Department.

Protecting PTL Assets and Brand Name

Each Team Member is entrusted with PTL's assets and honoring that trust is a basic responsibility to each other and to PTL. We must protect PTL assets from loss, damage, misuse or theft. Theft of property, inventory for sale, equipment or money from PTL, vendors or customers will not be tolerated and will be grounds for immediate termination. This includes time theft (i.e. an employee accepts pay for work that they have not actually done). Use of PTL assets for purposes other than PTL business requires prior authorization by appropriate levels of management. Consult your immediate supervisor about the authorization needed for any non-business use of PTL assets.

The trade names and trademarks of Pilot Thomas Logistics, Maxum Petroleum LLC, Pilot Travel Centers LLC, Flying J Inc., Pilot Corporation, Thomas Petroleum, LLC and each of its affiliates have significant value and recognition in our industry. Each Team Member should act in a manner that enhances and does not detract from the value of our trade names and trademarks.

Business Records and Communications

When PTL creates or maintains reports, records and communications, the Team Members are also responsible for the integrity of those records. It is against this *Code* to make false or misleading entries in PTL books or records. All financial reports, sales reports, expense reports, time sheets, accounting records and other similar documents must be true and accurate to the best of your knowledge and belief. If you are uncertain

of the validity of an entry or report, raise your concern to the best source for correcting it, which will most likely be your immediate supervisor. Never allow yourself to be part of a chain of incorrect information. No PTL Team Member should ever destroy or alter any documents or records in response to any investigation, suspected investigation, anticipated litigation, litigation or lawful request, whether internal or external. Please refer any external requests for documents to the Legal Department.

Confidential information regarding PTL's operations and business activities is essential to the conduct of our business. We operate in a very competitive environment and our competitors are intensely interested in obtaining PTL's financial and operating information. Confidential information includes any information that is not common, public knowledge and/or known to competitors, customers, suppliers, and others (including other Team Members of PTL who do not have a valid business reason for obtaining this information). Any Team Member who possesses confidential information shall take all steps necessary to safeguard and protect such information from disclosure.

Disclosure of strategic PTL operating plans including locations where PTL may be building, selling or acquiring facilities and property, should not be made to internal or external parties that are not involved in the projects until construction has begun or a public announcement has been made by PTL.

Employment documentation that is not accurate is strictly prohibited. Falsification of reports regarding: employment applications; absence from work; claims made about injuries while on the job or on company premises; claims made under benefit plans provided by PTL; and falsification of company communications or time sheets **are strictly prohibited** and may be grounds for termination from PTL.

PTL does not permit, under any circumstances, the discussion of future pricing strategy with those outside PTL. Please refer to PTL's separate Policy Regarding Antitrust Compliance and Policy Regarding Customer Communications for further details.

Conflicts of Interest and Corporate Opportunities

Business decisions and actions on behalf of PTL must be made in the best interest of PTL and must never be influenced by personal considerations or personal or outside relationships. You must never use PTL property, information or its position to create personal or family benefit. A conflict of interest may occur when: (1) family members or close personal friends of a Team Member are involved in business matters with PTL; (2) Team Members within PTL are close personal friends or family members, and to the extent that such relationship interferes with sound business judgment being exercised by one or more of the involved Team Members; (3) when a Team Member or a Team Member's family member has a direct or indirect personal or financial interest in any business issue that is under consideration; (4) when outside business interests, or "moonlighting" interferes with a Team Member's ability to do his or her job to the satisfaction of PTL; and (5) when a Team Member enters into a business or personal

relationship, including fraternization, unrelated to PTL business, with a vendor of PTL or someone who works with or for such vendor, to the extent such relationships affect a Team Member's ability to make sound business decisions with regard to such vendor or a competing vendor.

A Team Member should never attempt to become involved in a business that may compete with PTL nor attempt to acquire an interest in property or other assets in which PTL might reasonably be expected to have an interest, without first offering the opportunity to PTL.

Each Team Member must annually disclose to his or her supervisor all potential conflicts of interest as listed above, including those where even the appearance of a conflict of interest may exist. Disclosure and discussion are the best ways to protect against and deal with conflicts of interest.

Fair Dealing

Each Team Member must always deal fairly with PTL customers, competitors, business partners, and employees in pursuing business opportunities. Team Members should never manipulate, abuse privileged or confidential information, misrepresent material facts or use any other unfair practice to gain an unfair advantage.

Purchasing Practices

All purchasing decisions will be based on the best value realized by PTL and in alignment with our business standards and goals. Important components of purchasing include competitive bids, partnering arrangements, incentive-based contracts, quality verification, confirming the legal and financial condition of the supplier and avoiding personal conflicts such as dealing with family members or friends of PTL Team Members. The Conflict of Interest Section above should be considered in all purchasing decisions.

If you have been entrusted with a PTL Credit Card, Purchasing Card or PTL Travel Card, you are bound by the respective card's terms and agreements. The use of the Purchasing Card for purchase of personal items is against PTL policy and makes you subject to disciplinary action, up to and including termination.

Computer Applications and Software

The following four directives apply to all computer and electronic systems owned and installed by PTL for the express purpose of assisting us in the efficient operation of our facilities and Corporate Offices.

System Integrity

Hardware, peripheral attachments, and all installed software on electronic systems owned by PTL may not be modified, added to or deleted without the express permission of Technology Services, the Division Director or the Region Manager in consultation with Technology Services. At no time may a PTL Team Member use, or allow to be used, any personal hardware or software on any PTL electronic systems.

No software program including, but not limited to, audio cd's, internet provider software or screen savers may be copied or transferred from PTL electronics systems under any circumstances. No additional communications programs such as on-line or Internet access software may be installed on any PTL electronic system. PTL telephone access lines may not be used to transmit or receive any data other than authorized PTL business-based information.

All PTL electronics systems must maintain the original desktop configurations, properties or "ini." files in order to allow the system to function properly.

System Security

All data entered and stored on PTL electronic systems, hard drives and flash drives is the property of PTL and is considered proprietary and confidential. Data stored on these systems is to be treated as such and reasonable steps must be taken in order to protect the information from unnecessary loss, improper modification or damage.

All data entered and stored on PTL electronic systems must be "backed up" or saved on a daily basis. Failure to save this data can result in a serious loss of information in the event of an equipment failure. If a loss of operational data is caused by an individual's negligent failure to save data on a daily basis, it may be cause for disciplinary action, up to and including termination.

Similarly, electronic systems must be protected from software virus infections. Back-office systems must operate the anti-virus program at all times. If not a back-office system, operations managers must conduct a virus scan as directed by PTL's Help Desk.

In order to protect the confidentiality of PTL data, as well as to deter the introduction of outside virus infections, electronic data may not be transferred from one operations facility to another without the prior approval of the Manager of Operations Technology, the Division Director, and the Region Manager.

Personal Use of PTL Technology

The use of PTL Technology to view or store pornography or visiting any other sites that create a hostile or sexually charged workplace is strictly prohibited. "Surfing" the world-wide web during work hours is prohibited. It amounts to time abuse and subjects PTL technology to viruses and spyware. The use of PTL Technology to engage in online gambling is also strictly prohibited. E-mail and Voicemail should not be utilized

for personal purposes such as, but not limited to: outside business ventures; political or religious causes; or social media. This policy will be treated like all other PTL policies, and non-compliance will result in the appropriate disciplinary action, up to and including termination of employment.

E-Mail Policy

The e-mail system (which includes the Internet access and Outlook/Microsoft Exchange Servers) is the property of PTL. PTL reserves the right to review, audit, intercept, access, disclose, or handle accordingly all messages composed, sent and received on the e-mail system at any time for any purpose. The contents of any Team Member's e-mail may be disclosed to PTL management without the permission of the Team Member when such disclosure is properly authorized and doing so is for a legitimate business purpose. However, unauthorized access of another employee's electronic mail is strictly prohibited.

Be selective when addressing e-mail and using DISTRIBUTION GROUPS. As more and more PTL employees gain access to Outlook/Microsoft Exchange Servers and Intra-Company e-mail, it becomes increasingly important to use the e-mail functionality in the most appropriate way possible. In an effort to use e-mail more efficiently, employees should limit message recipients to those on a "need-to-know" basis or an interest in the information provided in the message. Blast emails regarding personal items (such as the sale of tickets for an event by a PTL Team Member) are strongly discouraged, as such emails disrupt the efficiency of all PTL Team Members. If in doubt, ask your supervisor on whether a "blast" email to numerous Team Members is appropriate.

An employee should answer "no" to enabling macros if they receive a file that contains a macro. First, open the file, and view its contents without enabling the macros. Once it is determined that the macros are needed, close the file then reopen the file with the macros enabled. Macros can sometimes contain damaging viruses. If an employee has a question whether or not a macro should be enabled or may be damaging please contact the Helpdesk or Desktop Support.

Refrain from creating, sending, or forwarding "chain letters" or jokes in e-mail. If an employee receives an unsolicited "chain letter" or joke from an external or internal user, delete it. The content of e-mail can be extremely damaging to PTL if it contains statements that you, as a Team Member of PTL, would not be proud of if it was published on the front page of your hometown newspaper. Please be mindful of that standard when creating, sending or forwarding e-mail.

Please note that PTL employees have no privacy rights when it comes to use of PTL hardware, software or technology.

Social Media Policy

Employees may maintain personal websites or blogs on their own time (i.e. while not on the PTL time clock) using their own facilities. Team Members must ensure that social media activities do not interfere with their work. In general, PTL considers social media activities to be personal endeavors, and employees may use them to express their thoughts or promote their ideas, on their own time and with their own devices, as long as they do not conflict with company policies or business. In addition, all team members should be aware that anything posted on social media is open to the public. As such, violations of the Social Media Policy, including but not limited to posting financial, confidential or proprietary information about PTL, defamatory, discriminatory or illegal remarks, falsely representing PTL or violating state, federal or local law can result in discipline of the team member, up to and including termination.

The Letter and Spirit

The standards of conduct set forth in this *Code* shall serve as our minimum acceptable level of conduct. As with anything else at PTL, we strive for a higher standard. Knowing when something just doesn't feel right is often our best clue to not go any further with our actions. PTL cannot reproduce and distribute every law or rule that exists everywhere we do business. While this *Code of Business Conduct* is framed by our experience with U.S. law; the principle of doing the right thing and following applicable law applies to every community in which we do business. We must all grasp the intent and the *spirit* of our *Code of Business Conduct* and seek advice and counsel whenever we are uncertain about our choices of action.

<u>Getting Help</u>

Questions

If you have questions about policies, practices or our *Code of Business Conduct,* talk to your immediate supervisor, manager or Human Resources Manager. If for some reason you are uncomfortable speaking with your immediate supervisor, please call the 1-844-814-5933 number listed below. Your concerns and issues expressed to the Ethics Hotline will be looked into and your identity kept anonymous, unless you choose to identify yourself. Please call immediately upon the development of a concern - time may be of the essence in avoiding a bigger problem.

Other Resources

You can also seek advice and counsel from PTL's functional departments such as Human Resources, Finance and the Legal Department. Your reporting will be held in the strictest of confidence by trained professionals in these departments.

Ethics Hotline

The Ethics Hotline is an additional resource for anonymous advice or discussion on workplace behavior and ethics. The Ethics Hotline phone number is: **1-844-814-5933** (Callers may call anonymously). If requested by the Team Member, the Ethics Hotline will treat the Team Member's identity and the alleged illegal or unethical conduct as confidential information, and will disclose the identity of such source **only as absolutely necessary** to comply with legal requirements and to investigate the reported conduct. Those informed of the Team Member's identity shall be made aware of the need for confidentiality. If you call anonymously, you will be provided a number to use in identifying your inquiry. The group of outside professionals who answer your call will work with you to get the information PTL needs to address your concern. If you are aware of any ethical issue or irregularity, don't attempt to handle an investigation on your own. Ask for help from Human Resources, Finance, Auditing, the Legal Department, or call the Ethics Hotline. Who you talk to is not as important as you talking to *somebody*. Be confident that PTL will stand behind our *Code of Business Conduct* and stand behind those who raise issues in good faith.

Reporting Illegal or Unethical Conduct

The Ethics Hotline also enables Team Members to report unethical or illegal acts, or suspicion of unethical or illegal acts. PTL will not allow retaliation against any Team Member who reports in good faith concerns about compliance with the law, compliance with this *Code* or other ethical concerns. Human Resources coordinates the resolution of all calls. This may includes the involvement of Human Resources, Finance, Audit, the Legal Department and departmental supervisors as necessary. Should any Team Member become aware of any issue concerning the financial or ethical integrity of

PTL, including questionable accounting or auditing matters, they should bring it to the attention of management. If requested by the Team Member, the Internal Audit Office will arrange for the confidential, anonymous submission to the Board of Managers Audit Committee any concerns regarding questionable accounting or auditing matters.

Our Values

No single document can list and explain every question or business practice. Remember the words found throughout our *Code of Business Conduct* like *trust, respect, dignity* and *honesty.* These values form the foundation for good decisions.

Questions?

Talk to your supervisor or call the Human Resource, Finance, or Legal Departments.

Pilot Thomas Logistics

Because of the many factors involved, every scenario cannot be itemized in this* Code of Business Conduct. *When in doubt, seek the guidance of your supervisor or call the Ethics Hotline.

Reporting Unethical Conduct?

Have Questions or Need Advice?

Get Help

1-844-814-5933

Pilot Thomas Logistics

Acknowledgement

I acknowledge that I have received a copy of the PTL's Code of Business Conduct.

My signature below certifies that I have read, understand and agree to comply with the policies as set forth in the PTL Code of Business Conduct, as well as the other policies that are outlined in the PTL Team Member Handbook. I understand that it is my responsibility to 1) comply with PTL policies, 2) report any violation of PTL's Code of Conduct, and that I will not be retaliated against for any legitimate non-abusive reporting of violations or ethical issues.

____

Team Member Signature   Date

____

(Print Name of Team Member)

____

Employee Number

Haul Safe

Thomas Fuels, Lubricants and Chemicals, Inc.

HAUL SAFE

Employee Safety Manual

Four Points of "Think Incident Free"

Training

State of Mind

Planning

Proper Tools and Equipment

Thinking Before Acting Is The Key To Working Safely

Revised 1/27/2009

HAUL SAFE

Table of Contents

- ❑ Emergency Response Numbers
- ❑ TP - Safety Policy
- ❑ TP – Mission Statement
- ❑ Management Commitment & Employee Involvement
- ❑ Employee Acknowledgement
- ❑ Responsibilities & Duties
  - Management
  - Safety Coordinators
  - Employees
- ❑ Rules of Conduct
- ❑ **Operating Policies**
- ❑ Harassment in the Workplace
- ❑ Drug & Alcohol – Policy Statement
- ❑ Motor Vehicle record Policy
- ❑ Driving Policy
- ❑ Vehicle Usage Policy
- ❑ Return-To-Work & Light Duty Job Policy
- ❑ Safety Meetings
- ❑ **General Safety**
  - a. General Safety Guidelines
  - b. Organization of Safety
  - c. Employee General Conditioning
  - d. Health and First Aid
  - e. Emergency Evacuation Procedures
  - f. Personal Behavior
  - g. Fire Protection and Emergency Equipment
- ❑ Fire Extinguisher Safety (page 47)
- ❑ Flammable& Combustible Liquids Safety (page 48)
  - h. Housekeeping
  - i. Dress for work areas (excluding offices)
  - j. Hazardous Work Permit
  - k. Confined Space
  - l. Commercial Vehicles
  - m. Rigging
- ❑ Job Safety Analysis (JSA)
- ❑ Fleet Safety
- ❑ Safe Backing
- ❑ Forklift Safety
- ❑ Fire Extinguisher Safety
- ❑ Flammable & Combustible Liquids Safety
- ❑ Compressed Air Safety
- ❑ Compressed Gases Safety
- ❑ Electrical safety
- ❑ Lifting Safety
- ❑ Ladder Safety
- ❑ Office Safety
- ❑ **Hazard Recognition**

HAUL SAFE

Table of Contents

- ❑ **Accident Investigations Process**
- ❑ Investigation Procedure
- ❑ Incident Reporting Procedures
- ❑ Medical/Non-Medical Reporting
- ❑ Customer Incident Reporting Procedures
- ❑ Accident / Incident Action Plan
- ❑ **PPE**
  - Eye Protection
  - Hand Safety
  - Foot Protection Safety
  - Hearing Safety
- ❑ **Environmental Protection**
  - Container Handling and Disposal
  - SPCC (Spill Prevention, Containment and Countermeasure Plans)
  - Waste Management
  - Spill Reporting
  - Clean Up
- ❑ **Truck Loading / Unloading Procedures**
- ❑ **HAUL SAFE**
  - Program Procedures
  - Transport / Trailer
  - Bobtail
- ❑ Bulk Oil Plant Safety
  - Sampling
  - Receiving Bulk Product(s)
- ❑ **HAZCOM**
  - Written Hazard Communication Program)
- ❑ Employee Education & Training
- ❑ Safety Incentives & Awards
- ❑ Short Service Employee Program
- ❑ **SPILL PREVENTION**
  - Spill Emergency Planning
  - Procedures
  - Chemical Hazard Emergency
  - Lock Out / Tag Out
- ❑ **FORMS**
  - **Employer's 1st Rpt of Injury**
  - **Customer Acc/Incident**
  - **Near Miss**
  - **Vehicle Accident**
  - **Spill Rpt**
  - **Hazard Recognition**
  - **Job/Behavior Observation**
  - **JSA**
  - **Waste Gathering**
  - **Safety Communication**
  - **Accident / Incident Action Plan**
  - **Safety Meeting Sign-In Sheet**
- ❑ **REFERENCE GUIDE**
- ❑ **Rigging**
- ❑ **Ropes, Slings, Chains & Hooks**
- ❑ **Strapping Table**

Emergency Response
Telephone Numbers

Emergency Contact ____________________________________

Alternate Contact ____________________________________

Department of Transportation __________________________

Environmental Protection Agency ______________________
(Department of Natural Resources)

Fire Department ______________________________________

Police Department ____________________________________

County Sheriff's Department ___________________________

Ambulance ____

Hospital ____

ChevronTexaco Operations Supervisor __________________

Tow Truck Service ____________________________________

Vacuum Truck Service _________________________________

Backhoe Operator _____________________________________
(Trained/Qualified in Hazardous Materials)

Management Commitment & Employee Involvement

- Employee Acknowledgement
- Health, Safety and Environmental – Policy Statement
- Responsibilities & Duties
  - Management
  - Warehouse Managers / Safety Coordinators
  - Employees
- Accountability
  - Offense Schedule
  - Safety Violation Warning Notice
- Safety Meetings / Training

Employee Acknowledgement of Safety Process

I have read a copy of the Thomas Fuels, Lubricants and Chemicals, Inc. Safety, Health and Environmental Process. It has been discussed with me and I understand its contents.

If I encounter safety problems in the course of my work, which were not covered by the hand book or my Supervisor, I will discuss them with my Supervisor.

______________	__________________________
Date	Employee
______________	__________________________
WH/Location	Supervisor

Acknowledgement

I, ________________________________ (name) hereby

acknowledge receipt of the **Thomas Fuels, Lubricants and Chemicals, Inc.** Safety Process.

______________ ______________________

Date Signature

(This portion to be retained by employee)

....

Acknowledgement

I, ________________________________ (name) hereby

acknowledge receipt of the **Thomas Fuels, Lubricants and Chemicals, Inc.** Safety Process.

______________ ______________________

Date Signature

(This portion to be retained by employer in employee personnel file)

Mission Statement

VISION

Thomas Fuels, Lubricants and Chemicals, Inc. is committed to becoming: **The preferred Supplier of Wholesale Fuels, Lubricants and Chemicals in our Areas of Operation.**

MISSION

We will accomplish this by:

High Performance Organization;

- bringing out the best in our people through capable management, training, and performance based recognition.

Quality Products

- Committing to provide quality products to our customers

Value-Added Marketing & Service

- Providing value-added solutions for our customers

Financial Strength

- Being highly profitable and continually investing in our business

Passion To Win

- Relentlessly pursuing our vision

Safety Policy Statement

In order to maintain the recognized safety standards desired, it is company policy of **Thomas Fuels, Lubricants and Chemicals, Inc.** to actively pursue an accident prevention program through all levels of our company. Training in hazard recognition and control is essential to help prevent the occurrence of accidents. The following is the accident prevention program that is to be supported and maintained by all employees.

Thank you for your cooperation.

As a member of our organization you automatically accept a moral obligation to your fellow workers and an economic obligation to the company to see that operations under your care, custody and control are carried out in a safe and efficient manner.

Supervisors, Operations Managers, Office Managers and employees all need information and training to ensure they are aware of their responsibilities and understand our company's goals for an injury free workplace. Training in hazard recognition and control is essential to help prevent the occurrence of accidents.

As a company, we reserve the right to make any changes at any time by adding to, deleting, or changing any existing policy for the improvement of procedures.

With your support, we can be successful.

____

William L. Thomas
President