



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION I  
5 Post Office Square, Suite 100  
Boston, Massachusetts 02109-3912

Steven C. Schlang  
Enforcement Counsel  
617-918-1773 (phone)  
617-918-1809 (fax)

RECEIVED

JUN 29 2012

EPA ORC  
Office of Regional Hearing Clerk

June 29, 2012

Wanda I. Santiago  
Regional Hearing Clerk  
U.S. Environmental Protection Agency  
Region 1  
5 Post Office Square  
Mail Code – ORA18-1  
Boston, Massachusetts 02109-3912

Re: In the Matter of: 5N Plus (formerly MCP Metal Specialties), Inc.  
Docket Number: EPCRA-01-2012-0058

Dear Ms. Santiago,

Please find enclosed for filing an original and one copy of an Administrative Complaint regarding the above-matter.

Please do not hesitate to contact me should you have any questions regarding the enclosed.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven C. Schlang".

Steven C. Schlang

cc: Chris Rascher  
Jim Gaffey  
Michael Falso, President – 5N Plus

**In the Matter of: 5N Plus, Inc.**  
**Docket Number EPCRA-01-2012-0058**

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Administrative Complaint has been sent to the following persons on the date noted below:

Original and one copy  
hand delivered:

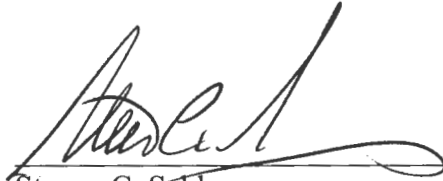
Wanda Santiago  
Regional Hearing Clerk (RAA)  
U.S. EPA, Region I  
One Congress Street, Suite 1100  
Boston, MA 02114-2023

Copy by Certified Mail-  
Return Receipt Requested

Michael Falso, President  
5N Plus, Inc.  
515 Commerce Drive  
Fairfield, CT 06825

Date:

6/29/12



Steven C. Schlang  
Office of Environmental Stewardship U.S.  
Environmental Protection Agency  
Region I  
Five Post Office Square, Suite 100  
Mail Code OES04-4  
Boston, MA 02109-3219  
tel: (617) 918-1773  
fax: (617) 918-0773

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 1 – NEW ENGLAND

RECEIVED

JUN 29 2012

EPA ORC  
Office of Regional Hearing Clerk

\_\_\_\_\_  
IN THE MATTER OF )  
)

5N Plus (formerly MCP Metal )  
Specialties), Inc. )  
515 Commerce Drive )  
Fairfield, CT 06825 )

Proceeding under Section 325(c) of )  
Title III of the Superfund )  
Amendments and Reauthorization Act, )  
42 U.S.C. § 11045(c) )  
)  
\_\_\_\_\_ )

Docket No: EPCRA-01-2012-0058

**COMPLAINT AND NOTICE OF  
OPPORTUNITY FOR HEARING**

**I. STATEMENT OF AUTHORITY**

1. The United States Environmental Protection Agency (“EPA”) issues this administrative Complaint and Notice of Opportunity for Hearing pursuant to Section 325(c) of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 11045(c), also known as the Emergency Planning and Community Right-to-Know Act of 1986 (“EPCRA”). This action is subject to 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, 40 C.F.R. §§ 22.1-22.52. The authority to issue this Complaint has been delegated to the Legal Enforcement Manager of the Office of Environmental Stewardship, United States Environmental Protection Agency, Region 1 (“Complainant”).

2. The Complaint notifies 5N Plus, formerly MCP Metal Specialties, Inc., (“Respondent” or “5N Plus”), that EPA intends to assess civil penalties for Respondent’s failure to:

- (a) timely submit Tier II hazardous chemical inventory forms to the proper authorities, in violation of Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), and its implementing regulations at 40 C.F.R. Part 370; and
- (b) timely provide toxic chemical release inventory reporting forms (“TRI”) to EPA and the State of Connecticut in violation of Section 313(a) of EPCRA, 42 U.S.C. § 11023(a), and its implementing regulations at 40 C.F.R. Part 372.

3. The Notice of Opportunity for Hearing describes Respondent’s option to file an Answer to the Complaint and to request a formal hearing.

## **II. APPLICABLE STATUTES AND REGULATIONS**

### EPCRA Statutory and Regulatory Authority

4. In accordance with Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), owners and operators of facilities that are required to prepare or have available Material Safety Data Sheets (“MSDSs”) for hazardous chemicals under OSHA (“hazardous chemicals” or “hazardous chemicals under OSHA”) must prepare and submit an emergency and hazardous chemical inventory form (“Tier I” or “Tier II” form) to the local emergency response commission (“LEPC”), the state emergency response commission (“SERC”), and local fire department. Tier I or Tier II forms must be submitted annually on or before March 1 and are required to contain chemical inventory information with respect to the preceding calendar year. Additionally, Section 312(b) of EPCRA, 42 U.S.C. § 11022(b), authorizes EPA to establish minimum

threshold levels of hazardous chemicals for the purposes of Section 312(a) of EPCRA, 42 U.S.C. § 11022(a).

5. The regulations promulgated pursuant to Section 312 of EPCRA, 42 U.S.C. § 11022, are found at 40 C.F.R. Part 370.

6. In accordance with Section 312(b) of EPCRA, 42 U.S.C. § 11022(b), 40 C.F.R. § 370.10(a) establishes minimum threshold levels for hazardous chemicals for the purposes of Part 370.

7. Under 40 C.F.R. §§ 370.20, 370.40, and 370.44, the owner or operator of a facility that has present a quantity of a hazardous chemical exceeding the minimum threshold level must prepare and submit a Tier I or Tier II form to the LEPC, SERC and local fire department. Forty C.F.R. § 370.45 requires that Tier I or Tier II forms be submitted annually on or before March 1 and are required to contain chemical inventory information with respect to the preceding calendar year. The LEPC, SERC or local fire department may request that a facility submit the more comprehensive Tier II form in lieu of the Tier I form. Connecticut requires the Tier II form.

8. In accordance with Section 313(a) of EPCRA, 42 U.S.C. § 11023(a), owners or operators of a facility subject to the requirements of Section 313 must prepare and submit annually, no later than July 1 of each year, a toxic chemical release form for each toxic chemical listed under 40 C.F.R. § 372.65 that was manufactured, processed, or otherwise used during the preceding calendar year at the facility in quantities exceeding the thresholds established under Section 313(f) of EPCRA, 42 U.S.C. § 11023(f) and 40 C.F.R. Part 372. Under Section 313(a), each TRI form is required to be submitted to EPA and to the state in which the subject facility is located.

9. The regulations promulgated pursuant to Section 313 of EPCRA, 42 U.S.C. § 11023, are found at 40 C.F.R. Part 372.

10. Forty C.F.R. § 372.22 provides that owners or operators of facilities that have 10 or more full-time employees; that are in the Standard Industrial Classification (“SIC”) codes or North American Industry Classification System (“NAICS”) codes specified in 40 C.F.R. §§ 372.22(b) and 372.23; and that manufactured, processed, or otherwise used a toxic chemical listed under 40 C.F.R. § 372.65 in a quantity exceeding the established threshold during a calendar year are required by 40 C.F.R. § 372.30 to submit a Form R for each of these substances for that year. The thresholds for reporting are found in 40 C.F.R. §§ 372.25 and 372.28. Unless otherwise specified under 40 C.F.R. § 372.28, generally the thresholds for reporting are 25,000 pounds for chemicals that are “manufactured” or “processed” and 10,000 pounds for chemicals that are “otherwise used.” Pursuant to 40 C.F.R. § 372.27, if the amount manufactured, processed, or otherwise used is less than or equal to 1,000,000 pounds and the reportable amount is less than or equal to 500 pounds per year, the owner or operator is not required to submit the Form R for such chemical under § 372.30, but may instead submit a certification statement that contains the information required in 40 C.F.R. § 372.95 before July 1 of each year (commonly referred to as a “Form A”). This alternate reporting option is not available for all chemicals, including lead, which is listed in 40 C.F.R. § 372.28 as a chemical of special concern with a lower reporting threshold. Hereinafter, Form As and Form Rs collectively shall be referred to as “TRI Forms.”

11. Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), as amended by EPA’s 2008 Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, promulgated in accordance with the Debt Collection Improvement Act of 1996 (“DCIA”), 31 U.S.C. § 3701, provides for

the assessment of civil penalties for violations of Section 312(a) and 313(a) of EPCRA, 42 U.S.C. §§ 11022(a) and 11023(a), in amounts of up to \$32,500 per day for violations occurring between March 15, 2004 and January 12, 2009, and up to \$37,500 per day for violations occurring after January 12, 2009.

### **III. GENERAL ALLEGATIONS**

12. Respondent operates a facility located at 515 Commerce Drive in Fairfield, Connecticut (the “Facility”), where Respondent produces, among other items, crystalline gallium trichloride from gallium metal and chlorine gas. The gallium trichloride is sold for use in LED displays. Respondent also has other manufacturing processes, which use antimony, bismuth, chlorine, lead, selenium and tin, among other chemicals.

13. Respondent is a corporation organized under the laws of the State of California. As a corporation, Respondent is a “person” within the meaning of Section 329(7) of EPCRA, 42 U.S.C. § 11049(7), 40 C.F.R. § 370.66, and 40 C.F.R. § 372.5 against whom a civil penalty may be assessed under Section 325(c) of EPCRA, 42 U.S.C. § 11045(c).

14. Respondent is an owner or operator of a “facility,” as that term is defined by Section 329(4) of EPCRA, 42 U.S.C. § 11049(4), 40 C.F.R. § 370.66, and 40 C.F.R. § 372.3.

a. EPCRA Section 312

15. On June 20, 2011, James Gaffey and Andrew Meyer, two EPA Region 1 inspectors, conducted an inspection at the Facility to gather information regarding Respondent’s compliance with EPCRA 312 (“EPCRA 312 Inspection”). During the EPCRA 312 Inspection, the EPA inspectors met with Robin Wilcox (Respondent’s EHS/Business Development Manager, Michael Falso (Respondent’s president), and Kimberly Deren (Respondent’s consultant).

16. During the EPCRA 312 Inspection, Respondent's representatives told the EPA inspectors that Respondent had not submitted Tier II forms to the local fire department, LEPC or SERC until February 2011. Shortly after the EPCRA 312 Inspection, Respondent's environmental consultant, Arcadis, forwarded supporting documentation to EPA showing that a Tier II report for 2010 had been filed in February 2011.

17. According to documents submitted by Respondent, the following chemicals were present at the Facility during 2010. The amounts referenced are the maximum amounts in pounds ("lbs.") present at the Facility at any one time during 2010:

Chlorine	2400 pounds
Gallium Trichloride	8592 pounds
Lead	207,497 pounds

18. Other documents submitted by Respondent on October 18, 2011 showed that the facility had a maximum amount of 8,592 pounds of gallium trichloride at any one time in 2010. Respondent failed to timely file a Tier II Form including gallium trichloride.

19. The substances mentioned in Paragraphs 17 and 18 are "hazardous chemicals" as defined under 29 C.F.R. § 1910.1200(c) and all exceed the minimum threshold levels set forth in 40 C.F.R. § 70.10(a). Additionally, two of the chemicals, chlorine and gallium trichloride, are considered "extremely hazardous substances," pursuant to 40 C.F.R. Part 355. In accordance with 40 C.F.R. 370.10(a), extremely hazardous substances ("EHS") are subject to a 500 pound reporting quantity or the Threshold Planning Quantity ("TPQ") in Appendices A and B of 40 C.F.R. Part 355, whichever is lower. The TPQ for chlorine is 100 pounds and the reporting quantity for gallium trichloride is 500 pounds.



20. Prior to the February 2011 Tier II filing, Respondent had not submitted any Tier II report for any chemicals described in Paragraph 17 above for any years prior to 2010, although according to information submitted to EPA by Respondent, the following chemicals were present in 2008 and 2009 in the following maximum amounts at any one time:

**2008**

Chlorine – 2,400 pounds  
Gallium trichloride – 8,592 pounds  
Lead – 207,497 pounds

**2009**

Chlorine – 2,400 pounds  
Gallium trichloride – 8,592 pounds  
Lead – 207,497 pounds

21. At all times relevant to the violations cited herein, Respondent was required under OSHA to prepare or have available on-site MSDSs for the hazardous chemicals listed in Paragraph 19 above.

22. As the operator of a facility that was required under OSHA to prepare or have available MSDSs for hazardous chemicals, identifying which hazardous chemicals were present at the Facility in quantities exceeding the Minimum Threshold Limit (“MTL”), Respondent was subject to Part 370. In particular, the presence of the hazardous chemicals listed in Paragraphs 17 and 19, and their associated quantities, required the company to submit complete and accurate Tier II forms to the LEPC, SERC, and local fire department by March 1 of 2008, 2009 and 2010 with respect to chemical inventory in the previous calendar year.

b. EPCRA Section 313

23. On November 7, 2011, Christian Rascher, an EPA inspector, conducted an inspection at the Facility to determine whether Respondent had submitted TRI Forms in compliance with the requirements of EPCRA 313 ("EPCRA 313 Inspection).

24. During the EPCRA 313 Inspection and after reviewing documents submitted by Respondent showing chemical purchases, the EPA inspector determined that Respondent had failed to submit TRI reports for lead during the years 2008, 2009, and 2010. In addition, Respondent had failed to submit a TRI report for selenium in 2010.

25. During the time period subject to the allegations in this Complaint, Respondent employed more than 10 full time employees.

26. During the time period subject to the allegations in this Complaint, Respondent was classified in NAICS codes 331492 and 325188, (codes for secondary processing of other nonferrous metals and all other basic inorganic chemical manufacturing, respectively) which, pursuant to 40 C.F.R. §§ 372.22(b) and 372.23, are codes subject to EPCRA Section 313 reporting.

27. During reporting year 2008, Respondent manufactured or processed approximately 118,300 pounds of lead, a chemical listed under 40 C.F.R. § 372.65. Pursuant to 40 C.F.R. §§ 372.25 and 372.28, the threshold reportable quantity for the manufacture or processing of this chemical is 100 pounds. The 118,300 pounds of lead is more than 10 times more than the reporting threshold for EPCRA Section 313.

28. During reporting year 2009, Respondent manufactured or processed approximately 77,940 pounds of lead. The 77,940 pounds of lead is more than the reporting threshold for EPCRA Section 313.

29. During reporting year 2010, Respondent manufactured or processed approximately 115,280 pounds of selenium, a chemical listed under 40 C.F.R. § 372.65. Pursuant to C.F.R. §§ 372.25 and 372.28, the threshold reportable quantity for the manufacture or processing of this chemical is 25,000 pounds. The 115,280 pounds of selenium is more than 4 times greater than the reportable threshold of 25,000.

#### **IV. VIOLATIONS**

##### **COUNT 1 - EPCRA 312 VIOLATIONS: Failure to Timely Provide Tier II Hazardous Chemical Inventory Forms to the Proper Authorities**

30. Complainant realleges and incorporates by reference Paragraphs 1 through 29 of this Complaint.

31. In May 2007, Respondent first notified the LEPC of the presence of chlorine at the Facility, an EHS, in amounts exceeding 100 pounds, in accordance with the emergency planning provisions of 40 C.F.R. Part 355, Subpart B. However, Respondent failed to file required Tier II hazardous chemical inventory forms, notifying the SERC, LEPC and local fire department of the existence of reportable quantities of hazardous substances, until Respondent filed a Tier II in February 2011 for the year 2010.

32. In its February 2011 Tier II report, Respondent failed to report gallium trichloride.

33. Gallium trichloride is an EHS with a threshold reporting amount of 500 pounds, as set forth in 40 C.F.R. § 370.10(a)(1).

34. According to information submitted to EPA by Respondent, Respondent stored approximately 8,592 pounds of gallium trichloride at the Facility in calendar years 2008, 2009, and 2010. For EPCRA 312 purposes, this amount is over 17 times greater than the threshold reporting amount for gallium trichloride. According to information submitted to EPA by

Respondent, Respondent failed to file Tier II forms for gallium trichloride for those calendar years.

35. Chlorine is an EHS with a threshold reporting amount of 100 pounds, as set forth in 40 C.F.R. § 370.10(a)(1).

36. According to information submitted to EPA by Respondent, Respondent stored at 2,400 pounds of chlorine for reporting years 2008 and 2009 but failed to file Tier II forms for chlorine for those calendar years. This amount is over twenty-four times than the threshold reporting amount of 100 pounds.

37. For EPCRA 312 purposes, lead and lead compounds have a threshold reporting amount of 10,000 pounds, as set forth in 40 C.F.R. § 370.10(a)(2)(i).

38. According to information submitted to EPA by Respondent, Respondent stored at least 10,000 pounds of lead or lead compounds during reporting years 2008 and 2009 but failed to file a Tier II for lead for those years.

39. According to information submitted to EPA by Respondent, Respondent stored 207,497 pounds of lead or lead compounds during reporting year 2008. This amount is over twenty times than the threshold reporting amount of 10,000 pounds.

40. According to information submitted to EPA by Respondent, Respondent stored approximately 207,497 pounds of lead or lead compounds during reporting year 2009. This amount is over twenty times greater than the threshold reporting amount of 10,000 pounds.

41. Pursuant to EPCRA Section 312(a), 42 U.S.C. § 11022(a), and 40 C.F.R. §§ 370.20, 370.40, 370.44 and 370.45, Respondent was required to prepare and submit Tier II forms for, at least, gallium trichloride, chlorine, and lead to the SERC, LEPC and local fire department for calendar years 2008 and 2009 on or before March 1 of the next calendar year,

respectively, in order to report the data required by Section 312(d) of EPCRA, 42 U.S.C. § 11022(d), and 40 C.F.R. § 370.42.

42. Respondent failed to submit Tier II forms for gallium trichloride, chlorine, and lead for calendar years 2008 and 2009.

43. Pursuant to EPCRA Section 312(a), 42 U.S.C. § 11022(a), and 40 C.F.R. §§ 370.20, 370.40, 370.44, and 370.45, Respondent was required to prepare and submit a Tier II form to the SERC, LEPC and local fire department for gallium trichloride for the calendar year 2010 on or before March 1 of 2011, in order to report the data required by Section 312(d) of EPCRA, 42 U.S.C. § 11022(d), and 40 C.F.R. § 370.42.

44. Respondent filed a timely Tier II form for calendar year 2010 but failed to include gallium trichloride on its Tier II form, even though the amounts stored at the Facility exceeded the 500 pound reporting level.

45. Accordingly, Respondent violated EPCRA Section 312(a), 42 U.S.C. § 11022(a), and 40 C.F.R. §§ 370.20, 370.40, 370.44, and 370.45, for calendar years 2008, 2009 and 2010.

46. Respondent is therefore subject to an assessment of penalties under Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), and 40 C.F.R. Part 19.

COUNT II - EPCRA 313 VIOLATIONS: Failure to Timely  
File Toxic Chemical Release Inventory Reporting Forms

47. Complainant realleges and incorporates by reference Paragraphs 1 through 46 of this Complaint.

48. During reporting year 2008, Respondent manufactured or processed approximately 118,320 pounds of lead, a chemical listed under 40 C.F.R. § 372.65, in quantities

that exceeded ten times the 100 pound reporting threshold set forth at 40 C.F.R. §§ 372.25 and 372.28.

49. During reporting year 2009, Respondent manufactured or processed approximately 77,930 pounds of lead, quantities that exceeded the reporting threshold level set forth at 40 C.F.R. §§ 372.25 and 372.28.

50. Pursuant to EPCRA Section 313(a), 42 U.S.C. § 11023(a) and 40 C.F.R. § 372.22, Respondent was required to submit a Form R for lead and/or lead compounds to EPA and the State of Connecticut to report the data required by Section 313(g) of EPCRA, 42 U.S.C. § 11023(g), for calendar years 2008, 2009 and 2010 on or before July 1, 2009, 2010, and 2011 respectively.

51. Respondent failed to submit TRI forms for lead or lead compounds by July 1 of the calendar years 2009 and 2010 to EPA and the State of Connecticut, in violation of Section 313(a) of EPCRA, 42 U.S.C. § 11023(a), and 40 C.F.R. § 372.30. The reports were submitted on February 28, 2012.

52. During reporting year 2010, Respondent manufactured or processed 115,280 pounds of selenium, amounts that exceed 25,000 pounds, the reporting threshold level for selenium, set forth at 40 C.F.R. § 372.25.

53. Pursuant to EPCRA Section 313(a), 42 U.S.C. § 11023(a) and 40 C.F.R. § 372.22, Respondent was required to submit a Form R for selenium to EPA and the State of Connecticut to report the data required by Section 313(g) of EPCRA, 42 U.S.C. § 11023(g), for calendar year 2010 on or before July 1, 2011, or alternatively to submit a Form A in compliance with the alternate threshold and certification requirements of 40 C.F.R. §§ 327.27 and 372.95 by such date.

54. Respondent failed to submit a TRI form for selenium by July 1, 2011, to EPA and the State of Connecticut, in violation of Section 313(a) of EPCRA, 42 U.S.C. § 11023(a), and 40 C.F.R. § 372.30 (or alternatively § 372.27). The reports were submitted on February 28, 2012.

55. Respondent is therefore subject to an assessment of penalties under Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), 40 C.F.R. § 372.18, and 40 C.F.R. Part 19.

#### **V. PROPOSED CIVIL PENALTY**

56. Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), authorizes EPA to assess a civil penalty of up to \$25,000 per day of violation for violations of Section 312(a) and 313(a) of EPCRA, 42 U.S.C. §§11022(a) and 11023(a). Pursuant to the DCIA, 31 U.S.C. § 3701, and 40 C.F.R. Part 19, violations that occur between March 15, 2004, and January 12, 2009 are subject to up to \$32,500 per day; and violations that occur after January 12, 2009 are subject to up to \$37,500 per day of violation.

57. In light of the above-referenced findings, EPA seeks to assess total civil penalties of **ninety-three thousand nine hundred dollars (\$93,900)** for the EPCRA Section 312 and 313 violations, as follows:

(a) *EPCRA Section 312:*

58. EPA has determined that there were at least two violations of failing to file a Tier II form on time for the years 2008 and 2009 for gallium trichloride, chlorine, and lead and one violation for failing to file a Tier II form to include information regarding gallium trichloride for the year 2010. The failure to file such reports hampers the ability of federal, state, and local authorities to properly prepare for accidents and chemical releases.

59. The proposed civil penalty for Respondent's violations of EPCRA Section 312 has been determined in accordance with Section 325(c) of EPCRA, 42 U.S.C. § 11045(c). For purposes of determining the amount of any penalty to be assessed, EPA considered the nature, circumstances, extent and gravity of the violations, and with respect to the Respondent, its ability to pay, prior history of violations, degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justice may require. To develop the proposed penalty in this complaint, the Complainant has taken into account the particular facts and circumstances of this case with specific reference to EPA's "Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act" (dated September 30, 1999, as amended by the Penalty Policy Supplements Pursuant to the 2004 Civil Monetary Penalty Inflation Adjustment Rule, dated June 5, 2006) ("ERP"), a copy of which is enclosed with this Complaint. This policy provides a rational, consistent and equitable calculation methodology for applying the statutory penalty factors enumerated above to particular cases.

60. Pursuant to Part V of the ERP, the first stage of calculating an EPCRA Section 312 penalty requires the determination of the "extent" level of the most recent year of the violation and the second stage concerns the "gravity" level of the most recent year of the violation. The "extent" of the violation alleged in Count I was determined to be "Level 1" because Respondent failed to cover all hazardous chemicals present at the Facility in amounts equal to or greater than the reporting thresholds. In 2010, gallium trichloride, an EHS substance, was present at the Facility in amounts at least 17 times the threshold but was not reported on the



Facility's 2010 Tier II. The "gravity" of the violation alleged in Count I was determined to be "Level A" because the of the quantity of EHS.

61. Under the ERP, EPA has discretion to select an amount within the range specified in the appropriate matrix box. Respondent's failure to submit the Tier II form was determined to fall at the high-point of the Level 1-A matrix box, based on the circumstances of the violation, resulting in a penalty of \$37,500. Additionally, EPA seeks penalties for Respondent's additional failures to file Tier II reports for calendar years 2008 and 2009 at \$1500 per year. Accordingly, EPA seeks **forty thousand five hundred** (\$40,500) for Respondent's violation of EPCRA Section 312.

62. After consideration of the Respondent's failure to voluntarily disclose the violations, its lack of a history of prior violations, degree of culpability, and economic benefit, the Complainant proposes no further adjustments to the gravity-based penalty amounts for the Section 312 violations.

(b) *EPCRA Section 313*

63. EPA has determined that there are at least three violations of EPCRA 313 for failing to file a TRI form for lead for calendar years 2008, 2009, and 2010. Additionally, Respondent violated EPCRA 313 by failing to file a TRI form for selenium for calendar year 2010. Failure to report in a timely manner may deprive the community of its right to know about chemicals used, stored, or released near or in the neighborhood that may affect public health and the environment, and may also prevent comprehensive planning by federal, state and local authorities to properly prepare for accidental chemical releases.

64. The proposed civil penalty for Respondent's violations of EPCRA Section 313 has been determined in accordance with Section 325(c) of EPCRA, 42 U.S.C. § 11045(c). For

purposes of determining the amount of any penalty to be assessed, EPA considered the nature, circumstances, extent and gravity of the violations, and with respect to the Respondent, its ability to pay, prior history of violations, degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justice may require. To develop the proposed penalty in this complaint, the Complainant has taken into account the particular facts and circumstances of this case with specific reference to EPA's "Enforcement Response Policy for Section 313 of the Emergency Planning Community Right-To-Know Act and Section 6607 of the Pollution Prevention Act" (dated April 12, 2001) ("313 ERP"), a copy of which is enclosed with this Complaint. This policy provides a rational, consistent and equitable calculation methodology for applying the statutory penalty factors enumerated above to particular cases.

65. Pursuant to the 313 ERP, the first stage of calculating an EPCRA Section 313 gravity-based penalty requires consideration of the "circumstances" of the violation and the "extent" of the violation. Subsequent to this initial determination, EPA must determine whether there are adjustments to be made to the penalty based upon voluntary disclosure, history of prior violation(s), delisted chemicals, attitude, other facts as justice may require, supplemental environmental projects, and ability to pay. The "circumstance" of the violations alleged in Count II for the late reporting of lead for reporting years 2008 and 2009 was determined to be "Level 1" because Respondent failed to submit TRI forms for lead to the EPA and the state TRI database for more than one year after they were due. For lead, a persistent bio-accumulative toxic chemical listed in 40 C.F.R. §§ 372.25 and 372.28, the violations existed at least since 2009. The "extent" of the lead violations alleged in Count II was determined to be "Level B," based on total corporate sales, the number of employees and the amount of chemical over threshold. A Level 1B violation is \$24,080, multiplied by two years.

The “circumstance for the late reporting of selenium for reporting year 2010 was determined to be Level 4, Category II, because the TRI form for selenium was less than one year late. The “extent” of the selenium violations was determined to be “Level C” based on the total corporate sales, the number of employees, and the amount of chemical over threshold. In addition, a per day formula applies to Level 4C violations, yielding a total penalty of \$5129.

The total penalty for EPCRA Section 313 violations was calculated to be \$53,339, rounded to \$53,400.

## **VI. NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

66. Respondent has the right to request a hearing to contest the issues raised in this Complaint. Any such hearing would be conducted in accordance with the Consolidated Rules of Practice, 40 C.F.R. Part 22. Any request for a hearing must be included in Respondent’s written Answer to this Complaint and filed with the Regional Hearing Clerk at the address listed below within 30 days of receipt of this Complaint.

67. In its Answer, Respondent may also: (1) dispute any material fact in the Complaint; (2) contend that the proposed penalty is inappropriate; or (3) contend that it is entitled to judgment as a matter of law. The Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint of which Respondent has any knowledge. If Respondent has no knowledge of a particular factual allegation and so states, the allegation is considered denied. The failure to deny an allegation constitutes an admission of that allegation. The Answer must also include the grounds for any defense and the facts Respondent intends to place at issue.

68. The original and one copy of the Answer, as well as a copy of all other documents which Respondent files in this action, must be sent to:

Wanda Santiago  
Regional Hearing Clerk  
U.S. EPA, Region 1  
5 Post Office Square  
Suite 100 (ORA18-1)  
Boston, MA 02109-3912

69. Respondent should also send a copy of the Answer, as well as a copy of all other documents which Respondent files in this action, to Steven C. Schlang, the attorney assigned to represent EPA and who is designated to receive service in this matter at:

Steven C. Schlang  
Senior Enforcement Counsel  
U.S. EPA, Region 1  
5 Post Office Square  
Suite 100 (OES04-4)  
Boston, MA 02109-3912  
Tel: (617) 918-1773

70. If Respondent fails to file a timely Answer to this Complaint, it may be found to be in default, which constitutes an admission of all the facts alleged in the Complaint and a waiver of the right to a hearing.

## **VII. INFORMAL SETTLEMENT CONFERENCE**

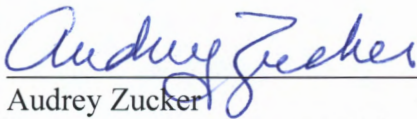
71. Whether or not a hearing is requested upon the filing of an Answer, Respondent may confer informally with EPA concerning the alleged violations, the amount of any penalty, and/or the possibility of settlement. Such a conference provides Respondent with an opportunity to respond informally to the charges, and to provide any additional information that may be relevant to this matter. EPA has the authority to adjust penalties, where appropriate, to reflect

any settlement reached in an informal conference. The terms of such an agreement would be embodied in a binding Consent Agreement and Final Order.

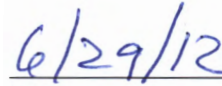
72. Please note that a request for an informal settlement conference does not extend the thirty (30) day period within which a written answer must be submitted in order to avoid a default. To request an informal settlement conference, Respondent or its representative should contact Steven C. Schlang, Enforcement Counsel, at (617) 918-1773.

### **VIII. CONTINUED COMPLIANCE OBLIGATION**

73. Neither assessment nor payment of an administrative penalty shall affect the Respondent's continuing obligation to comply with Sections 312(a) and 313(a) of EPCRA, 42 U.S.C. §§ 11022(a) and 11023(a); and implementing regulations at 40 C.F.R. Parts 370 and 372.



Audrey Zucker  
Acting Legal Enforcement Manager  
Office of Environmental Stewardship  
U.S. Environmental Protection Agency  
Region 1 – New England



Date