12/27/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Mobil Oil Corporation	)	Docket No. EPCRA-91-0120 et al.
	)	
	)	
Respondent	)	

Initial Decision

EPCRA, section 304 - 10-day delay in reporting the release of a reportable quantity of sulfur dioxide to LEPC caused by the absence of monitoring data and the need to construct by calculation and estimates some of the variables for determining the quantity released, found unreasonably long.

EPCRA, section 304 - Facility which had not given prior consideration to the prompt reporting of excess releases of sulfur dioxide from its incinerator stack when facts came to its attention that such a release may have occurred can take no refuge in the technicality that its first rough calculations showed no exceedance.

EPCRA, section 325 - $75,000, penalty assessed when evidence indicated that notice to the LEPC could have been given at least three days earlier than it was given.

Appearances: Charles F. Lettow, Esq.
Julie A. Waddell, Esq.
Cleary, Gottlieb, Steen & Hamilton
1752 N Street, N.W.
Washington, D.C. 20036
Attorneys for Respondent

Debra Binder, Esq.
Joseph McVeigh, Esq.
U. S. EPA, Region II
26 Federal Plaza
New York, NY 10278
Attorneys for Complainant

OPINION

This is a proceeding under the Emergency Planning and Community Right to Know Act ("EPCRA"), section 325(b)(2), 42 U.S.C. 11045(b)(2), to assess a civil penalty of $250,000, against Mobil Oil Corporation for failure to comply with EPCRA'S reporting requirements.[1] The violation charged is the failure to immediately report a release of approximately 450 pounds of sulfur dioxide to the Local emergency planning committee ("LEPC"), as required by EPCRA, section 304, 42 U.S.C. 11004. The penalty of $250,000, is assessed on the grounds that LEPC was not notified of the release until 10 days after it occurred.

Mobil in its answer to the complaint admitted to the release of sulfur dioxide but asserted that it did not have knowledge that the release was in a quantity required to be reported under EPCRA until 10 days after the release occurred. Accordingly, it contended that it had complied with EPCRA's reporting requirements and that, in any event, a penalty of $250,000, was excessive under the circumstances.[2]

---

[1] EPCRA, section 325(b)(2), 42 U.S.C.11045(b)(2), provides for the administrative assessment of a civil penalty of not more than $25,000, per day for each day of violation of EPCRA's emergency notification requirements. The civil penalty is to be assessed and collected in the same manner and subject to the same provisions as civil penalties under the Toxic Substances Control Act ("TSCA"), section 16, 15 U.S.C. 2615. TSCA, section 16, requires that the penalty be assessed by an order made on the record after a hearing in accordance with 5 U.S.C. 554.

[2] The pleadings summarized are those relating to count 1 of the amended complaint in Docket 91-0123. The other charges in the complaint and the charges in the complaints in Dockets 91-0120 and 91-0122, have been settled by consent orders.

A hearing was held on this matter in Washington, D.C. on August 9-12, 1993. Both parties have filed posthearing briefs. This initial decision is rendered on consideration of the entire record and the briefs. Proposed findings of fact inconsistent with this decision are rejected.

EPCRA's Reporting Requirements

EPCRA, section 304, 42 U.S.C. 11004, requires that if there is a release from a facility of a substance listed by the EPA under EPCRA, section 302, 42 U.S.C. 11002, as an extremely hazardous substance, the owner or operator of the facility shall immediately notify (by telephone, radio or in person) the community emergency coordinator of the LEPC for any area likely to be affected by the release and the State emergency response commission ("SERC") of any State likely to be affected by the release.[3] Sulfur dioxide ("SO_2")is listed by the EPA as an extremely hazardous substance, releases of which in excess of one pound must be reported.[4]

The reporting of SO_2 is qualified by the fact that it is not subject to the notification requirements of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), section 103, 42 U.S.C. 9603. Consequently, a release is only to be reported if it is not a federally permitted release, i.e., not a discharge in compliance with a permit issued by the EPA

[3] See 40 C.F.R. 355.40 for the applicable regulations.

[4] 40 C.F.R. Part 355, App. A.

or a State.[5] If the emissions are regulated by a State or Federal permit, releases to be reported are those exceeding in reportable quantities any permit levels established in the permit.[6]

The Facts

Mobil owns and operates an oil refinery at Billingsford Road, Paulsboro, New Jersey, and did so on March 12, 1990.[7] The refinery is a "facility" as defined in EPCRA, section 329(4), 42 U.S.C. 11049(4).[8]

Mobil's refinery contains a Sulfur Recovery Unit Complex which uses sophisticated processes based on the "Claus reaction" to separate and recover naturally-occurring sulfur from the crude petroleum being refined. The Recovery Complex contains two Sulfur Recovery Units ("SRUs"). Each SRU consists of a furnace, a main reaction chamber, a converter, which contains three catalyst beds, condensers for cooling and collecting the elemental sulfur, and auxiliary burners to sustain the reaction process.[9] Fuel gas containing a high percentage of hydrogen sulfide ("H_2S"), sometimes referred to as "acid gas", is processed through the SRU where the H_2S content is reduced by converting it to elemental sulfur and

---

[5] EPCRA, section 304(a)(2), 42 U.S.C. 11004(a)(2); CERCLA, section 101(10), 42 U.S.C. 9601(10).

[6] See Judge Frazier's Interlocutory Order Granting Complainant's Cross-motion for Partial Accelerated Decision, Docket Nos. EPCRA- 91-0120, 91-0122, 91-0123, September 30, 1992.

[7] Stipulation, Transcript of proceedings ("Tr.") 6.

[8] Stipulation, Tr. 6.

[9] RPF No. 8.

water. The final reduction takes place at the tail gas units where the remaining unconverted H_2S as well as some other compounds are emitted into the air. The recovered elemental sulfur is sold.[10]

The Claus reaction, converting H_2S to produce elemental sulfur and water, is aided by a catalyst in the converter. The catalyst consists of aluminum oxide spheres of varying sizes which provide sites at which the Claus reaction can take place. Overtime, hydrocarbons and sulfur compounds deposit in these sites and diminish the efficacy of the reaction process. The refinery addresses this deposition by regenerating the catalyst, typically once a year for each unit.[11]

During a catalyst regeneration, air is introduced into the reaction chamber containing the catalyst and, through a combustion process, the carbon and sulfur deposits are oxidized, or "burned" off the catalyst. Steam and nitrogen are also introduced to aid temperature control. The regeneration progresses through each of the three catalyst beds and roughly takes about a week to complete. The products of combustion, which include SO_2, carbon dioxide and water, are emitted from the Sulfur Complex's incinerator stack.[12]

The release at issue in this proceeding occurred on March 12, 1990, during a catalyst regeneration, or "burn", from the incinerator stack at the refinery's Sulfur Recovery Unit known as

---

[10] Mobil's proposed finding ("RPF") No. 7; Tr. 323, 490-493.

[11] RPF 9.

[12] Tr . 326, 380-383.

"SRU-3."[13]

Mobil's air emissions from incinerator stack at SRU-3 are subject to state regulatory requirements and are governed by an operating permit. Under the state regulatory requirements and the permit, emission limits of SO_2 are set at 15,000 parts per million by volume at standard conditions and 540 pounds per hour. A third limitation is that at any instance the maximum mass emission in pounds per hour shall not exceed twice the allowable emission.[14]

According to Mobil, there are no monitoring requirements for SO_2 emissions from the incinerator stack specified by the New Jersey regulations or permit.[15]

The discharge of SO_2 from the incinerator stack for SRU-3 in quantities in excess of reportable quantities occurred on March 12, 1990, between 10:00 am and 12:00 noon.[16]

On or about 12:00 noon on that date Mobil received an odor and nuisance complaint stemming from five persons who were working

---

[13] Tr. 500-501.

[14] Tr. 6; New Jersey Regulations on Air Pollution From Sulfur Compounds ("NJAC"), Respondent's Exhibit (RX) 23, sections 7:27-7.2(c)2, 7:27-72(r), 7:27-7.2.

[15] Tr. 365. Mobil, however, does monitor the SO_2 concentrations in the incinerator stack but not the flow. Tr. 367.
Mobil also asserts that there are no federal air regulatory requirements applicable to the incinerator stack. Tr. 327. Presumably, this is in reference to any limitations on SO_2 emissions imposed under the Clean Air Act, 42 U.S.C. sections 7401-7671q . Accepting this as true for the purpose of this decision, there are still reporting requirements under EPCRA with respect to SO_2 emissions.

[16] Complainant's Exhibit (CX) 3.

nearby at a drum storage area.[17] Richard Rodack, at that time Mobil's Environmental Compliance Supervisor at the refinery, was notified of the complaints.[18] Upon being notified, Mr. Rodack, as he stated, had to make two determinations: First, whether or not the incident had the potential to cause citizens' complaints or odor complaints from people outside the refinery. Second, Mr. Rodack had to determine whether or not a release of a reportable quantity under SARA had taken place.[19]

Since Mr. Rodack believed that the release had the potential to cause citizens' complaints, he notified the State Emergency Response Commission ("SERC") at 1:29 pm.[20]

With respect to determining whether or not a release of reportable quantities under SARA had taken place, while Mobil did not have any monitoring device recording releases of SO_2 from the incinerator stack in mass (pounds released), it did have the data from which this could be calculated.

All parties agree that the mass of SO_2 emitted from the incinerator stack is a function of both the concentration of SO_2 at the exit point of the stack and the volume of the flow stream

---

[17] Stipulation, Tr. 7.

[18] Tr. 420, 423-425.

[19] Tr. 428, 437. The reference to SARA (acronym for the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613) was specifically to the emergency notification provisions of EPCRA, section 304, 42 U.S.C. 11004. RX 6, 8.

[20] Stipulation, Tr. 7; Tr. 429.

through the stack.[21] Mobil had on hand at the time of the release the following data with respect to making this calculation:

The concentration of SO_2. This was available both from Mobil's Process Monitoring System ("PMS") in six minute averages and from its newer Process Information system ("PI") which could provide concentration data on a minute by minute basis.[22]. In addition, there was a strip chart reader in the control room recording the concentration of SO_2.[23]

The volume of the flow stream. Five streams go to make up the total volume of the flow through the stack: main air, trim air and fuel gas to the catalyst regenerator and draft air and fuel gas to the incinerator.[24] Mobil had available from its PI system the main air and trim air flows to the catalyst regenerator.[25] The other three variables, fuel gas to the regenerator, and draft air and fuel gas to the incinerator, had to be estimated from what was known about the gas flow to the catalyst regenerator and the air

---

[21] Tr. 212, RX 14a. The formula for computing pounds of SO_2 emitted in one hour, as given by Professor Debenedetti, is total flow of air and gas in standard cubic feet per hour (SCFH) * 10^{-3} * parts per thousand SO_2 (averaged over the hour)/ [5.94 (SCF per pound of SO_2)]. RX 14a. The formula can be written in somewhat more simplified form as follows: Flow (SCFH) * SO_2 (ppt)/ 5940.

[22] For PMS concentration data, see RX 9, p.1, and Tr. 440. For PI data see RX 3, pp. 5-11, and Tr. 510, 514, 523.

[23] RX 9, p. 11; Tr. 151-152, 341, 499, 532. The curve over the peaks in the strip chart was plotted by Ms. Murphy in doing her third set of calculations. Tr. 531-533, 542.

[24] RX 14a.

[25] RX 3, p. 3; Tr. 515.

and gas flows to the incinerator.[26]

On being told of the complaint on March 12, Mr. Rodack looked at the SO_2 concentrations for the incinerator stack shown by the PMS system for the period from 10:00 a.m. to 12:27 p.m. when the regenerator was shut down. This data showed an hourly average concentration of SO_2 for the 10th hour of 9.746 parts per thousand (ppt) and for the 11th hour a concentration of 10.46 ppt. Since these concentrations were two-thirds of the limit of 15,000 parts per million (ppm), he assumed there had not been a reportable release.[27] Mr. Rodack did note that the average six minute concentrations at 12:03 p. m. and at 12:09 p.m. were over 17 ppt (or 17,000 ppm), but he believed that these figures did not denote an exceedance because he knew the regeneration process was being shut down and the volumetric air flow would be going to zero.[28]

Mr. Rodack's understanding that compliance with permit levels on mass emissions could be determined from the concentration alone was wrong. Data on flow rate was also needed and the assumption that a concentration of 15,000 ppm was equivalent to an emission of 540 lbs SO_2 per hour would be valid only if the regeneration took place under normal operating conditions when the normal stack flow

---

[26] Tr. 518-522.

[27] Tr. 437, 439, 446-447; RX 9, p.1. A concentration of 9.746 ppt, multiplied by 1000, converts to 9,746 ppm, and 10.46 ppt converts to 10,466 ppm. Tr. 441.

[28] Tr. 450.

rate is about 3,600 standard cubic feet per minute.[29] The catalyst regeneration is not run under normal conditions, however, and the air flow rates for the 10th and 11th hours were considerably higher.[30]

Mobil was not satisfied with Mr. Rodack's estimate based on a concentration of 15,000 ppm, and a process engineer, Ms. Kim Murphy, was asked to do a more refined calculation to determine whether there had been a release in reportable quantities.[31]

Ms. Murphy made three sets of calculations.

For her first calculation, Ms. Murphy used the known variables of main air and trim air flows to the regenerator and the SO_2 concentration. She took all this data from the PI system using hourly average concentration readings for the SO_2. This computation, which admittedly was very rough, did not disclose any emissions in reportable quantities. Ms. Murphy did not remember the precise figures she came up with.[32] Professor Debenedetti, using the data taken from Ms. Murphy's worksheets, came up with 471.6 lbs. per

---

[29] Tr. 211; CX 23, p. 5. A flow of 3,600 standard cubic feet per minute equates to 216 thousand standard cubic feet per hour (MSCFH).

[30] Tr. 451, 472; RX 3, p.2 (showing main and trim air flows to the catalyst regenerator of 294 MSCFH for the 10th hour and 293.4 MSCFH for the 11th hour.

[31] Tr. 451-453, 509.

[32] Tr. 515-517; RX 3, p. 3. In doing these calculations on the stand, Ms. Murphy came up with a value of 472 lbs SO_2 per hour for the period between 10:00 and 11:00 a.m., and 457 lbs. per hour for the period between 11:00 a.m. and 12:00 noon. Tr. 553-558.

hour for the 10th hour and 455.8 lbs per hour for the 11th hour.[33] When he did the calculations using his figures, he came up with 460 lbs for the period between 10 and 11, and 534.9 lbs.for the hour between 11 and 12, a figure very close to the limit.[34] The difference in results appears to be attributable to the difference between the hourly average concentration taken from the PI data which Ms. Murphy used and the average of the 6 minute concentrations for the hour from the PMS data calculated by Professor Dibenedetti.[35]

Professor Debenedetti recognized that the value of 534.9 lbs. per hour of SO_2 called for further calculations. In his opinion, however, the lower value arrived at by MS. Murphy would show a greater margin of safety and, therefore, less urgency for doing a revised calculation.[36]

Nevertheless, Mobil did recognize that the preliminary calculation using two of the five air flows was only a rough approximation of the actual quantity of SO_2 emitted.[37] Accordingly,

---

[33] Tr. 720.

[34] Tr. 718; RX 14a.

[35] Compare RX 3, p. 3 (Ms. Murphy's concentration figures) with RX 24 (Professor Debenedetti's calculations). Ms. Murphy, for example used an SO_2 concentration of 9.23 ppt for the 11th hour, while Professor Debenedetti used a concentration of 10.831 ppt. The same main and trim air flows were used by both.

[36] Tr. 718-721.

[37] It must be recognized that Mobil had two concerns about the emission which caused the odor. One was the possibility that the incident could lead to citizens' complaints (and, presumably, lawsuits), and the other was the possibility that a reportable

Ms. Murphy did a second calculation in which she took account of the unknown air flows.[38]

Ms. Murphy could not recall the precise time when she did her second calculations, except to say that the second calculation and the third calculation (which led Mobil to conclude that a reportable release had occurred) were done close together.[39]

Ms. Murphy's description of the methods she used to calculate values for the unknown flows do indicate that it was time-consuming work.[40] After obtaining values for all five flows to the incinerator, she recalculated the mass emission of SO_2 using that data but with the same PI hourly concentration figure.[41] The calculation showed an SO_2 concentration of 557.41 lbs. per hour for the 10th hour, some 17 lbs. over the permit limit, and 538.81 lbs. per hour, very near the limit, for the 11th hour.[42]

At this point, Ms. Murphy decided to look at the minute-by-minute PI concentration data for a verification of the hourly

---

quantity had been released. Supra, p. 7.

[38] Tr. 509, 517.

[39] Tr. 551, 571.

[40] See Tr. 517-520, 725-726.

[41] Tr. 521, 567, 569.

[42] Tr. 521-523, 542; RX 3, p. 2. Ms. Murphy's concentrations in lbs. per hour, however, do not square with Professor Debenedetti's formula. Since the SO_2 volumes in SCFH for the 10th and 11th hour are equal to or very close to the total flow times concentration in ppt for those hours, the indication is that she used a different constant to convert cubic feet of SO_2 into pounds (in the vicinity of 5.47).

averages that she had been using. This data appears to have been obtained by Ms. Murphy on March 21, 1990.[43] Ms. Murphy analyzed the minute-by-minute PI concentration data making adjustments for negative numbers and numbers that were over range and plotted a curve on the strip chart to find the maximum concentration.[44] She arrived at a recalculated SO_2 concentration for the 10th hour of 12.6 ppt, and for the 11th hour of 16.2 ppt.[45] These values tend toward the high side, since she picked the maximum concentration for the period that was revealed by her computations.[46]

Using the recalculated concentration figures, Ms. Murphy came up with emissions of 680 lbs. per hour SO_2 in the 10th hour and 873 lbs. per hour in the 11th hour.[47] Professor Debenedetti in his calculations used lower concentration figures and somewhat different flow figures, and arrived at an emission of 505.4 lbs SO_2 for the hour between 10 and 11, and 587.4 lbs. for the hour between 11 and 12.[48] Both calculations, accordingly, do show that an

---

[43] See date on RX 3, pp. 5-11. This is the archive data from PI obtained by Ms. Murphy. Tr. 527.

[44] Tr. 531-535.

[45] Tr. 530-535; RX 9, p.10. See also RX 3, p.2 (new concentrations written by Ms. Murphy).

[46] Tr. 536.

[47] RX 9, p. 10. Ms. Murphy also made a minor change in her fuel gas figure but she did not consider this as really affecting the results. Tr. 534. Her calculations showed that this time she used the 5.94 constant in Professor Debenedetti's formula.

[48] RX 14a. Professor Debenedetti used an SO_2 concentration of 9.303 ppt. for the hour 10-11 compared to Ms. Murphy's 12.6 ppt., and a concentration of 10.83 ppt. for the hour 11-12 compared to

exceedance had occurred between the hours of 10:00 a.m. and 12:00 a.m.

The results of Ms. Murphy's third calculation were obtained on March 22, 1990, and Mobil on that date called the Local Emergency Planning Commission.[49] The follow-up written report filed by Mobil showed an emission of between 450-500 lbs., which is approximately the amount that the mass emissions computed by Ms. Murphy for the 10th and 11th hours exceeded the permit level of 540 lbs. per hour.[50]

Discussion

The issue in this case is whether the notice given by Mobil to the LEPC on March 22, 1990, was "immediate" notice within the meaning of EPCRA and the regulations. Mobil contends that it was, since it did not obtain what it regarded as satisfactory data that a reportable release had actually occurred until after Ms. Murphy completed her third set of calculations on March 22, 1990. It is the EPA's position, on the other hand, that Mobil had sufficient data on hand at the time of the release on March 12th, to alert it to the fact that a reportable release had taken place.

Undoubtedly, Mobil thought it was justified in waiting until Ms. Murphy completed her third, and most refined, set of

---

Ms. Murphy's 16.2 ppt. He also calculated a total flow of 322,110 SCFH for the hours 10-11 and 11-12, compared to 320,110 shown on Ms. Murphy's spreadsheet for the hour 10-11, and 319,490 SCFH for the hour 11-12. Compare RX 14a (Professor Debenedetti's calculations) with RX 9, p.10 (Ms. Murphy's calculations).

[49] Stipulation, Tr. 7.

[50] CX 3; RX 9, p. 10.

calculations before concluding that it should report the release. But the standard is not what Mobil desired in the way of data before concluding that a reportable release had occurred, but at what point in time did Mobil have or could have had sufficient information about the release that it would have been reasonable to conclude that there had been a reportable release and that it should be reported.[51]

The question of what Mobil knew or should have known about the emissions on March 12th turns largely on the SO_2 concentration data that was used. Although only two of the flow constituents were known, if they showed an exceedance, or were very close to showing an exceedance, then it was highly probable that a reportable release had occurred. The addition of the missing flow data could only increase the concentration, given the formula that the mass of SO_2 emissions depends on the quantity of the flow.[52]

Professor Debenedetti showed that if Ms. Murphy had used the 6-minute PMS data with the main and trim air flows that were known, she would have come up with an SO_2 concentration of 534.9 lbs. per hour for the hour 11-12. This was so close to the limit of 540 lbs. per hour, that, in Professor Debenedetti's words, "it indicates

---

[51] In the matter of Genicom, Docket No. EPCRA-III-057 (July 16, 1992).

[52] There is no indication that the missing flow data could have caused a decrease in the quantity of total flow.

that you ought to refine your calculations."[53]

Mobil never did satisfactorily explain why it was reasonable for Ms. Murphy to have relied on the hourly average figure she generated from the PI system without verifying it with the average of the six-minute PMS readings. There is no evidence that the PMS data was not reliable or that it was not available on March 12, except for the inconvenience of having to go to a PMS monitor or calling the control room or some other office which had a PMS monitor. If Ms. Murphy had compared the two sets of data and taken the conservative approach of using the higher of the two values, she would have discovered, like Professor Debenedetti, that the emissions were too near the limit to be relied on as an indication that no exceedance had occurred.

Mobil emphasizes that it was not required to monitor mass SO_2 emissions from the incinerator stack, and had never before attempted to calculate what those emissions were.[54] The clear implication is that it was unprepared to deal with the eventuality that there could be reportable emissions from the stack. This argument is unpersuasive as justification for the delay in reporting the release.

The requirements of EPCRA with respect to reporting SO_2

---

[53] Tr. 717; RX 14a. Had Ms. Murphy used the constant indicated by her first calculations (which appeared to be in the neighborhood of 5.47), she would have come up with an even higher concentration.

[54] Ms. Murphy, for example, had never previously been asked to calculate SO_2 emissions from the incinerator stack. Tr. 510.

releases have been in effect since at least the end of 1987.[55] If EPCRA is to be effective, the emphasis should not be on how unusual or unexpected the release is but on the immediacy of reporting it. This construction is in accordance with what Congress intended when it passed the Act. As is stated in the legislative history:

> The previous section [dealing with emergency response planning] is intended to insure that each local community is prepared to address a hazardous substance emergency in the best way possible. Section 312 is intended to assist the community by requiring the facility at which the emergency originates to promptly provide necessary information to the locality.
>
> Each facility owner and operator at which a hazardous substance emergency occurs must immediately notify the appropriate officials and provide all relevant information at that time. This notification can, and almost always will, be verbal....[56]

Mobil knew, or should have known, that during catalyst regeneration, SO_2 was emitted from the incinerator stack and that normal flows were not present and flows above normal could take place. I find that under these circumstances Mobil should at least have taken reasonable steps to insure that it would be able to report promptly in the event that an emission in reportable quantities did occur. Mobil is given great latitude as to what is

---

[55] EPCRA, section 304 was enacted as part of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613, 1733 (1986). The EPA's regulation designating SO_2 as an extremely hazardous substance was published on April 22, 1987, with the local agencies for reporting purposes to be established by the end of 1987. 52 Fed. Reg. 13378, 13402.

[56] H. R. Rep. No. 99-253(I), 99th Cong., 2d Sess. 114 (1985), reprinted in 1986 U.S. Code Congressional and Administrative News 2835, 2896. See also In the matter of Genicom, Docket No. EPCRA-III-057 (July 16, 1992)

reasonable, of course, since there are no monitoring requirements. I find, however, that it was not reasonable to wait until a release happens and then, for the first time, address the problem and take whatever time it needs to do the calculations to its satisfaction before even making the preliminary telephone call to the LEPC.

No cases directly in point have been cited. This interpretation of EPCRA's reporting requirements follows logically from the principle that a statute is to be construed so as to accomplish the purpose for which it was intended.[57]

The reason why Mobil was not required to monitor SO_2 emissions from the incinerator stack under its permit is not explained in the record. But that applied only to requirements under the Clean Air Act and not to compliance with EPCRA. The two statutes represent different approaches to dealing with the emissions of hazardous pollutants. The Clean Air requirements ensure day-to-day compliance with ambient air quality standards. EPCRA is intended to minimize the harm whenever a hazardous substance is released in harmful quantities, even though such a release may be unusual.

I further find that it was unreasonable for Mobil not have used the PMS data for its preliminary calculations. Mobil's obligation was to get as accurate data at the time the release occurred as it could about the quantity of the release. This meant

---

[57] Cf., Motor Vehicle Manufacturers v. Ruckelshaus, 719 F. 2d. 1159, 1165 (D.C. Cir. 1983) (Construction of statute which delayed putting into effect testing procedures for determining conformance of vehicles to emission standards rejected because it would frustrate Congress' intent to speed up war against pollution.)

at least looking at the six-minute PMS averages, and if the PI hourly average was still preferred, giving some reasonable explanation why this was so other than the fact that the data may not have been as readily accessible. No persuasive reasons have been given as to why the PI data should have been preferred. The record indicates, however, that the PMS six-minute averages of concentration was the more reliable data, since it is reasonable to assume that Professor Debenedetti would not have used it in his calculations if he did not believe that it would give more accurate results than the hourly PI average.

It is interesting to note that Mobil did not wait for refined calculations to report the release to the SERC when it was notified that SO_2 odors had been detected at the plant. In that case, it did not concern itself about whether there had been an exceedance. Whatever may have been Mobil's reasons for waiting for more precise calculations before reporting the release to the LEPC as an exceedance, they must be weighed against the interest of the public in being informed of the release so that the local officials can promptly take whatever measures they deem appropriate.

Mobil's argument about its good faith efforts would be more persuasive if Mobil had given reasonable consideration to the calculation of incinerator stack emissions so as to comply with EPCRA's immediate reporting requirements when facts came to its attention indicating that an emission in reportable quantities may have occurred. It can be reasonably concluded that the report of the presence of SO_2 odors was such an event, given the way Mobil

responded to it. Mobil, however, has not shown that prior to the release on March 12, it gave any consideration to its procedures for promptly reporting releases of SO^2 in reportable quantities from the incinerator stack. In that case, it cannot take refuge in the technicality that the emissions were close to but not above the permit limits, when it had reason to believe that more refined calculations, which would have included all flows, was likely to show an exceedance.

In sum, where the preliminary data that was available at the time of the release showed a release so close to the reportable quantities, it could be found that Mobil should have at least made the preliminary oral report to the LEPC on March 12. While this interpretation of EPCRA would be reasonable, it is not so clear from the wording of the statute as to provide a basis for assessing the large penalty that the EPA proposes.[58] The cases hold that the obligation to report arises from the time that the release in reportable quantity is known or should have been known from the data available.[59] The preliminary data, however, did not show an exceedance, even with the use of the six-minute average PMS figures.

---

[58] See Rollins Environmental Services (NJ), Inc. v. U.S. EPA, 937 F. 2d 649 (D.C. Cir. 1991) (Agency interpretation of regulation upheld but monetary penalty denied because regulation did not give adequate notice of conduct it was prohibiting or requiring).

[59] In the Matter of Genicom Corporation, Docket No. EPCRA-III-057 (Initial Decision, July 16, 1992) at 8-9. See also EPA's Penalty Policy for violations of EPCRA, section 304, CX 8, pp 1, 11 (the penalty for failure to notify starts to run from the time the owner or operator had knowledge of the release).

At the same time, the record does not support Mobil's claim that it was justified in waiting ten days to report the release. What is missing in Ms. Murphy's testimony is evidence that there was any urgency to come up with the completed calculations.[60] It is true, that the time actually required to do the calculations Ms. Murphy did cannot be reconstructed. Since Mobil has raised the issue of the reasonableness of its actions as justification for the delay, however, it must take the consequences of the failure to provide more precise data as to the time Ms. Murphy spent on the work. On the facts in this case, it does seem reasonable to find that Mobil could have completed its calculations within seven days and not taken ten days to do them. What was involved was making certain assumptions about the three unknown flows and refining the concentration figures. Everyone agrees that calculations for the emissions themselves can be done very quickly. It does not appear that there was a need to search or wait for data that was not readily retrievable.[61]

The Appropriate Penalty

The EPA argues that its penalty of $250,000, for the 10-day delay in reporting the exceedance to the LEPC is in conformity with the EPA's Penalty Policy for assessing penalties for violations of

---

[60] See Tr. 525, 587.

[61] The record indicates, for example, that it only took a day for Ms. Murphy to do the regression analysis that resulted in her final computations. Supra, p. 12.

EPCRA, section 304.[62] In determining the appropriate penalty, I am required to consider the EPA's Penalty Policy, and if I do not follow it, I must give reasons for doing so.[63]

The Penalty Policy uses a matrix to assess a "base penalty." Under the matrix, violations are classified according to their "gravity" and "extent."

The EPA classifies the violation as level I (the highest level) in extent (no notification to the appropriate LEPC within two hours after the owner or operator had knowledge of the release unless extenuating circumstances existed that prevented notification), and Level A (also the highest level) as to as to gravity (amount released was greater than 10 times the reportable quantity).[64] The EPA also contends that the maximum penalty of $25,000, per day should be assessed because of the potential consequences of the violation.

Accepting, these classifications as in conformity with the Penalty Policy, I find that the appropriate penalty for a three day violation is $75,000. The per day assessment is a reasonable deterrent against a repetition of this or a similar violation.

Mobil argues that there was little potential for harm from the excess emissions and that the one pound per hour limit does not

---

[62] The full title of the Penalty Policy is Final Penalty Policy for Sections 302, 303, 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 (June 13, 1990), CX 8.

[63] 40 C.F.R. section 22.27(b).

[64] Penalty Policy, Tr. 50-51; CX 8, pp. 11, 16.

reflect the potential hazards caused by SO_2 emissions. The reasonableness of a regulatory limit is not an appropriate issue to be considered in this proceeding. The proper forum for considering that issue is in the rule-making proceeding held for the purpose of considering the classification of substances as extremely hazardous and the reporting thresholds for them. In fact, as Mobil points out, there is an ongoing rule-making proceeding to consider whether the reportable limit for SO_2 should be increased.[65] Until the regulatory limit is changed, however, the present limit of one pound as triggering the requirement to report is assumed to be reasonable.

ORDER[66]

Pursuant to EPCRA, section 325(b), 42 U.S.C. 11045(b), a civil penalty of $75,000, is assessed against Mobil Oil Corporation. The full amount of the penalty shall be paid within sixty (60) days of the effective date of the final order. Payment shall be made in

---

[65] Mobil's proposed conclusion of law No. 21. I do not agree, however, that the EPA's proposal of a 100-pound value for SO_2 is relevant to considering the gravity of the violation. The gravity of the violation in this case lies in the extent to which there was a deviation from the requirement to immediately report the release.

[66] Unless an appeal is taken pursuant to 40 C.F.R. 22.30, or the Environmental Appeals Board elects, sua sponte, to review this decision, this decision shall become the final order of the Agency. 40 C.F.R. 22.27(c).

full by forwarding a cashier's check or a certified check in the full amount payable to the Treasurer, United States of America, at the following address:

EPA - Region 2
(Regional Hearing Clerk)
P. O. Box 360188M
Pittsburgh, PA 15251

Gerald Harwood
Senior Administrative Law Judge

Dated: December 27, 1993