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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
F. C. HAAB COMPANY, INC.	)	Docket No. EPCRA-III-154
	)	
Respondent	)	

INITIAL DECISION DETERMINING PENALTY

By: Charles E. Bullock
Administrative Law Judge

Issued: June 30, 1998
Washington, D.C.

Appearances

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INTRODUCTION

Following the filing of the Complaint and Answer, and the parties' respective prehearing exchanges, this matter was set for hearing.[(1)] The Complaint was issued under the authority of the Administrator of the Environmental Protection Agency (EPA) pursuant to section 325 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. § 11045, and 40 C.F.R. § 22.14. Pursuant to delegated authority, the Director, Hazardous Waste Management Division, EPA Region

III (Complainant) issued the Complaint against F. C. Haab Company, Inc. (Respondent) for violations of EPCRA sections 311 and 312, 42 U.S.C. §§ 11021 and 11022. The facts in this case as they relate to liability were determined by an order issued by the undersigned granting Complainant's unopposed motion for accelerated decision as to liability. *In re F.C. Haab Company, Inc.,* Docket No. EPCRA-III-154 (Order, Sept. 30, 1997)(Order on Liability).[(2)] The determinations as to liability were set forth in the Order on Liability in great detail and are incorporated herein by reference. However, for purposes of clarity, they are summarized as follows.

Respondent is a Pennsylvania Corporation located in Philadelphia, Pennsylvania and is in the business of (1) delivering heating oil, fuel oil, and occasionally kerosene and gasoline to residences, commercial buildings, churches and apartment buildings. Order on Liability, slip. op. at 2; Transcript (Tr.) 162 (Haab). On September 16, 1993, Complainant (through its contractor, Dynamac Corporation) performed an inspection of Respondent's facility at Morris and Schuylkill Avenues in Philadelphia, Pennsylvania. Order on Liability, slip. op. at 3; Complainant's Exhibit (C. Ex.) 1A (Inspection Report). The inspection revealed that in 1990, 1991 and 1992, Respondent had stored 4,059,000 pounds of light petroleum distillate, a constituent of #2 Heating Oil; 10,197,00 pounds of vacuum residue, a constituent of #6 Oil; 2,500,000 pounds of kerosene; 1,280,000 pounds of hydrotreated heavy paraffinic distillates, a constituent of Lube Oil, and 17,556 pounds of light petroleum distillate, a constituent of Unleaded Gasoline. Order on Liability, slip. op. at 4; Inspection Report at 6 & 9, Tr. 36 (Hollingsworth).

The inspection also revealed that Respondent had failed to submit Material Safety Data Sheets (MSDSs) or a list of each chemical discussed above to the State Emergency Response Commission (SERC), the Local Emergency Planning Committee (LEPC), and the relevant local fire department. Inspection Report at 9. Respondent also did not submit Emergency and Hazardous Chemical Inventory Forms (Tier II reports) to those same agencies for reporting year 1990, by March 1, 1991; for reporting year 1991, by March 1, 1992; and for reporting year 1992, by March 1, 1993. *Id*.

Following a one-day hearing on October 8, 1997, briefs on the issue of penalty were filed by the parties. By order issued November 24, 1997, the undersigned denied Complainant's motion to reopen the administrative record. For the reasons set forth below, the level of penalty is determined to be **$68,000**.

ARGUMENT

A. Complainant

Complainant urges that a total penalty of $210,000 be assessed as set forth below:

Count I:	Failure to submit MSDS or list to the LEPC. Violation of section 311 of EPCRA, 42 U.S.C. § 11021.	$10,000
Count II:	Failure to submit MSDS or list to the SERC. Violation of section 311 of EPCRA, 42 U.S.C. § 11021.	$10,000
Count III:	Failure to submit MSDS or list to the Fire Department. Violation of section 311 of EPCRA, 42 U.S.C. § 11021.	$10,000
Count IV:	Failure to submit a completed Emergency and Hazardous Chemical Inventory Form by March 1, 1991 to the LEPC. Violation of section 312 of EPCRA, 42 U.S.C. § 11022.	$20,000

Count V:	Failure to submit a completed Emergency and Hazardous Chemical Inventory Form by March 1, 1991 to the SERC. Violation of section 312 of EPCRA, 42 U.S.C. § 11022.	$20,000
Count VI:	Failure to submit a completed Emergency and Hazardous Chemical Inventory Form by March 1, 1991 to the Fire Department. Violation of section 312 of EPCRA, 42 U.S.C. § 11022.	$20,000
Count VII:	Failure to submit a completed Emergency and Hazardous Chemical Inventory Form by March 1, 1992 to the LEPC. Violation of section 312 of EPCRA, 42 U.S.C. § 11022.	$20,000
Count VIII:	Failure to submit a completed Emergency and Hazardous Chemical Inventory Form by March 1, 1992 to the SERC. Violation of section 312 of EPCRA, 42 U.S.C. § 11022.	$20,000
Count IX:	Failure to submit a completed Emergency and Hazardous Chemical Inventory Form by March 1, 1992 to the Fire Department. Violation of section 312 of EPCRA, 42 U.S.C. § 11022.	$20,000
Count X:	Failure to submit a completed Emergency and Hazardous Chemical Inventory form by March 1, 1993 to the LEPC. Violation of section 312 of EPCRA, 42 U.S.C. § 11022.	$20,000
Count XI:	Failure to submit a completed Emergency and Hazardous Chemical Inventory form by March 1, 1993 to the SERC. Violation of section 312 of EPCRA, 42 U.S.C. § 11022.	$20,000
Count XII:	Failure to submit a completed Emergency and Hazardous Chemical Inventory Form by March 1, 1993 to the Fire Department. Violation of section 312 of EPCRA, 42 U.S.C. § 11022.	$20,000

Complainant presented three witnesses: (1) David Wright, Chief of the Chemical Emergency Preparedness Information and Site Assessment section, U.S. EPA, Region III; (2) Joseph Hollingsworth, EPCRA Inspector, Dynamac Corporation (at time of the September 16, 1993 inspection of Respondent's facilities), a corporation under contract with EPA, Region III; and (3) Lt. Stephen R. Roth, assigned to Hazardous Material Administrative Unit, Philadelphia Fire Department. Complainant also submitted Complainant's Exhibits 1, 1A, 2, 3, and 5, which were received in evidence. Complainant's Exhibit 4 was identified, but not offered or received into evidence.

In support of its position, Complainant states as follows. The EPCRA enforcement provision, section 325, identifies several factors to be taken into account in the determination of penalties for violations of EPCRA section 304.[(3)] Section 325, however, does not identify specific factors to be considered when calculating penalties for violations of EPCRA sections 311 and 312. However, as a matter of policy, Complainant states that EPA uses the statutory factors listed in section 325(b)(1)(C), and set forth in the Agency's Penalty Policy, to determine the

calculation of penalties for violation of sections 311 and 312. Complainant's Post Hearing Brief (C.Br.) at 5; Tr. 69 (Wright); *See also* C. Ex. 2 (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) at 6 (Penalty Policy)).

Complainant uses the Penalty Policy, which is based upon the section 325(b)(1)(C) factors, to calculate the proposed penalty. Under the Penalty Policy, a base penalty is first established by analysis of the nature, circumstances, extent, and gravity of the violation, which is converted into a numerical figure by using the Penalty Policy's Base Matrices. Then, adjustments are made based upon consideration of the remaining statutory factors--ability to pay, prior history, culpability, economic benefit/savings, and other matters as justice may require. Penalty Policy at 6, 22. The "nature" of an EPCRA reporting violation, according to the Penalty Policy, is either an "emergency response" violation or an "emergency preparedness/right-to-know" violation. *Id.* at 8. Complainant explains that all the violations at issue in this case are "right-to-know" violations. C.Br. at 8; Penalty Policy at 9, 10.

The extent of the violation, under the Penalty Policy, is first defined by identifying the nature of the violation at issue, then reviewing the specific issues set forth in the policy for that particular violation. Penalty Policy at 10-18. The extent factor for "right to know" violations "reflects the potential deleterious effect the noncompliance has on the Agency's, SERC's or LEPC's ability to implement the Act or the public's ability to access the information . . . . Extent addresses the timeliness and utility of reports submitted." *Id.* at 12-13. Because Respondent failed to make the required submissions under EPCRA sections 311 and 312 within 30 days after the reporting violations arose, Complainant asserts that the violations fall within extent "Level 1" under the Penalty Policy. C.Br. at 9; Penalty Policy at 13-14.

With respect to the gravity of the violations, Complainant assigned "Level A" in the Penalty Policy because the quantities of all of the substances were well above the 10,000 pound reporting threshold for sections 311 and 312. EPCRA §§ 311 & 312; 40 C.F.R. § 370.20(b); Tr. 72, 81-82 (Wright); Penalty Policy at 17.

According to Complainant, the appropriate circumstances calculation, as determined in the Penalty Policy matrices by the gravity and extent levels, is "Level 1A." C.Br. at 10. For section 311 violations, a "Level 1A" penalty ranges from $8,000 to $10,000. Penalty Policy at 20. Complainant recommends $10,000, the high end of the range. *Id.* at 10; Tr. 74 (Wright). For the section 312 violations, where "Level 1A" ranges from $20,000 to $25,000, Complainant suggests $20,000, at the bottom of the range. C.Br. at 11; Tr. 82 (Wright). This calculation of the base penalty, according to Complainant, reflects the overall extreme seriousness of Respondent's violations. C.Br. at 11.

Complainant asserts, and Respondent agrees, that there is no issue in this case regarding Respondent's ability to pay, and Respondent has waived any penalty mitigation based upon this issue. *Id*. at 12; Tr. 75 (Wright); Tr. 266 (Casper).

Complainant asserts that it has appropriately considered Respondent's status as a first-time offender by not assessing daily penalties which could have caused the penalty to exceed $150,000,000. C.Br. at 12-13. Complainant argues that the $210,000 proposed penalty is reasonable because it is a small percentage of the statutory maximum of $150,000,000. *Id*. at 12-13, 24-25. Complainant also argues that it correctly assessed a penalty for Respondent's failure to report to each point of compliance (i.e., SERC, LEPC, and the local fire department) rather than a single penalty for the multi-point compliance situation, as Respondent proposed. *Id.*

Because EPCRA is a strict liability statute, Complainant argues that it did not need to show that Respondent failed to adhere to a standard of care under the culpability standard. *Id.* at 14. Complainant asserts that, in any event, Respondent had actual, as well as constructive knowledge of the EPCRA requirements. *Id.* at 14-

15. Also, Complainant concluded that there was no economic benefit to the violation, and therefore, made no adjustment for this factor. *Id.* at 17; Tr. 78, 84 (Wright).

Complainant further argues that no adjustment should be made for the "other matters as justice may require" factor for: (1) Respondent's $100,000 expenditure for what it termed an "environmentally beneficial project;" (2) Respondent's belated submission of the MSDSs and Tier II reports for 1990-1992; and (3) Respondent's claim that it is a small business. C.Br. at 17-24. Finally, Complainant states that Respondent has presented no persuasive reasons for departure from the Penalty Policy and urges rejection of Respondent's attempt to introduce "additional evidence" at this late stage in this proceeding.[(4)]

B. Respondent

Respondent presented five witnesses in this proceeding: F. Christian Haab, Jr., Esquire, who serves as F.C. Haab Company's General Counsel and works in management, insurance matters, personnel and other areas; Ronald McGowan, General Manager of F.C. Haab Company's Schuylkill Terminal; Larry Gramlich, Vice President of Operations of F.C. Haab Company; Helen Kennelly, Secretary to the Service Manager at the Schuylkill Terminal; and Lieutenant Thomas Bitto of the Philadelphia Fire Department, Engine 60. Respondent offered 14 exhibits, Exhibit Nos. 1-14, all of which were received in evidence.

Respondent urges that the undersigned deviate from the Penalty Policy and assess an initial penalty of no more than $70,000. Respondent's Post Hearing Brief (R.Br.) at 5, 14. Then, Respondent argues for a reduction of the penalty to zero based upon consideration of Respondent's environmentally beneficial expenditure and its alleged small business status. R.Br. at 28.

In the first instance, Respondent urges that the penalty policy guidelines be considered, but not rigidly followed because of the record in this proceeding. R.Br. at 8, 21. Respondent argues that Complainant's witness, David Wright, did not appropriately and fully consider adjustment factors to the $210,000 amount initially determined by Complainant's contractor, Joseph Hollingsworth of Dynamac. *Id*. at 10-12. Specifically, Respondent alleges that Mr. Wright could have, but did not, assess one count of violation for failure to submit the required forms, rather than separate violations for failure to submit the respective filings to the SERC, LEPC and fire department. R.Br. at 13-14. Respondent also states that Mr. Wright should have, but did not, consider or give weight to: (1) Respondent's immediate compliance with EPCRA as soon as it obtained the addresses from Dynamac; (2) the local fire company's knowledge of the types of materials that were stored in the Haab facility; and (3) Respondent's continued compliance since April 1995, when Mr. Wright initially calculated the penalty in this case. R.Br. at 3-4. In sum, Respondent alleges that Complainant did not properly exercise its discretion to deviate from the Penalty Policy to assess a reasonable penalty under the unique circumstances of this case. *Id*. at 21.

Respondent also asserts that it had no actual notice of the EPCRA requirements, either because of references thereto in some of its MSDS forms or through the alleged delivery of an information packet by Lieutenant Roth of the Philadelphia Fire Department. R.Br. at 14-16. Respondent also argues that Complainant's assertion that its recommended penalty of $210,000 is reasonable because it could have assessed a penalty of over $150,000,000 is inconsistent with the Penalty Policy. *Id*. at 19-20. Respondent asserts that the level of EPA's proposed penalty is excessive, and therefore punitive, rather than remedial, as required by EPA policy and precedent. *Id*. at 21.

Respondent further argues that the Philadelphia Fire Department's Engine 60 had actual knowledge of the materials that were present at Respondent's facility so that Respondent's failure to file the EPCRA forms was not critical. R.Br. at 3-4.

DISCUSSION

A. Base Penalty

As the parties have correctly noted, the Penalty Policy uses the statutory factors set forth in section 325(b)(1)(C) of EPCRA as a basis for setting guidelines for assessing penalties under sections 311 and 312 of EPCRA. Preliminarily, the Penalty Policy discusses the interplay of the various statutory provisions of

EPCRA:

> EPCRA § 325(c) states that any person who violates § 312 is liable for a penalty in an amount not to exceed $25,000 for each violation. For violations of § 311, § 325(c)(2) provides that the violator is subject to a penalty in an amount not to exceed $10,000 per violation. Section 325(c)(3) states that each day a violation of §§ 311 or 312 continues constitutes a separate violation. The statute provides no further guidance for calculating penalties under § 325(c) for violations of §§ 311 and 312. However, as a matter of policy, the Agency will use the statutory factors listed in § 325(b)(1)(C) as guidance in calculating penalties for §§ 311 and 312.

Penalty Policy at 6.

Part 22 of EPA's Regulations, 40 C.F.R. Part 22, directs the Presiding Judge to consider the Agency's Penalty Policy.[(5)] While a Presiding Judge may deviate from the Penalty Policy after considering these guidelines,[(6)] the facts in this case do not present such a situation. Accordingly, as set forth below, the penalty assessed in this decision shall be calculated in accordance with the Penalty Policy.

Under the Penalty Policy, a base penalty for sections 311 and 312 violations is determined by considering the nature, extent, gravity, and circumstances of the violation. Penalty Policy at 6. These factors are incorporated into one matrix for EPCRA section 311 violations and another matrix for EPCRA section 312 violations. The different matrices are necessary because the maximum daily amount of penalty is $10,000 for section 311 violations and $25,000 for section 312 violations. Penalty Policy at 7. The base penalty under both provisions is calculated using Table I of the Penalty Policy, which contains the matrices for sections 311 and 312 violations. *Id*. at 7, 20.

Prior to discussing the specifics of Complainant's calculation, the question arises as to the reasonableness of Complainant's decision not to assess penalties on a per day basis. While both Complainant and Respondent agree that multiple day penalties should not be assessed, Complainant asserts that a strong reason for adopting its recommendation of $210,000 is that such an amount is "equal to less than one-tenth of one percent of the statutory maximum of over $150 million." C.Br. at 12. Asserting in pleadings that each of the violations identified in the Complaint continued for multiple days, EPA explains that the statute authorizes up to the maximum for each and every day the violation continued, amounting to more than $150 million of possible penalty in this case. *Id.;* 42 U.S.C. § 11045(c)(1-3), EPCRA § 325(c)(1-3). The Complaint, however, does not specify more than one violation for each count and Complainant expressly states that only one violation is alleged in each count. C.Br. at 12. This action, therefore, alleges violations that provide a statutory maximum of $30,000 for the three section 311 violations and $225,000 for the nine section 312 violations, totaling $255,000 - $45,000 more than the Complainant's $210,000 recommendation. Furthermore, the fact that Complainant could, but chose not to, assess separate penalties for each of the chemicals that Respondent failed to report does not, in and of itself, justify the $210,000 figure. Accordingly, Complainant's use of comparison between (1) a supposed maximum penalty of $150,000,000 using multi-day and multi-chemical penalties and (2) Complainant's actual recommendation of $210,000, as justification for its proposed $210,000 penalty, is rejected.

There is essentially no difference between Complainant's and Respondent's positions with regard to the nature, extent, gravity and circumstances of the violation. However, there is a critical difference between the parties' positions as to whether or not one penalty should be assessed for the three points of compliance. Following a review of the nature, extent, gravity and circumstance of the

violation, and determination of an initial base penalty, the multi-point of compliance situation and other adjustment factors will be discussed.

As previously explained, the nature of the EPCRA reporting violations at issue in this case, according to the Penalty Policy, is classified as "emergency preparedness/right-to-know." The section of the Penalty Policy that addresses the extent of the violation describes the extent in the context of the nature classification. Penalty Policy at 10-18. Emergency Preparedness/ Right-to-Know violations are placed in one of three extent levels, depending upon the extent of the violation at issue. *Id*. at 12-16.

The extent factor is used in the Penalty Policy to reflect the amount of deviation from EPCRA and its regulatory requirements. Penalty Policy at 10. More specifically, it addresses the timeliness and utility of reports submitted under emergency preparedness/right-to-know provisions. Penalty Policy at 13. Failure to submit an MSDS form or list of MSDSs, as required by EPCRA section 311(a), within 30 days of the submission due date, as defined at EPCRA section 311(d), is classified in the Penalty Policy as an extent "Level 1" on the Penalty Policy matrix. *Id.* Failure to submit the inventory forms, as required by EPCRA section 312, within 30 days of the reporting deadline, is also classified in the Penalty Policy as an extent "Level 1" offense. *Id.* at 14. Respondent's section 311 and 312 violations are extent "Level 1" violations under the Penalty Policy's matrices because the required reports were not submitted to the appropriate agencies within 30 calendar days of the reporting obligations.

The gravity of the violation, according to the Penalty Policy, is also considered in the context of the nature of the various violations addressed by the policy. The gravity of emergency preparedness/right-to-know violations is based upon the number and/or amount of the chemical(s) in excess of the reporting threshold present at the facility. Penalty Policy at 17. For violations of EPCRA section 311, when the amount of hazardous chemical present at the facility at any time during the reporting period was greater than ten times the reporting threshold, then the violation falls within gravity "Level A" on the Penalty Policy's matrix. *Id.* For failure to file, or untimely filing of reports required under EPCRA section 312, when the amount of any hazardous chemical not included in the report was greater than ten times the reporting threshold, the violation also falls within gravity "Level A." *Id.* In this case, the reporting threshold was 10,000 pounds for both the section 311 and 312 requirements. Tr. 72, 81-82 (Wright); 40 C.F.R. § 370.20(b). At the time of EPA's inspection, the total quantity of hazardous substances stored on-site included: light petroleum distillate, 4,059,000 pounds as a constituent of #2 Heating Oil and 17,556 pounds as a constituent of unleaded gasoline; vacuum residue, 10,197,000 pounds; kerosene, 2,500,000 pounds; and hydrotreated heavy paraffinic distillate, 1,280,000 pounds. Inspection Report at 6; Tr. 36 (Hollingsworth). Each of these substances was stored in quantities that exceeded the reporting threshold by a magnitude of more than ten. Respondent's violations, therefore, fall within gravity "Level A" on the Penalty Policy matrices.

Once the extent and gravity levels are determined, then a penalty range can be identified on the Penalty Policy's matrices. The matrix for an EPCRA section 311 violation determined to be an extent "Level 1" and gravity "Level A" violation produces a penalty range of $8,000 to $10,000. Penalty Policy at 20. The matrix for an EPCRA section 312 violation determined to be an extent "Level 1" and gravity "Level A" violation suggests a penalty range of $20,000 to $25,000. *Id.* The circumstances factor then determines the appropriate penalty within the penalty range. *Id.* at 19.

The Penalty Policy defines the circumstances of the violation to refer to the potential consequences of the violation. *Id.* at 18. The policy explains:

> The main objectives of the emergency planning and community right-to-know provisions are to assist local and State committees in planning for emergencies and to make information on chemical presence and hazards available to the public. Thus, a respondent's failure to report in a manner that meets the standard required by the Statute or rule could

> result in a situation where there is potential for harm to human health and the environment.

Penalty Policy at 18. The potential for harm from a particular violation may be measured by the potential for exposure to harm posed by noncompliance or the adverse effect the noncompliance had on the purposes or procedures for implementing the EPCRA program. *Id.* For example, "if the circumstances of a violation indicate that the potential for emergency personnel and the surrounding community to be at risk of exposure in the event of a release was high (the emergency personnel did not know of a chemical's presence and could not plan for the safety of the surrounding community in the event of a release)" then the Penalty Policy instructs Complainant to recommend a penalty at the high end of the penalty range. *Id.* at 19. The Penalty Policy further explains:

> In determining the circumstance level, consideration may be given to the relative proximity of the surrounding population, to the effect the noncompliance has on the LEPC's ability to plan for chemical emergencies, and any actual problems that first responders and emergency managers encountered because of the failure to notify (or submit reports) in a timely manner.

Id. at 19. Complainant recommends penalties for the EPCRA section 311 violations in this proceeding at the highest amount in the penalty range, $10,000, and penalties for the EPCRA section 312 violations at the lowest amount in the penalty range, $20,000. C.Br. at 11-12; Tr. 74, 82-83(Wright).

Complainant, however, has not adequately explained why the high end of the range was selected for the section 311 violations, nor why the low end of the range was selected for the section 312 violations. The record is bereft of specific recommendations as to the factors described in the Penalty Policy that affect penalty selection. More specifically, there is no rationale presented as to why Complainant selected the recommended calculations within the ranges set forth by the extent and gravity levels in the penalty matrices. Complainant's witness Wright stated that he did not know why the person who calculated the penalty chose the high end of the range for the section 311 violations and the low end of the range for the section 312 violations.[(7)] Although Mr. Wright stated that he "was not personally involved in the discussions as to how the penalties were arrived at within using [sic] the circumstance factor," he identified the type of factors that would have been considered by the penalty calculator. Tr. 73-74, 83 (Wright). He indicated that the circumstance factor may include consideration of the types and quantities of materials stored and the lack of information to the public. Tr. 74 (Wright). Later in testimony, Mr. Wright also indicated that a penalty calculator might consider the nature of the chemicals stored at the facility, the impact the chemicals would have if there was an emergency situation and public knowledge of the information. Tr. 83 (Wright). These explanations, however, do not explain how the circumstances component of the Penalty Policy affected this particular case. Most of the issues that Mr. Wright identified as part of the circumstances were already considered in determining the extent and gravity levels of the penalty. Neither Mr. Wright nor any of EPA's other witnesses described circumstances unique to this case that warranted any particular penalty within the penalty range. In the absence of any support for the recommended penalty, the Respondent should be given the benefit of the doubt because Complainant bears the burden of proof in this proceeding. Accordingly, $8,000, the amount at the lowest end of the penalty range for section 311, Level 1A violations and $20,000, the amount at the lowest end of the penalty range for section 312, Level 1A violations are selected.

Therefore, the following base penalty amounts reflect the penalties before mitigating factors are considered:

Counts I - III (section 311)	$ 24,000 ($ 8,000 per count)
Counts IV - XII (section 312)	$180,000 ($20,000 per count)
Total Base Penalty Amount	$204,000

B. Mitigating Factors

Neither party has recommended an adjustment to the base penalty because of ability to pay, prior history of violations or economic benefit or savings realized by Respondent as a result of the violations. Accordingly, no adjustment shall be made for these factors as they are discussed in the Penalty Policy.[(8)] The factor of culpability will be discussed after the following sections.

1. Small Business Policy

Respondent argues that the proposed penalty should be adjusted downward because it is a small business. R.Br. at 28. As support for this argument, Respondent cites President Clinton's Executive Memorandum on Regulatory Reform (Executive Memorandum), 60 Fed. Reg. 20621 (April 26, 1995), which states, among other things, that (1) an agency, such as EPA, shall exercise its enforcement discretion for small businesses "when the violation is corrected within a time period appropriate to the violation in question . . .," and (2) the affected agency shall submit a plan to implement this Policy to the Director of the Office of Management and Budget by June 15, 1995. R.Br. at 23-24. Because Respondent asserts that it is a small business, it argues for a reduction of the proposed penalty on this basis. *Id*. at 28.

Complainant responds that EPA's Small Business Policy, issued in response to the Executive Memorandum, is not applicable to Respondent because it applies only to settlement negotiations. C.Br. at 20; R. Ex. 11(EPA's Final Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. 27984 (June 3, 1996)(Small Business Policy). Complainant further asserts that, even if the Small Business Policy applied to litigated proceedings, it would not apply to Respondent because Respondent does not meet the Small Business Policy's definition of a small business. C.Br. at 21-22.

While many arguments are raised with respect to this issue, it can be resolved on the basis of the Small Business Policy's definition of a small business, which is as follows:

> For purposes of this Policy, a small business is defined as a person, corporation, partnership, or other entity who employs 100 or fewer individuals across all facilities and operations owned by the entity.

Small Business Policy at 2. While Respondent references Pennsylvania law to support its argument that it is a small business, that argument is inappropriate. It is the EPA's Small Business Policy's definition that is applicable here. Respondent Haab and its subsidiaries together employ approximately 350 people. Tr. 182-183, 193-195 (Haab). The Haab companies have a common officer in that Larry Gramlich, Haab's Vice President for Operations, is also the Vice President for Operations for all of the subsidiaries. Tr. 195 (Haab). Also, Haab owns the bulk terminals of at least two of the subsidiaries (specifically, Reit Oil Company and Miller & Bethman) and Christian Haab submitted Tier II reports on behalf of some of the Haab subsidiaries along with a cover letter using F.C. Haab stationery. Tr. 195-196 (Haab). Thus, Respondent clearly does not meet the definition in EPA's Small Business Policy of an "entity who employs 100 or fewer individuals across all facilities and operations owned by the entity." R. Ex. 11 at 2. Accordingly, Respondent's argument to reduce the penalty based upon the Executive Memorandum and/or the Small Business Policy is rejected.[(9)]

2. Other Matters as Justice May Require

Respondent argues that there was no actual risk to the community because the local responding fire company (Engine 60), which was also the city's only HAZMAT Unit, was fully prepared to respond to a fire at Respondent's facility in spite of the fact that Haab had not filed the appropriate forms. R.Br. at 22; Tr. 238-254 (Bitto). Respondent claims also that Engine 60's Vital Building Information (VBI) sheets, prepared from the fire department's yearly inspection, recorded pertinent information to aid Engine 60 in fighting a fire at Respondent's facilities. R.Br. at 4; Tr. 239-242 (Bitto). In addition, Respondent argues that placards on Respondent's storage tanks provided pertinent information to aid Engine 60 in fighting a fire. R.Br. at 4.

Complainant urges rejection of any downward adjustment due to, in effect, Respondent's alleged substantial, if not actual, compliance with EPCRA's requirements. C.Br. at 23-24. Complainant notes that, while VBIs and placards contain some information, MSDS forms provide for more detailed information regarding the nature and potential hazards associated with specific chemicals. *Id.*

Complainant has shown that Respondent's alleged substantial compliance is not sufficient and filing of the more detailed MSDSs is required. Tr. 135-138 (Roth); 249-254 (Bitto). Examples of information contained in the MSDSs, but not in the VBIs or placards include: exact product ingredients, Tr. 249 (Bitto); physical data, such as boiling point, melting point, packing density and vapor pressure, Tr. 249-250 (Bitto); fire and explosion data, including flash point and auto emission temperature, health hazards and reactivity data, Tr. 250 (Bitto); combustibility, Tr. 251-252 (Bitto); and tank storage quantity, Tr. 254 (Bitto). Furthermore, the Respondent has not provided any evidence that the State Emergency Response Commission and Local Emergency Planning Committee had any information whatsoever regarding the types and quantities of hazardous materials stored at the Respondent's facility. No reduction in penalty is warranted, therefore, for Respondent's alleged substantial compliance.

At this time, the argument made by Respondent that it should have been assessed one penalty -- not three -- for each year it did not submit reports to the three required agencies, must be addressed. For purposes of this discussion, the undersigned finds that this issue is most appropriately considered and decided under the "other matters as justice may require" factor. The Penalty Policy explains that a facility may submit information on one chemical to each of the three recipients (the SERC, the LEPC, and the local fire department) at different times, resulting in different penalty amounts. Penalty Policy at 8. Failure to submit the forms to each of the three recipients, therefore, is generally considered three separate violations, resulting in three penalties on the Penalty Policy matrices. *Id.* The Policy provides, however, that for first-time violators, where the facts and circumstances of the case warrant it, one penalty may be assessed for these multi-point of compliance situations. *Id.* An example given in the Policy to demonstrate when such calculation is appropriate is when "it is clear that the respondent had no prior actual knowledge of the ... EPCRA reporting requirements." *Id.* Respondent argues that it should have been assessed one penalty for the multi-point of compliance situation in this case because it had no prior actual knowledge of the EPCRA reporting requirements. R.Br. at 5.

Complainant, on the other hand, claims that Respondent is not entitled to single point of compliance penalty calculation. C.Br. at 12-13. Acknowledging that the Penalty Policy authorizes a single count for the three points of compliance, Complainant explains that it did not propose a single count of violation for the Respondent's violations because Respondent's first-time violator status was already built into the proposed penalty when Complainant did not propose a penalty for multi-day or multi-chemical violations. *Id.* Complainant asserts that the facts and circumstances of this case do not warrant single point of compliance calculation because Respondent had actual knowledge of EPCRA's requirements, the violations extended over a number of years and the violations involved large amounts of hazardous chemicals. C.Br. at 13; C.Reply at 7. Complainant asserts that Respondent had actual knowledge of EPCRA's requirements because: 1) the MSDS forms that Respondent received contained references to EPCRA and put Respondent on notice of the existence of EPCRA, and 2) Lt. Stephen Roth of the Philadelphia Fire Department delivered an information package to Respondent's facility summarizing the requirements of EPCRA. C.Br. at 14-15; C.Ex. 1A, Attachment E2(MSDSs for Heating Oil #2 and Chevron Marine Engine Oil Delo 477 SAE 20W-40); C.Ex. 3(Memorandum from S. Roth to BC Janda indicating information package dropped off at F.C. Haab at Morris & Schuylkill on May 18, 1993); C.Ex. 5(SARA Title III and Pennsylvania Act 165 Facility Reporting Requirements); Tr. 138-46 (Roth). Complainant further asserts that Respondent deals with large amounts of regulated substances and should not receive lenient treatment for its failure to apprise itself of its obligations. C.Reply at 7-8.

Respondent discounts Complainant's argument that Respondent received actual notice of the EPCRA requirement. Respondent states that the argument that it had actual knowledge of EPCRA because two of its MSDS sheets contained references to EPCRA is unfounded.(10) Respondent further asserts that Lt. Roth never delivered an information packet to Respondent. R.Br. at 16. Even if it had received the information packet, Respondent argues that the packet would not have informed it that the references to "chemicals" or "hazardous chemicals" applied to oil and it would have been difficult for a home heating oil dealer to determine that EPCRA applied. *Id*.

Respondent's argument is not persuasive. The law is quite clear that ignorance of the law does not excuse a violator from a particular legal requirement. Respondents are charged with the knowledge of the statutes of the United States and of the Federal regulations promulgated thereunder.(11) It is Respondent's responsibility to become aware of its legal obligations and ensure that it has complied with all federal statutes and regulations that apply to its activities. Respondent's statements that it was simply unaware of the existence of EPCRA, a law passed by Congress four years before the first violations in this case occurred, do not absolve Respondent of its legal obligations. Respondent, therefore, had constructive knowledge of EPCRA and its application to Respondent's activities.

The question as to Respondent's actual knowledge of the law comes from the Penalty Policy which allows for a reduction in an otherwise applicable penalty "where it is **clear** that respondent had no prior actual knowledge of the ... EPCRA reporting requirements." Penalty Policy at 8, *emphasis added*. Although Respondent has shown that none of its employees remember receiving a packet of information from Lt. Roth explaining its EPCRA obligations and that the references to EPCRA in two of Respondent's MSDS forms were not sufficient to put it on actual notice of its EPCRA legal obligations, the record also reflects Lt. Roth's testimony that he visited Respondent's tank farm on May 18, 1993 and gave the EPCRA information package to a woman at that facility. Tr. 138-146.(Roth); C. Ex. 3, C. Ex. 5. While there is some evidence to support Respondent's position, in light of the evidence submitted by Complainant, Respondent has not shown persuasively and clearly that it did not have actual knowledge of its legal obligation to submit the MSDS forms and Tier II reports to the SERC, LEPC, and local fire department. Therefore, Respondent's argument is rejected.

However, while Respondent's previous argument in support of a single penalty for each of the three years a violation of section 312 occurred has been rejected, other evidence in the record supports assessing only one penalty per year under the "other matters as justice may require" factor.

The EAB has stated:

> It is ... within the presiding officer's prerogative to consider what type of environmental citizen Spang [or any other Respondent] has been in deciding upon an appropriate penalty to assess. The justice factor, which vests the Agency with broad discretion to reduce the penalty *when the other adjustment factors prove insufficient or inappropriate to achieve justice,* [footnote omitted] is clearly suited to this end.

In re Spang & Co. EPCRA Appeal Nos. 94-3 & 94-4, slip. op. at 23 (EAB Oct. 20, 1995).

Pursuant to the EAB's rationale, Respondent's actions as a responsible "environmental citizen," warrant some reduction in penalty. Respondent operates in a heavily regulated industry and showed that it tried to comply with all applicable environmental laws. Respondent retained an environmental consultant, was active in associations, through which it gained information about changing regulations and requirements for owners of bulk oil and storage facilities, and communicated with other dealers in the same industry. Tr. 164-165 (Haab). While Respondent is not excused from its failure to comply with EPCRA, a distinction should be made between Respondent, who generally complies with its environmental obligations and cooperates with local and federal authorities, and other violators who completely

disregard any environmental requirements. The testimony of Respondent's officials and employees demonstrates that this is a company that, while it failed to meet its environmental obligations in this instance, is, in general, a responsible environmental corporate citizen that takes its environmental obligations seriously. This conclusion is supported by the fact that Respondent had no previous violation of any significance, brought itself into compliance, and decided to upgrade its containment curbing, as discussed below.

Also, Respondent argues that its expenditure of almost $100,000 of environmentally beneficial expenditures should be the basis for a significant reduction in its penalty under the "other matters as justice may require" factor. Respondent states that this amount consists of upgraded cement curbing and paving around its facility to provide a barrier between the terminal and the adjacent Schuylkill River, in the event of a release from the tanks. Tr. 185-187; 208-209 (Haab). In addition to the curbing, Respondent installed discharge valves, drainage culverts, and "speed bumps" to localize and contain spills and facilitate the cleanup. *Id.* Respondent argues that it was not required to install upgraded cement curbing, but voluntarily undertook this work to improve on the existing curbing of old telephone poles and macadam. Tr. 205-206 (Haab).

Complainant agrees that environmentally beneficial expenditures may be considered as a basis for reducing a penalty. C.Br. at 17. However, it disagrees that this particular expenditure is justification for a reduction in Respondent's proposed penalty. Complainant asserts that if Respondent believed that its existing containment facilities were inadequate, it should have performed the upgrade in any event. *Id*. at 18. Complainant asserts that Respondent has failed to show that the existing curbing was inadequate. *Id*. Complainant also argues that there must be a nexus between the violation in this case and Respondent's expenditures, and asserts that Respondent has failed to make the requisite showing. *Id*. Complainant, therefore, urges that Respondent's claim be rejected. *Id*. at 19.

Although Supplemental Environmental Projects (SEPs) to be performed in the future can only be considered in settlements, and not in litigated proceedings,[(12)] environmentally beneficial expenditures already completed may be considered as a basis for a reduction of the penalty under the "other factors as justice may require" standard if (1) "the evidence of environmental good deeds . . . [is] . . . clear and unequivocal," there is a nexus between the nature of the violation and the environmental benefit to be derived from the project, and evidence in the record justifies the amount of the expenditure. *In re Spang*, EPCRA Appeal Nos. 94-3 & 94-6, slip. op. at 24-25. Containment of oil spills is required under Respondent's Spill Prevention Control and Countermeasures (SPCC) Plan. 40 C.F.R. § 112.7. The SPCC regulations require "[a]ppropriate containment and/or diversionary structures or equipment to prevent discharged oil from reaching a navigable water course." 40 C.F.R. § 112.7(c). Both Respondent and Complainant agree that the existing curbing of old telephone poles and macadam met the definition of "appropriate containment." R.Br. at 18; C.Br. at 18. The question arises as to whether Respondent's additional expenditures justify a reduction in penalty.

Respondent's expenditure of $100,000 on cement curbs with added paving, valves and containment "speed bumps" offers superior protection against a potential release of oil into the Schuylkill River or its banks adjacent to the facility. While Complainant is correct that it is unlikely that the old containment wall would be breached, such a breach was possible. Respondent's upgrade of the 50-year-old containment wall reduces the likelihood of a spill even more, and, therefore, is an environmentally beneficial expenditure. Furthermore, this expenditure for enhanced containment increased emergency preparedness and response at Respondent's Schuylkill Terminal by enabling emergency response personnel to respond more quickly and efficiently in the event of a release of oil from the tank or truck. Tr. 186-187 (Haab). Accordingly, a sufficient nexus between EPCRA and the expenditures is present and a reduction in the penalty in this action on this basis is appropriate.

3. Culpability

One additional factor, culpability, must be discussed. The Penalty Policy states the following:

> The existence of a violation is established without a showing of failure to adhere to a standard of care. As with other statutes, EPA pursues a policy of strict liability in penalizing for a violation. Nonetheless, under the penalty system in this policy, the base penalty may be increased, decreased or remain the same depending on the violator's culpability.
>
> Two concepts that underlie culpability are the violator's knowledge of the requirement and the violator's control over the violative act. The lack of knowledge of a particular requirement would not necessarily reduce culpability. To do so would encourage ignorance of the law. The test under CERCLA § 103 and EPCRA §§ 304, 311, and 312 will be whether the violator knew or should have known of the CERCLA/EPCRA requirements or that the general nature of his operation deals with hazardous chemicals. A reduction in penalty based upon lack of knowledge may only occur where a reasonably prudent and responsible person in the violator's position would not have known that the conduct was violative of CERCLA or EPCRA.

Penalty Policy at 25-26. As previously discussed, the Respondent has not made a persuasive argument as to lack of knowledge. Nor has it made an argument as to lack of control. Accordingly, no adjustment for this factor will be made.

CONCLUSION

A review of the discussion above reveals that two findings require a reduction in the Base Penalty; i.e., (1) the finding that, overall, Respondent has been a good environmental citizen, and (2) the finding as to the benefits of Respondent's environmental expenditures. Considering both of these factors together, it is determined that Respondent should be assessed one penalty for its section 311 violations, and one penalty for each year that a section 312 violation occurred.

Thus, the final penalty is $68,000 calculated as follows:

Count I, II, III	$ 8,000
Count IV, V, VI	$ 20,000
Counts VII, VIII, IX	$ 20,000
Counts X, XI, XII	$ 20,000
Total Base Penalty	$ 68,000

ORDER

1. A civil penalty in the amount of $68,000 is assessed against Respondent, F. C. Haab, Inc.

2. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service date of the final order by submitting a certified check or cashier's check payable to Treasurer, United States of America, and mailed to:

> EPA - Region V
> (Regional Hearing Clerk)
> Mellon Bank
> P.O. Box 360515
> Pittsburgh, PA 15251-6515

3. A transmittal letter identifying the subject case and the EPA docket number, plus Respondent's name and address must accompany the check.

4. Failure upon part of 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. 31 U.S.C. § 3717; 40 C.F.R. § 102.13(b)(c)(e).

5. Pursuant to 40 C.F.R § 22.27 this Initial Decision shall become the final order

of the Environmental Appeals Board (EAB) within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the

EAB is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.3(a), within 20 days after the Initial Decision is served upon the parties or (2) the EAB elects, sua sponte, to review this Initial Decision.

Charles E. Bullock
Administrative Law Judge

1. *In re F.C. Haab Company, Inc.*, Docket No. EPCRA-III-154 (Notice of Hearing, Dec. 23, 1996).

2. By order issued December 23, 1996, the undersigned granted Complainant's motion to exclude a copy of EPA's May 8, 1995 Interim Revised Supplemental Environmental Project (SEP) Policy from Respondent's prehearing exchange.

3. The statute instructs, "In determining the amount of any penalty assessed pursuant to this subsection, 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, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." 42 U.S.C. § 11045(b)(1)(C), EPCRA § 325(b)(1)(C).

4. C.Br. at 2-4. In support of its assertion that a single penalty for multi-points of compliance is appropriate under the circumstances in this case, Respondent argued in its post-hearing brief that EPA adopted the single penalty method in two other EPCRA administrative actions. R.Br. at 6-7. Respondent attached the Complainant's prehearing exchange and the Complaint from one proceeding and the Complaint from another at Tabs 1 and 2 to its post-hearing brief, and appears to be requesting that the Presiding Judge take official notice of these documents. *See* R.Br. at n.2. Complainant objects to the introduction of these documents, asserting that the late introduction of these documents at this stage in the proceedings is inappropriate, the documents are irrelevant, and the admission of these documents would prejudice EPA. Complainant's Reply Brief (C.Reply) at 8-9. In the event that Tabs 1 and 2 are accepted, Complainant requests leave to submit an additional brief to provide the Court with the full range of sections 311 and 312 administrative complaints and address the significance of the documents presented by Respondent. C.Reply at 10. Tabs 1 and 2 to Respondent's post-hearing brief are rejected. Proposed and negotiated settlement penalties are not relevant to this proceeding. It is, therefore, not necessary to address whether official notice or additional briefing is appropriate.

5. "If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b).

6. *In re Employers Insurance of Wausau and Group Eight Technology, Inc.,* TSCA Appeal No. 95-6, 7 E.A.D. 722 (EAB Feb. 11, 1997)*on remand, In re Group Eight Technology, Inc.*, TSCA-V-C-66-90 (Initial Decision Nov. 17, 1997).

7. Tr. 74, 82 (Wright). The person who initially calculated Complainant's proposed penalty, Stephanie Branch Wilson, the EPCRA Enforcement Coordinator when she calculated the penalty, no longer holds that position. Tr. 67 (Wright). Ms. Branch Wilson did not testify in this proceeding. Mr. Wright supervised and concurred with Ms. Branch Wilson in her penalty calculations. *Id*.

8. *See* Penalty Policy at 22-24, 27-29 for discussion of the effect these factors might have on a penalty calculation.

9. Respondent also argues that the Executive Memorandum has a requirement that

agencies such as EPA waive or reduce penalties for small businesses under certain circumstances independent from the plan that the agency must develop to implement the Executive Memorandum. R.Br. at 24. This argument is not persuasive. It is clear that EPA was required to develop a plan to implement the Executive Memorandum and that EPA did so with its Small Business Policy.

10. R.Br. at 14. Respondent suggests that the references to EPCRA on the MSDS forms are unexplained, finely printed, may be read to state that EPCRA is not applicable, and nowhere mention either section 311 or 312. *Id.* at 15.

11. *See* 44 U.S.C. § 1507; *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); *In re Apex Microtechnology, Inc.*, Docket No. EPCRA-09-92-00-07 at 13 & n.6 (Initial Decision May 7, 1993); *In re Riverside Furniture Corp.*, Docket No. EPCRA-88-H-VI-406S at 4 (Initial Decision Sept. 28, 1989).

12. *In re F.C. Haab, Inc.*, EPCRA-III-154 (Order Dec. 23, 1996); *In re Spang & Co.*, EPCRA Appeal Nos. 94-3 & 94-6, slip. op. at 22-23 (EAB Oct. 20, 1995).