7/24/91

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
PITT-DES MOINES, INC.,	)	**Docket No. EPCRA-VIII-89-06**
	)	
Respondent	)	

INITIAL DECISION

DATED: July 24, 1991

EPCRA: Pursuant to Section 325(c)(1) of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. §11045(c)(1), the Respondent Pitt-Des Moines, Inc. is assessed a civil penalty of $12,000 for failure to file on time a Form R for nickel processed at the Respondent's Provo, Utah facility, in violation of Section 313(a) of EPCRA, 42 U.S.C. §11023(a).

APPEARANCES:

For Complainant:	Katherine L. Letson, Esquire David J. Janek, Esquire for U.S. Environmental Protection Agency
For Respondent:	Richard F. Gisler, Esquire for Pitt-Des Moines, Inc.

I. PROCEDURAL HISTORY

On September 29, 1989, the Complainant, Region VIII of the United States Environmental Protection Agency (Complainant), filed a complaint under Section 325(c)(1) of the Emergency Planning and Community Right-to-Know Act (EPCRA or the Act), 42 U.S.C. §11045(c)(1)[1] alleging that the Respondent Pitt-Des Moines Inc. (Respondent or PDM) had violated Section 313(a) of EPCRA, 42 U.S.C. §11023(a).[2] The Section 313 violation alleged is that the Respondent failed to file on time a Form R for calendar year 1988 for the Respondent's Provo, Utah facility. Form R is a toxic chemical release form required by Section 313(a) that must be filed annually on July 1 of the following year, in this case 1989. The Form R filing requirement applies to owners and operators of facilities that have 10 or more full time employees, that are in Standard Industrial Classification Codes 20-39 and that manufacture, process or otherwise use a toxic chemical identified in EPCRA, in excess of the threshold level specified in EPCRA. See Sections 313(b), 313(c) and 313(f) of EPCRA. The complaint seeks a civil penalty of $34,000, as described in more detail, infra.

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[1] EPCRA is also known as Title III of the Superfund Amendments and Reauthorization Act of 1986.

[2] The U.S. Code Sections will not be cited hereinafter and the statutory references will use the Section numbers from the original act before its codification, e.g. Section 313 of EPCRA.

The Respondent, on October 18, 1989, filed its Answer in which PDM denied that it violated Section 313 of EPCRA. The Answer alternatively asserts that, if the Respondent did violate Section 313, the penalty sought is unreasonable.

The proceeding went to evidentiary hearing on July 18-19, 1990, during which the following decisional record was established. The Complainant presented two witnesses and introduced into evidence 10 exhibits, which were designated as Exhibits A through V. The Respondent presented 5 witnesses and identified 13 exhibits at trial which were designated as Exhibits 1 through 13. These Exhibits were introduced into evidence with the exception of Exhibits 6,12 and 13, which were not offered into evidence by the Respondent. The transcript of the hearing is contained in two volumes totalling 313 pages. In addition, the parties had stipulated to various facts which were submitted in written form on June 19, 1990. The stipulated facts were the subject of a motion to clarify Stipulation Number 14, which motion was granted at hearing (Tr. 4). In September 1990, the parties submitted Initial Briefs together with Proposed Findings of Fact and Conclusions of Law, and filed Reply Briefs in October 1990.[3]

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[3] The exhibits will be cited as "Ex." with the letter or number (e.g., Ex. A or Ex. 1); the transcript will be cited as "Tr." with the page number (e.g., Tr. 10); the stipulations will be cited by number (e.g. Stipulation No. 1); and the briefs will be cited by abbreviated party and page number (e.g., Comp. Initial Br., p. 10).

This initial decision will consist of a description of the positions of the parties with regard to the matters at issue, an analysis and resolution of the matters at issue, findings and conclusions based upon resolution of the matters at issue, and an order disposing of the issues. Any argument in the parties' briefs not addressed specifically herein is rejected as either unsupported by the evidence or as not sufficiently persuasive to warrant comment. Any proposed finding or conclusion accompanying the briefs not incorporated directly or inferentially into the decision, is rejected as unsupported in law or fact, or as unnecessary for rendering this decision.

II. THE POSITIONS OF THE PARTIES

1. Complainant's Position

Complainant asserts that Respondent has admitted almost all of the underlying facts necessary to sustain the complaint. In particular, Complainant avers that PDM admits that nickel and chromium are covered toxic chemicals (Stipulation No. 12); that nickel and chromium are contained in products used during fabrication of items at the Respondent's Provo facility (Ex. 11, pp. 2,3); that once fabricated, the items are/were placed into the stream of commerce (Tr. 144); and that, if the Provo facility processed or otherwise used more than 50,000 pounds of nickel or chromium in a calendar year, then the Respondent was required to file a Form R for each substance to state the estimated release of each toxic chemical (Stipulation No. 4; Tr. 31).

The Complainant then asserts that PDM admits that it did not

file a Form R for nickel and chromium amounts fabricated at the Provo facility in 1988, until after July 1, 1989 (Exs. D and 6).

The primary fact in dispute that the Complainant focuses on in its Initial Brief is whether PDM processed or otherwise used more than 50,000 pounds each of chromium and nickel at the Provo facility in 1988. Complainant notes that the facility was inspected in July 1989 by EPA Inspector Paul Grimm, as a result of which PDM agreed to calculate the amounts of toxic chemical containing materials manufactured, processed, or otherwise used at the facility during 1987 and 1988 to determine if it had to file a Form R report (Ex. F, p. 7; Tr. 72). The Complainant avers that the Respondent properly calculated the percentages of nickel and chromium in the stainless steel at Provo, then multiplied those percentages by the weights of the stainless steel fabricated at the facility (Ex. 11, p. 3). Based on these calculations, PDM calculated that it did exceed the 50,000 pound threshold for nickel and chromium in 1988, and was, therefore, subject to Form R requirements (Tr. 220). Indeed, Complainant notes that the Respondent determined that it exceeded the 50,000 pound threshold without considering all the nickel and chromium containing products used in its process at the facility (Tr. 220). As a result, on September 14, 1989, PDM filed Form Rs for both nickel and chromium for 1988 (Exs. D and 6).

Complainant takes the position that the Form Rs filed by the Respondent are admissions which shifted the burden at hearing to the Respondent to show that it did not exceed the threshold.

Complainant contends that the evidence the Respondent relied on at trial, which was comprised of new calculations indicating that PDM did not exceed the 50,000 pound threshold, was self-serving - a complex creation that involved formulas and calculations invented just prior to the hearing. Because of this, Complainant argues that the later calculations could not demonstrate that PDM failed to meet the threshold.

In particular, Complainant asserts that the evidence at hearing showed that the Respondent processed approximately 84 tons of a stainless steel known as AL-6XN (Ex. 1, p. 1; Tr. 16) and that other projects at the Provo facility involved approximately 30 tons of stainless steel (Tr. 168). Also, Complainant notes that welding was performed at the facility and that welding rods contained chromium and nickel (Tr. 115). Further, Complainant points out that the evidence showed that stainless steel must have 10% chromium (Tr. 104) and that AL-6XN contains 20% chromium and 25% nickel. (Tr. 109).

Complainant asserts that Respondent's own witness, Steven Oyster, testified that the amount of nickel processed at the Provo facility in 1988 was 60,080 pounds. Therefore, Complainant argues that PDM concedes its duty to file a Form R for nickel for 1988. As to chromium, Mr. Oyster's testimony was that there was 48,783 pounds in AL-6XN steel processed in 1988 at the Provo facility. Complainant then takes the position that, when the other 30 tons of stainless steel are taken into account, 6,000 more pounds of chromium must be added since there is a 10%

chromium content in this other stainless steel (30 tons = 60,000 lbs; 60,000 lbs x 10% = 6000 lbs.). This would make the amount of chromium processed 54,783 pounds (48,783 lbs. plus 6,000 lbs), which would exceed the 50,000 pound threshold. Complainant further notes that these amounts exclude the welding rods and other nickel and chromium containing materials (Tr. 217).

Complainant, as a result of the above argument, asserts that a violation of Section 313 of EPCRA occurred because of the Respondent's failure to file Form Rs for nickel and chromium for the year 1988 by the July 1, 1989 deadline.

Complainant also argues that the penalty of $17,000 each for the two alleged violations is appropriate. It is noted that Section 325(c)(3) of EPCRA provides for assessment of penalties up to $25,000 per day. Further, in determining the amount of the penalty, the nature, circumstances, extent, and gravity of the violations, the ability of the violator to pay, the past history of violations, the degree of culpability, the economic benefit or savings, and such other matters as justice may require, shall be taken into account under Section 325(b)(1)(C) of EPCRA (Tr. 81).

Complainant asserts that EPA has generated its Enforcement Response Policy for EPCRA Section 313 (Penalty Policy) in response to the statutory directives and that the Penalty Policy provides the framework for assuring that the statutory factors are taken into account in penalty assessment. Complainant then avers that the penalty proposed against the Respondent was calculated in accordance with the Penalty Policy (Tr. 81) and

that, therefore, the statutory factors were considered in determining the proposed penalty. Complainant argues that the $34,000 is reasonable, particularly since it is a small amount for a company whose sales exceed $300,000,000 per year. Complainant notes that a penalty is important because the nature of the EPCRA 313 program is preventive, to provide a basic knowledge about existing chemicals and their releases, in order to safeguard human health and the environment. Complainant avers that the reporting required by EPCRA must be voluntary and timely and that an increased penalty is appropriate where compliance is achieved only after an EPA inspection, as happened in the present proceeding.

In summary, Complainant argues that the Respondent processed amounts of nickel and chromium exceeding the 50,000 pound threshold in the year 1988 and failed to submit the Form R reports as required by EPCRA. The Complainant avers that PDM admitted its mistake only after an EPA inspection, and conceded its duty to report by the late filing of the two Form Rs. As a result, Complainant asserts that a civil penalty in the amount of $34,000 should be entered against the Respondent for the two violations of Section 313 of EPCRA.

2. Respondent's Position

Respondent, in its Initial Brief, presents a variety of arguments. First, the Respondent asserts that it was not obligated to file a Form R for its Provo Facility for 1988 because it did not manufacture, process, import, or otherwise use

toxic chemicals in excess of the threshold quantities. While Respondent does admit that it filed a Form R for chromium and nickel in September 1989, it avers that this filing was based on erroneous information. PDM contends that the Complainant's method of arriving at the quantity of toxic chemicals is not applicable because that method includes toxic chemicals and metal alloys which are not subject to any process.

Further, even assuming arguendo that the Complainant's method of calculating threshold quantities is correct, the Respondent avers that the quantity of toxic chemicals should be calculated based upon the evidence it presented at trial and that this calculation would show that the threshold quantity for chromium was less than 50,000 pounds and that, therefore no violation for this chemical occurred. In addition, Respondent takes the position that, even if the Complainant's calculations with regard to threshold calculations are accepted, the penalties proposed are excessive because the Respondent's method of determining the amount of chemicals actually processed is reasonable, whereas Complainant's method is not contained in the statute or its implementing regulations, and was not publicized in a manner which could reasonably be expected to reach the parties such interpretations would affect.

PDM's first reliance is on the argument that a chemical is not processed if not subject to a physical process, so that only the particular portions of the steel sheets that were worked on at the Provo facility should be counted in determining the

threshold quantities. This would mean that the only quantities of nickel and chromium that should be considered for threshold purposes would be those quantities actually worked on at the facility - that is, the areas of the steel sheets that were subject to welding, burning or grinding. Under the Respondent's theory, since only certain areas of the steel sheets were subject to welding, burning, or grinding, the amount of nickel and chromium being processed at Provo was considerably less than 50,000 pounds and, therefore, no violations occurred.

To support it's position, the Respondent turns to the statutory definition of the term "process" which in Section 313(b)(c)(ii) of EPCRA is set out as follows:

> (ii) The term "process" means the preparation of a toxic chemical, after its manufacture, for distribution in commerce -
>
> (I) In the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such chemical, or
>
> (II) as part of an article containing the toxic chemical

The Respondent asserts that Section 372.3 of the EPA Regulations for EPCRA (Regulations), 40 C.F.R. § 372.3, mirrors the statutory definition and adds the following:

> Process also applies to the processing of a toxic chemical contained in a mixture or trade name product.

PDM contends that the key word in the definitions is "preparation" and that the use of this word in the statute means that the mere existence of toxic chemical at a facility is not

processing as contemplated by the Act, but rather processing requires some type of activity that will somehow affect the toxic chemical. Respondent urges rejection of Complainant's argument that the presence of a toxic chemical in an article which is subject to some processing is sufficient to include the entire amount of the toxic chemical in the article, as opposed to including only the amount of toxic chemicals in the portion of the article actually subjected to the physical process. PDM avers the Complainant's interpretation is contrary to the above quoted language of Section 313 of EPCRA that requires a toxic chemical to be prepared to be considered to be processed. The Respondent argues that, if the toxic chemical is not prepared but is only present in the article, such unprepared amounts should be excluded for statutory purposes, such as determining threshold amounts. PDM further asserts that the language of the Regulation cited above merely acknowledges that a toxic chemical contained in a mixture is subject to EPCRA and does not change the statutory requirement that the toxic chemical must be prepared.

The Respondent also argues that a metal alloy itself, such as the steel at issue herein, is not hazardous but contains the toxic chemicals such as chromium and nickel in its metallurgical structure. Therefore, under normal conditions of use, the chemicals contained in the alloy pose no threat of release. Indeed, it would only be under severe, abnormal conditions that the release of the toxic constituents could occur. PDM notes

that stainless steel is a crystalline product, that its component parts, including nickel and chromium, are not separate and that exposure to the nickel and chromium content does not occur in the normal ambient environment (Tr. 106-07). In this regard, no release of chromium or nickel from the steel involved could occur other than by a conscious, deliberate attempt to work on it (such as welding, burning or grinding), or by dropping it into a severe acid solution which does not exist in the normal environment (Tr. 110-11). As a result, Respondent asserts that the only areas that should be considered are the areas of the steel on which work was done, that is, the areas that were being welded, burned, or ground. PDM contends that it is inappropriate to include the nickel and chromium content of nonaffected areas, which constitute the larger portion of the steel sheets involved. According to the Respondent, the nonaffected areas are not deemed to be prepared and are, therefore, not covered under EPCRA.

In addition, PDM takes the position that the information provided to EPA which was relied upon by the Complainant is inaccurate. This information was contained in a letter of August 29, 1989, to EPA from PDM, which letter lists 125,800 pounds of nickel and 106,090 pounds of chromium as being processed at the Provo facility in 1988 (Ex. 7). The Respondent notes that Mr. Mark Meyer prepared this information, which formed the basis for the submission of the Form Rs in September 1989. According to PDM, Mr. Meyer erroneously supplied the amounts of chromium and nickel because of the tight time constraints of the deadline for

compiling such information. PDM points out that Mr. Meyer's testimony establishes that large quantities of stainless steel which were used by him in determining the amounts of nickel and chromium processed at the Provo facility, were never sent to Provo but were sent directly to the Arizona Project for which the stainless steel was intended. Specifically, Mr. Meyer pointed out the two most significant of these errors, which incorrectly included 249,503 pounds of AL-6XN steel in the total of 428,352 pounds calculated by Mr. Meyer to have been at Provo in 1988. (Tr. 196-202.)

To correct Mr. Meyer's mistakes, Respondent relies on Mr. Steven Oyster's testimony showing that there was a substantially smaller amount of stainless steel ordered shipped to Provo in 1988 than was shown on the information submitted to EPA by Mr. Meyer in August 1989 (Ex. 9; Tr. 245-46). The Respondent asserts that the calculations made by Mr. Oyster, based on his review of purchase orders, indicate that the correct figures for all stainless steel shipped to Provo in 1988 is 161,971 pounds. Using the percentage calculated by Mr. Meyer and accepted by EPA (23.5% for nickel and 20.5% for chromium in the AL-6XN steel), PDM calculates that the correct figure for nickel shipped to the Provo facility in 1988 is 63,201 pounds and the correct figure for chromium is 50,482 pounds. Then, the Respondent reduces these figures because certain of the steel was shipped to Provo but not worked on in 1988 and because certain other portions of the steel was transhipped from Provo with no work having been

performed on it. (Exs. 4A-4G; Exs. 4K and 4L; Ex. 9; Ex. 10; Tr. 245-46, 257-62.) The net result from PDM's calculations is that there was 60,080 pounds of nickel and 48,283 pounds of chromium present in all the steel worked on at Provo in 1988. As a result, Respondent argues that no reporting obligation for chromium existed for 1988 and that any assessment of the civil penalty in connection with the processing of that chemical is not warranted.

Further, the Respondent argues that, to process a toxic chemical, a preparation involving a physical interaction with the chemical is necessary. PDM relies on the evidence that a formula can be used to determine the areas of the stainless steel physically affected by the processing, particularly by the welding. In this regard, the Respondent contends that the processed amounts of nickel and chromium are 27,036 lbs. and 21,952 lbs. respectively. (Ex. 9; Tr. 283.) According to PDM, these figures significantly overstate the actual amounts since they are based on conservative assumptions that all the steel was subject to very high level processing (Tr. 283-84). Since the figures are well below the threshold level of 50,000 pounds, the Respondent argues that no violations have occurred with regard to either nickel or chromium.

Moreover, the Respondent argues that, even if the Complainant's interpretation of determining the amounts of chromium and nickel are accepted, the proposed penalty of $34,000 is excessive. In this regard, PDM avers that the Complainant

considers metal alloys to be solid mixtures (Tr. 40) and that it is not obvious that a crystalline product such as stainless steel is properly classified as a solid mixture. Respondent contends that Complainant did not introduce evidence to show that a crystalline product is a solid mixture and covered under the Act or that regulated companies should know this, despite it not having been addressed in any regulation. PDM points out that the Complainant admits that a clarification and guidance document on this was first published in January 1990 to educate the metal fabrication industry on EPA interpretations, and the Agency acknowledges that there is confusion about whether or not metals are included (Tr. 45-47, 49). The Respondent takes the position that the proposed penalties are unreasonable because the inclusion of metal alloys as a mixture for purposes of the Act does not appear in EPCRA or the Regulations, and is not reasonably inferable from the definition of mixture which is contained in the Regulations. As a result, the Respondent argues that the proposed penalty is unreasonable.

III. ANALYSIS AND RESOLUTION

On analysis, it is appropriate first to address the PDM argument that would defeat both counts of the complaint, that is, that the threshold amount of the chemicals involved should be determined based solely upon the area of the stainless steel that was being worked on and not on the total quantity of the chemicals contained in the stainless steel. It is warranted first to turn to the language of the statute, which provides in

Section 313(a) of EPCRA that a Form R shall be filed for each toxic chemical:

> ...that was manufactured, processed or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) of this section during the proceeding calendar year at such facility.

As the Complainant points out in its Reply Brief, p.3, the discussion of "process" contained in the preamble of Part 372 of the Regulations, 40 C.F.R. Part 372, distinguishes processing as focusing on the incorporation of a chemical into a product that is distributed in commerce (Ex. E, p. 4506). It is clear, therefore, that the chromium and nickel were incorporated into the stainless steel and are, therefore, subject to the process definition.

The statute, however, does not answer the ultimate question raised by PDM as to whether process for purposes of determining threshold amounts should only relate to the area worked on or should include all of the toxic substance that is incorporated in the basic material subject to being processed at the plant. Since the purpose of the Act is to secure information on and to protect the public and the environment from releases of toxic substances, it would be too narrow an interpretation of the term "process" to determine that it should only include the amounts of the chemical or substance actually affected by the processing. For statutory threshold purposes, the entire amount of the toxic substance contained in the material being processed should be considered. In the present case, it is clear that there is no imminent danger of release of the nonaffected chromium or nickel

from the stainless steel. However, in a variety of other circumstances, the access to the toxic substance might be much easier and the potential of release much greater than in the current proceeding. Therefore, to interpret that only the area affected by the particular process should be considered for threshold reporting purposes would in effect defeat the basic purpose of EPCRA. In many circumstances, very toxic substances could be stored as part of materials processed at a facility with no reporting requirement, if the interpretation suggested by the Respondent is adopted. Accordingly, it is held that when a portion of the material containing toxic substances is processed at a facility, such as the stainless steel processed at Provo, the entire amount of the toxic substance contained in the material must be taken into account in determining threshold amounts under Section 313 of EPCRA.

Turning next to the question of whether threshold amounts of nickel and chromium were contained in the stainless steel processed at the Provo facility in 1988, this issue can be disposed of as follows. First, as to nickel, accepting either the Respondent's calculations (Ex. 9) or the original calculations of Mr. Meyer's, even as revised at hearing (Ex. 7; Tr. 175-204), it is clear that the Respondent exceeded the threshold for nickel. The lowest calculation of steel that was processed at Provo was in Exhibit 9, which is sponsored by Respondent. This shows corrected amounts of nickel processed at Provo in 1988 as 60,080 pounds, which is well in excess of the

50,000 threshold limit (Ex. 9, p. 2). PDM does attempt to reduce this total poundage by 25%, to 27,036 pounds, based on its calculations of the amount of the steel affected by processing, that is, the area of the steel actually having work done on it (Ex. 9, p. 3, 6,7,). However, this further reduction must be rejected in light of the ruling made above that the entire amount of the toxic chemical in the material being worked on must be considered, not merely that area of the toxic material that is directly affected.

The reasonableness of the above rejection of PDM's nonaffected area reductions is buttressed by the intricacy of the calculations needed to determine the percentage of the areas affected by the work. These calculations were set out in Exhibit 9 and testified to by Mr. Oyster at hearing (Tr. 268-284). It would place not only an undue burden on the companies that are subject to EPCRA to require such calculations for every mixture covered under the Act but would also constitute a substantial hindrance in enforcement of the statute to require EPA to make such calculations to determine whether enforcement is needed. The intent of EPCRA is to determine the amount of toxic substances which might potentially cause harm to the public and/or the environment that are located at the various industrial facilities. To adopt the narrow interpretation on calculation of threshold amounts urged by PDM would defeat the basic purposes of the Act.

Since, under the calculations sponsored by the Respondent, it is established that the 50,000 pound threshold has been exceeded with regard to nickel, it must be concluded that the Respondent violated the reporting requirements by not filing a calendar year 1988 Form R for nickel by July 1, 1989. Accordingly, it must be held that the Respondent is in violation of Section 313(a) of EPCRA and Section 372.30 of the Regulations, 40 C.F.R. §372.30.

With regard to chromium, the evidence is not as clear as it is with nickel. First, Complainant makes the argument that submission by PDM of the August 29, 1989 letter showing amounts of nickel of 125,800 pounds and chromium of 106,090 pounds (Ex. 7) and the submission of the September 14, 1989 Form Rs (Ex. D) for nickel and chromium, constitutes admissions that establish that PDM was in violation of the 50,000 pound threshold amounts for both chemicals for the year 1988. Complainant asserts that these are admissions of exceeding the threshold, of a duty to report for the two chemicals and of a failure to report in a timely fashion, Comp. Initial Br., pp. 3,4.

Complainant is correct that the August 1989 letter and submission of the September Form Rs do constitute admissions, but it is also true that admissions can be controverted or explained by the party making them, see 4 Wigmore, Evidence, §§1058,1059 (Chadbourn rev. 1972). In the present case, the Respondent did attempt to contradict and explain the admissions by the presentation of evidence from Mr. Meyer explaining the errors

made in his original calculations which underlie the admissions, and by the testimony of Mr. Oyster who did his own review of the basic material on which the admissions were based, that is, the purchase orders from which the total amounts of stainless steel at Provo in 1988 were calculated.

Complainant attacks these explanations and contradictions by PDM, and claims that they are new theories involving self-serving, complex creations using formulas and calculations invented just prior to trial. Complainant's argument must, however, be rejected. While Mr. Oyster's exhibits were prepared shortly before trial, the witness did use the underlying purchase order data, the same data relied upon by Mr. Meyer in the original calculations which are the basis for the admissions by PDM. It would be unreasonable to accept the figures in the admissions, when the evidence clearly showed, based upon a review of the purchase orders in Exhibit 1, that almost 250,000 pounds of the AL-6XN steel, which was included in the admissions figures, was never physically at Provo in 1988 but went directly to the Arizona project. This is established by Mr. Meyer's testimony (Tr. 196-204) and by Mr. Oyster's testimony, who, as an official responsible for purchasing of the AL-6XN steel, was aware of its destination and uses (Tr. 238-246). These figures, as corrected by the witnesses, are the best evidence of the amount of stainless steel that was present at Provo in 1988 and are effective in contradicting and explaining the admissions that PDM made in the August 1989 letter and the filing of the

September 1989 Form Rs for nickel and chromium.

However, a close review of PDM's later calculations, which are summarized in Exhibit 9, show certain discrepancies. For example, there is 1,978 pound gross difference in the amount of steel shipped to Provo in 1989 when Mr. Oyster's 161,971 pound figure for AL 6XN steel is compared with the errors testified to by Mr. Meyer at hearing (Tr. 297-300). However, this amount is so small that it would not cause a sufficient change in Mr. Oyster's calculations to alter the overall conclusion that the 50,000 threshold limit for chromium was not exceeded. Using Mr. Meyer's figures, there would have been 163,949 pounds of the AL 6XN steel shipped to Provo in 1988, as opposed to Mr. Oyster's 161,971 pounds, for a total difference of 1,978 pounds. When the 1978 pounds are broken down for their chromium content by using the 20.5% factor, this only adds 406 pounds to the total of 49,149 pounds calculated by Mr. Oyster in Exhibit 9, p. 2. The revised total of 49,189 pounds for chromium, remains under the 50,000 threshold limit.

In addition, an analysis of the purchase orders (Ex. 1) indicates certain discrepancies which necessitate some recalculation of Mr. Oyster's totals, that are summarized at Exhibit 9, p. 8. Charge No. 4 of purchase order G11522 shows 25 tons of steel rather than the 15 tons used by Mr. Oyster. This changes the weight of the steel shipped to Provo on this item by 3930 pounds, from 5895 pounds to 9825 pounds. Moreover, there were minor errors involving purchase orders H33538-item 2 and

H33538-item 3, where percentages of the unit weights were dropped by Mr. Oyster. These added amounts total 2.40 pounds. In addition, there was a rounding error in H33540-item 3, which would change the total by 1.2 pounds. However, this would only change Mr. Oyster's total of 161,971 pounds to 165,904.60 pounds, rounded to 165,905 pounds. Again, when the chromium content of 20.5% is calculated, this leaves the total chromium at 34,011 pounds for the AL-6XN steel. When this is added to the 18,278 pounds of chromium in the other steel, there is a total for chromium of 52,289 pounds. However, the further reductions shown on Exhibit 9, p. 2 for chromium must be taken into account. Therefore, 2289 pounds must be subtracted for steel sent to Provo but not worked on during 1988 and an additional 400 pounds must be deducted for steel transhipped through Provo without processing. As a result, your ultimate figure is 49,590 pounds for chromium, which is still below the 50,000 pound threshold limit.

A further item that must be assessed is that Mr. Meyer in his initial determination left out at least one steel supply at Provo - the supply from Chicago Tube and Iron (Tr. 218-220; Ex. 11, p. 36). In explanation, Mr. Meyer indicated that once he had enough amounts to show PDM was at the threshold, he did not add more since the threshold was attained (Tr. 220). Chicago Tube and Iron supplied 500 pounds of stainless steel to Provo in 1988, so the chromium figure must be increased by 50 pounds since the chromium content is 10% for other stainless steel (500 x 10% =

50). This makes the final chromium amount 49,640 pounds (49,450 plus 50).

Mr. Meyer did state that he knew of no stainless steel other than Chicago Tube and Iron's that was in his worksheets in Exhibit 11 that was not included in his summary sheet in Exhibit 8 (Tr. 232-33). Since Chicago Tube and Steel's supply is the only identified omission, it would be speculation to conclude that sufficient other amounts of stainless steel were omitted to push the PDM chromium amount over the 50,000 pound threshold.

One other factor that needs to be considered is that there were certain percentages of chromium and nickel contained in the welding rods used at Provo in 1988. However, no quantification of the percent of chromium was offered at trial nor was any estimate given of the amount or weight of the welding rods that was used in the processing of the steel. As result, it is not possible to quantify this particular item and it would be mere speculation to conclude that it would add more than the 360 pounds (50,000 minus 49,640) of chromium needed to reach the 50,000 pound threshold. Such a conclusion is not warranted and cannot be reached based upon the evidence produced at trial. Such speculation will not be relied upon herein.

Another point merits brief comment. Complainant relies on testimony that there was an additional 30 tons of stainless steel in Provo in 1988, with a chromium content of 10% (Tr. 104, 118, 215). This would represent an additional 60,000 pounds of steel and another 6,000 pounds of chromium (60,000 x 10% = 6,000).

This, Complainant argues, puts PDM over the 50,000 pound threshold when added to Mr. Oyster's figure of 48,783 pounds shown in Exhibit 9, p. 2. However, the figure of 30 tons was clearly only a general estimate. Further, the more logical conclusion is that this other steel is already in the Meyer and the Oyster figures. Mr. Oyster relied on Mr. Meyer's figures for this other steel (Tr. 252-269; Ex. 9, p. 2) in his recalculations, which only involved the AL-6XN steel. When the initial Meyer figures are reviewed, they show a total of 517,490 pounds of stainless steel at Provo in 1988, of which 428,352 was AL-6XN (Tr. 223-224, 231-32; Ex. 8; Ex. 11, pp. 2,5). The difference of 89,138 pounds (517,490 minus 428,352) represents stainless steel other than AL-6XN and translates into 44.6 tons. This 44.6 tons must be considered to be the correct figure for the other stainless steel, which as noted above was generally estimated at 30 tons. As a result, the 30 ton figure relied on by Complainant as additional steel has in fact already been accounted for in the Meyer and Oyster calculations.

In light of the above analysis, it must be concluded that it was not established by the evidence at hearing that PDM exceeded the 50,000 pound threshold limit for chromium processed at its Provo facility in 1988. Therefore, the Respondent cannot be held liable for violation of Section 313(a) of EPCRA or Section 372.30 of the Regulations with regard to processing of chromium at its Provo plant in 1988.

As to the Complainant's proposed penalty for the violation

involving nickel, the following comments are warranted. The proposed penalty of $17,000 was calculated in accordance with the Penalty Policy, but it does not appear to take account of certain mitigating factors. In particular, the Act itself in Section 325(b)(1)(C) requires that the Administrator consider the nature, circumstances, extent, and gravity of the situation. Under the circumstances of the instant case, it would appear that there was no possibility of any accidental release of the nickel from the stainless steel that was processed at the Provo plant during the year 1988. There could be no possibility of any accidental release to the environment since this could only occur by high degree burning or by the intentional dissolution of the steel in an acid solution (Tr. 110-12). Further, the nickel was not released from the steel during the processing except from some vaporization during torch cutting or welding of the steel (Tr. 112-14). Any scraps or residual shavings from the process would still be in the form of steel and, therefore, not a threat (Tr. 114). In addition, there was no evidence to establish that the vaporized nickel was hazardous. It seems reasonable to conclude the vaporization from the process did not pose a danger to the people involved in the processing or to the environment.

The purpose of the reporting requirements in the Act is not only informational, to determine the quantity of toxic substances subject to processing, manufacture and use at covered facilities, but is also to determine the danger of such substances being released to the public and/or the environment. As described

above, the instant case represents a relatively benign situation where there is no possibility of any accidental release and where the releases that do occur are not dangerous. This, therefore, is a mitigating factor relating to the gravity of the violation and should be considered in determining the amount of the civil penalty. In this regard, having the nickel involved almost imperviously incorporated in stainless steel is not of the same consequence as having a toxic substance in a processed material where there is a much greater danger of release of such substance to the public or to the environment. While the Penalty Policy has been taken into account in determining the amount of civil penalty to be imposed, this further mitigating factor relating to the gravity of the situation necessitates that the proposed penalty be reduced. Consequently, the proposed penalty of $17,000 will not be adopted, but will be reduced to $12,000. Therefore, a $12,000 civil penalty will be entered against PDM for the Section 313(a) violation involving the failure of PDM to file a timely Form R for nickel at the Provo facility in 1988.

IV. FINDINGS AND CONCLUSIONS

Based upon the above discussion and analysis, the following findings and conclusions are entered herein.

1. PDM is a Pennsylvania Corporation that operates a fabricating facility in Provo, Utah (Stipulation Nos. 7 and 9).

2. The PDM Provo facility has ten or more full time employees and PDM's annual sales are in excess of $10,000,000 (Stipulation No. 10).

3. PDM's Provo Facility is in Standard Industrial Classification Code 3443 (Stipulation No. 11).

4. The U.S. Environmental Protection Agency (EPA) has jurisdiction over this matter and PDM pursuant to Section 325(c)(1) of EPCRA (Stipulation No. 1).

5. PDM is subject to Sections 313 of EPCRA and to the Regulations promulgated pursuant thereto which are contained at 40 C.F.R. Part 372 (Stipulation No. 2).

6. Under Section 313(b) of EPCRA and Section 372.22 of the Regulations, an operator of facility subject to EPCRA is required to submit annually a Toxic Chemical Release Inventory Reporting Form (Form R) for each toxic chemical listed in Section 372.65 of the Regulations, which chemical was manufactured, imported, processed or otherwise used during the proceeding calendar year in quantities exceeding the established toxic chemical threshold (Stipulation No. 3).

7. Under Section 313(b) of EPCRA and Section 372.22 of the Regulations, an operator of the facility that has ten or more full time employees, which is in Standard Industrial Classification Codes 20-39, who has manufactured, imported, processed or otherwise used a toxic chemical listed under Section 313(c) of EPCRA and under Section 372.65 of the Regulations, in excess of 50,000 pounds, was required in 1988 to submit a Form R for such substances for the calendar year 1988 (Stipulation No. 4).

8. The Form R for the covered toxic chemicals was required to be submitted to EPA and to the state in which the facility is

located on or before July 1, 1989, for the calendar year 1988 (Stipulation No. 5).

9. Nickel and chromium are both listed toxic chemicals under Section 372.65 of the Regulations (Stipulation No. 12).

10. Stainless steel is a solid mixture which contains the listed toxic chemicals nickel and chromium (Tr. 32).

11. PDM processed stainless steel at the Provo facility when it took large sheets of such product, changed their shapes and sizes and placed the finished product into the stream of commerce (Tr. 34,77,149,150 and 151).

12. Chromium and nickel are released into the environment when the stainless steel is welded, burned, and ground at the Provo facility, all which such activities occurred in 1988 (Tr. 110-14).

13. PDM submitted a letter of August 29, 1989 to EPA, which letter listed 125,800 pounds of nickel and 106,090 pounds of chromium as processed at the PDM facility in Provo in 1988. PDM did not file Form R reports for nickel and chromium for 1988 on or before July 1, 1989, but did submit Form R reports for 1988 for these chemicals on September 14, 1989 (PDM Finding of Fact Nos. 11 and 15; Ex. D; Ex. 7).

14. PDM's Form R submittals of September 14, 1989 was based on gathering all purchase orders and utilizing the method of determining the amount of chromium and nickel as orally instructed by EPA, that is, to include the entire content of

chromium and nickel in the stainless steel (PDM Finding of Fact No. 18).

15. The August 29, 1989 letter from PDM to EPA overstated the amount of nickel and chromium in the stainless steel because it included stainless steel which was never shipped to Provo, stainless steel which was not worked on in Provo, and stainless steel transhipped through Provo in 1988 (PDM Finding of Fact No. 19).

16. The correct total amounts of chromium and nickel in the stainless steel processed at the PDM Provo facility in 1988 was 49,640 pounds of chromium and 60,080 of nickel (Ex. 9; Section III, supra, p. 20). These amounts were determined by using EPA's method for determining threshold amounts, which includes the entire amount of chromium and nickel in the steel being worked on, not only the nickel and chromium in the area specifically subject to the welding, burning, or grinding (Section III, supra, p. 18).

17. Under EPCRA and the EPA Regulations promulgated pursuant thereto, the EPA method for determining the threshold levels by counting the entire amount of chromium and nickel that are in the piece of steel being worked on, including those areas not immediately affected by the work, is proper for determining threshold amounts that trigger Form R reporting requirements (id.).

18. As a result, PDM did not exceed the 50,000 pound threshold for chromium for Form R reporting in 1988, but it did

exceed the 50,000 pound threshold for nickel for Form R reporting purposes in 1988.

19. Accordingly, PDM is liable for a violation of Section 313(a) of EPCRA and Section 372.30 of the Regulations for its failure to file by the deadline of July 1, 1989, a Form R for nickel for 1988 at its Provo facility.

20. However, PDM is not liable for violation of EPCRA or the Regulations for its failure to file a Form R on time for chromium for 1988 at the Provo facility, since it did not process chromium in excess of the threshold limit of 50,000 pounds during that calendar year.

21. As to the amount of the civil penalty, the Penalty Policy must be taken into account, together with the mitigating circumstances that there was no reasonable possibility of any accidental release of the nickel, nor was there any danger to the public or the environment as a result of the processing of the stainless steel at PDM's Provo facility in 1988. Therefore, the appropriate amount of the penalty to be assessed against PDM in this action for the violation relating to nickel is $12,000.

V. ORDER

Based on the analysis, rulings, findings and conclusions contained herein, **IT IS ORDERED:**

1. That the Respondent is not liable for a civil penalty in connection with the processing of chromium at its Provo facility in 1988, since PDM did not process chromium in excess of the 50,000 pound

threshold and, therefore, there was no violation of Section 313(a) of EPCRA and Section 372.30 of the Regulations, 40 C.F.R. §372.30.

2. That, pursuant to Section 325(c)(1) of EPCRA, civil penalty of $12,000 be assessed against the Respondent for its failure to file on time a Form R for nickel processed at the PDM Provo facility in 1988, in violation of Section 313(a) of EPCRA and Section 372.30 of the Regulations, 40 C.F.R. §372.30.

3. That payment by the Respondent of the full amount of the $12,000 civil penalty assessed shall be made within sixty days (60) of service of the final order of the EPA Administrator,[4] by submitting a certified or cashier's check payable to Treasurer, United States of America. Said check shall be mailed to:

EPA - Region VIII
(Regional Hearing Clerk)
P.O. Box 360859M
Pittsburgh, PA 15251

Daniel M. Head
Administrative Law Judge

Dated: July 24, 1991
Washington, DC

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[4] Under Section 22.30 of the EPA Rules of Practice (Rules), 40 C.F.R. §22.30, the parties may file with the Regional Hearing Clerk a notice of appeal of this decision and an appellate brief within 20 days of service of this initial decision. This initial decision shall become the final order of the EPA Administrator within 45 days after its service, unless an appeal is taken by the parties or unless the Administrator elects, sua sponte, to review the initial decision pursuant to Section 22.30(b) of the Rules. After any appeal or sua sponte review, the order of the EPA Administrator shall be the final order in this cause.