5/19/92

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
THORO PRODUCTS CO.,	)	[CERCLA/EPCRA] Docket No.
	)	EPCRA VIII-90-04
	)	
Respondent	)	

1. EPCRA: 42 U.S.C. § 11004; CERCLA: 42 U.S.C. § 9603; IMMEDIATE NOTIFICATION; KNOWLEDGE OF RELEASE: The emergency notification requirement imposed by Section 304 of EPCRA requires the owner or operator of the facility to provide notice to the State Emergency Response Committee (SERC) and the Local Emergency Planning Committee (LEPC) immediately after the owner or operator acquires knowledge of the release of an extremely hazardous substance in a quantity equal to or in excess of a reportable quantity (RQ).

2. EPCRA: 42 U.S.C. § 11004; CERCLA: 42 U.S.C. § 9603; IMMEDIATE NOTIFICATION; KNOWLEDGE OF RELEASE: The condition precedent of knowledge which is incorporated into Section 304(a) of EPCRA may be met if the owner or operator of the facility personally possesses the required knowledge or if the knowledge of the release of an RQ of a reportable substance which is possessed by the person in charge of the facility may be imputed, under the particular circumstances of the case, to the owner or operator of the facility.

3. EPCRA: 42 U.S.C. § 11004; CERCLA: 42 U.S.C. § 9603; KNOWLEDGE OF RELEASE: Knowledge of the release includes either actual knowledge or constructive knowledge.

4. EPCRA: 42 U.S.C. § 11004; CERCLA: 42 U.S.C. § 9603; ACTUAL KNOWLEDGE: Actual knowledge, which is not necessarily absolute certainty, is an assurance of a fact that has happened or occurred.

5. EPCRA: 42 U.S.C. § 11004; 42 U.S.C. § 9603; CONSTRUCTIVE KNOWLEDGE: Constructive knowledge neither indicates nor requires actual knowledge but means knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent person ought to exercise, to a knowledge of actual facts. The failure to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law.

INITIAL DECISION

I. Complaint and Answer

This proceeding was initiated by a five-count complaint issued by the United States Environmental Protection Agency (EPA, Complainant, or the Agency) pursuant to Section 325 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. § 11045, and pursuant to Section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, (CERCLA), 42 U.S.C. § 9609. The complaint, as subsequently amended, alleges that the Thoro Products Company (Thoro or Respondent) violated Sections 304, 311 and 312 of EPCRA, 42 U.S.C. §§ 11004, 11021 and 11022, and Section 103 of CERCLA, 42 U.S.C. § 9603, by failure to comply with the emergency notification and reporting requirements mandated by the cited statutes. The violations are alleged to have occurred on March 22, 1990, following the release from Respondent's cleaning products facility (facility or plant) of a hazardous substance (chlorine) in quantities greater than the Reportable Quantity (RQ) established under CERCLA and EPCRA. More specifically, the amended complaint alleges, in five counts, the following violations of EPCRA and CERCLA:

Count I: Respondent failed to report the release immediately to the community emergency coordinator for the Jefferson County Local Emergency Planning Committee (which constitutes the Local Emergency Planning Committee (LEPC) within the meaning of Section 304 of EPCRA, 42 U.S.C. § 11004) and to the Colorado Emergency Response Commission (which constitutes the State Emergency Response

Commission (SERC) within the meaning of Section 304 of EPCRA, 42 U.S.C. § 11004), in violation of Section 304(a) of EPCRA, 42 U.S.C. § 11004(a).

Count II: Respondent failed to provide a written follow-up emergency notice concerning the release, as soon as practicable thereafter, to the SERC in violation of Section 304(c) of EPCRA, 42 U.S.C. § 11004(c).

Count III: Respondent failed to submit on or before October 17, 1987, or three months after the owner or operator first became subject to the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 651, et seq., a Material Safety Data Sheet (MSDS) for chlorine and for lupranate MS or a list of such chemicals, to the LEPC, the SERC and the fire department with jurisdiction over the facility, the Arvada Fire Protection District, in violation of Section 311 of EPCRA, 42 U.S.C. § 11021.

Count IV: Respondent failed to submit a completed annual emergency and hazardous chemical inventory form (Tier I or Tier II form) for 1989 by March 1, 1990, to the LEPC, the SERC and the fire department with jurisdiction over the facility, the Arvada Fire Protection District, in violation of Section 312(a) of EPCRA, 42 U.S.C. § 11022(a).

Count V: Respondent failed, as soon as it had knowledge of the release, to report the release immediately to the National Response Center (NRC) in violation of Section 103(a) of CERCLA, 42 U.S.C. § 9603(a).

On the basis of these alleged violations, the Complainant proposes that civil penalties in the following amounts be imposed for each count in the complaint:

Count I	$16,500
Count II	$16,500
Count III	$10,000
Count IV	$25,000
Count V	$16,500
Total	$84,500

In its answer to the amended complaint, the Respondent denied the alleged violations. Respondent admits that there was a release of chlorine and that its employees had knowledge of the release shortly before 8:00 a.m. on March 22, 1990, but denied that they at that time knew that there had been a release of an RQ of hazardous chemicals.

Thoro asserts it has made a good faith effort to comply with the requirements of EPCRA and CERCLA; Thoro is a small business, but one which has demonstrated a history of cooperation with emergency planning authorities, and which has taken an active role on a volunteer basis in programs set up under EPCRA.

On the day of the incident, March 22, 1990, Thoro maintains that it had in place and effectively implemented an Emergency Response Plan.

Shortly after the release, the Community Emergency Coordinator was on Thoro's site where the matter was discussed with him in

great detail. Thoro contends that this constitutes "notification" within the meaning of the statute and the applicable regulations.

Respondent further asserts that EPA has calculated the penalties from the time of the release, not from the time Thoro learned of the release. There is no requirement in the statute that Thoro put personnel at its plant 24 hours per day, and the approach taken by Complainant would read that requirement into the law where it does not belong.

Finally, Thoro argues that local emergency personnel responded effectively to the release, were familiar with Thoro's site, and the response to the release was handled efficiently and without significant damage or injury.

II. Background - Processing of the Case

A hearing was held in this matter in Denver, Colorado, on October 1 and 2, 1991. Thereafter, the Complainant and the Respondent filed their proposed findings of fact and conclusions of law, together with supporting briefs on November 8, 1991, and November 9, 1991, respectively. Reply briefs were filed by both parties on January 10, 1992. Final supplemental submissions were submitted by the Complainant on January 13, 1992, and by the Respondent on January 28, 1992.

III. Findings of Fact

On the basis of the entire record, including the testimony elicited at the hearing, the exhibits received in evidence and the submissions of the parties, and giving such weight as may be

appropriate to all relevant and material evidence which is not otherwise unreliable, I make the findings of fact which follow. Each matter of controversy has been determined upon a preponderance of the evidence. All contentions and proposed findings and conclusions submitted by the parties have been considered, and whether or not specifically discussed herein, those which are inconsistent with this decision are rejected.

1. Thoro, the Respondent in this matter, is a Colorado corporation. (Complaint at 3; Answer (Ans.) at 1.)

2. For all times relevant to the complaint in this matter, Thoro owned or operated a manufacturing facility at or near 6611 West 58th Place, Arvada, Jefferson County, Colorado. (Complaint at 3; Ans. at 1.)

3. The Thoro facility lies within the jurisdiction of the Colorado SERC. (Complaint at 5; Ans. at 2).

4. The responsibilities of the Colorado SERC are divided between the Department of Public Safety, Disaster and Emergency Services Division and the State Health Department, Hazardous Materials and Waste Management Division. The Disaster and Emergency Services Division of the Department of Public Safety has been assigned the responsibility for coordinating local emergency planning, for working with local emergency planning committees in the development of their plans and in reviewing those plans. The Hazardous Materials and Waste Management Division of the Colorado Department of Health is responsible for the administration of the

notification, reporting and data submission requirements of EPCRA. (Transcript (Tr.) 144-45.)

5. The State of Colorado has not received funding for operations under Title III of SARA, i.e., EPCRA. Consequently, the program is administered with great difficulty. Since it is not a well-funded program, it is also not a well-staffed program. (Tr. 145.)

6. The offices of the State Department of Health which are assigned SERC responsibilities have always been crowded and there is not a lot of filing space. There are in excess of 10,000 facility files. Consequently, there are times when things are misfiled or two files are created for the same facility. It is not always possible to pull files when they are requested. Occasionally files are lost. Until recently, there has been a shortage of file cabinets and some files have been stored in cardboard boxes. The majority of the MSDS's have been stored off-site. Although documents are not always filed upon receipt, the person responsible for filing keeps a list of everything that comes in. (Tr. 156-58, 169, 172.)

7. The Thoro facility lies within the jurisdiction of the Jefferson County LEPC. Emergency notification calls to the LEPC are received by Mr. Richard Cook, the chairman of the LEPC, or by his assistant, or, during off-duty hours, are referred to the county sheriff's department. (Complaint at 5; Ans. at 2; Tr. 298.)

8. For all times relevant to the complaint in this matter, the Thoro facility was used in part for manufacturing liquid

cleaning products, including chlorine solutions and liquid ammonia products. (Complaint at 3; Ans. at 1; Tr. 357.)

9. Chlorine is, and was for all times relevant to the complaint in this matter, used or stored at the Thoro facility. (Complaint at 3-4; Ans. at 1.)

10. On August 11, 1989, four thousand (4,000) pounds of chlorine were stored at the Thoro facility. (Complainant's (Compl.) Exhibit (Exh.) 1.)

11. On March 22, 1990, there was a release of chlorine from "Chloromat" process equipment at the Thoro facility. (Compl. Exhs. 1, 16.)

12. At approximately 6:45 a.m. on March 22, 1990, the Arvada Fire Protection District received a report from Meyer Convey Air, located at 6105 West 55th Avenue, Arvada, of a suspected chlorine odor in the vicinity. (Tr. 24, 42, 84; Compl. Exhs. 10, 16.)

13. Three fire stations within the Arvada Fire Protection District responded, including twenty-six (26) responding firemen and thirty-five (35) standby firemen. The responding firemen arrived at Meyer Convey Air at approximately 6:55 a.m. on March 22, 1990. (Compl. Exhs. 10, 16.)

14. The first fire unit on the scene reported that there was a heavy cloud in the area. (Tr. 51; Compl. Exh. 16.)

15. Members of the Jefferson County Sheriff's Department responded to the incident, beginning at approximately 6:49 a.m. The hazardous materials specialist for the Department, Deputy

Sheriff Mark Gutke, responded to the incident at approximately 7:02 a.m. (Tr. 59; Compl. Exh. 16.)

16. Fire Marshall Larry Delay of the Arvada Fire Protection District was among those who responded. He requested an all-out response from the Jefferson County Hazardous Materials Response Authority because he did not know the nature or source of the cloud. He established a command post at the intersection of 55th and Marshall. (Tr. 24, 27, 53; Compl. Exh. 10.)

17. Among the agencies which responded to the incident were the Arvada Fire Protection District, the Arvada Police Department, the Jefferson County Sheriff's Department, the Colorado State Patrol, the Bancroft Fire Department, the Denver Fire Department, the Fairmount Fire Department, the Wheatridge Fire Department, the Westminster Fire Department, the Wheatridge Police Department, and the Jefferson County Hazardous Materials Response Authority. (Tr. 27, 54; Compl. Exh. 10.)

18. The responders viewed the incident as very serious, and due to the unknown nature of the release, assumed a worst-case scenario. (Tr. 34, 56, 61-62.)

19. The cloud was thick or fog-like and variously described as white, grey or bluish in color. Visibility within the cloud was poor. (Tr. 26, 44, 51-52, 59, 81; Compl. Exhs. 10, 16.)

20. The contents and source of the cloud were unknown to the responders. (Tr. 24, 27, 51, 59, 61, 62, 88; Compl. Exhs. 10, 16.)

21. However, the release was suspected to be chlorine soon after the Arvada Fire Protection District personnel were on the scene. (Tr. 42, 84.)

22. The cloud was hanging in the valley area between 52nd to 56th Streets, south to north, and east-west from approximately Harlan to Marshall. (Tr. 59, 81; Joint Exh. 1; Compl. Exhs. 10, 16.)

23. The area covered by the cloud contained between one hundred (100) and two hundred (200) residences. Numerous businesses, primarily of a light industrial nature, were within the affected area. Several businesses along 55th Street between Harlan and Marshall were evacuated. (Tr. 29-30, 60-61, 81; Compl. Exhs. 10, 16.)

24. The affected area experiences heavy traffic volume at the time of day that the incident occurred and there was a lot of vehicular traffic, particularly on the main commuter routes, in the area on March 22, 1990. Roadblocks were set up by the Arvada Police Department and the Jefferson County Sheriff's Department to cordon off the area affected by the release. (Tr. 29-30, 53, 61, 86; Compl. Exh. 16.)

25. The responders contacted individual businesses in the area searching for the source of the release. A television news helicopter was also employed to search for the source of the release. Three or four extra dispatchers were called in to the Arvada Fire Protection District offices to go through the computer records and find businesses in the area that had hazardous

materials on hand so that the businesses could be checked out as a possible source of the release. (Tr. 28, 54, 60; Compl. Exhs. 10, 16.)

26. An undetermined number of school children were outside, within the cloud, waiting for their school buses. One of the responders, Deputy Sheriff Jon Sorenson, was stationed at 56th and Harlan near the center of the cloud. Deputy Sorenson loaded ten children into his patrol car and took them to their respective schools. (Tr. 29, 61, 86-87; Compl. Exh. 16.)

27. Deputy Sheriff Sorenson, who had been at a post near the center of the cloud experienced a "real bad headache." He sought medical attention from personnel in an ambulance at the command post. He was told that he was having "a minor effect" from the release and "was going to be all right." As soon as he felt better because the headache began to go away, he went back on duty. Five people also sought medical attention at the Lutheran Medical Center for symptoms during or after the release. They were observed and released. There was no way to determine whether their problem - described as "irritation" - was related to the chlorine release. (Tr. 87-88, 188-89; Compl. Exh. 16.)

28. At about 7:00 a.m., Frank Cook, a Thoro delivery man, came to the Thoro plant to pick up his delivery truck. As was his habit, he checked around a little bit to see if anything looked out of the ordinary but did not notice anything wrong. He did not detect any greater chlorine odor than usual at the plant. He did

not detect a release or problem while he was at the plant. (Tr. 423-25.)

29. Matthew M. Kramer, Assistant Fire Chief of the Arvada Fire Department, who arrived on the scene at about 7:09 a.m., passed within a block or a block and a half of the Thoro facility but did not observe any release in the vicinity of the facility and found the area to be "perfectly clear." (Tr. 52, 57.)

30. There is a ridge or hill between the Thoro facility and the area where the cloud accumulated. (Tr. 31, 57.)

31. Fire Marshall Delay did not associate the cloud with the Thoro facility because of the distance between the two and because the cloud was in a low lying area with the ridge between the two. (Tr. 31.)

32. At about 7:30 a.m., Nancy Hannah, Thoro's secretary and receptionist, arrived at work. When Ms. Hannah opened the door to the plant, she detected a strong chlorine odor. She closed the door. (Tr. 309, 313.)

33. There is no outdoor telephone at the Thoro site. Ms. Hannah left the site, went to a nearby convenience store, and telephoned Mr. Richard Newman, the President of Thoro, at his home. (Tr. 309.)

34. Ms. Hannah told Mr. Newman of the strong chlorine odor and asked him what to do. Sensing the concern which Ms. Hannah had, Mr. Newman instructed her to return to the Thoro facility and shut down the "Chloromat" processing machinery producing bleach and to keep other employees out of the building. He also told her that

he would wait by the telephone for a return call from her confirming that she had been able to shut off the machine. Ms. Hannah did not inform Mr. Newman of the gas cloud which had accumulated in the area below the elevated area at the facility. (Tr. 309-10, 361-63.)

35. After she returned to the facility, Ms. Hannah was unable to turn off the processing machinery. She did keep others from entering the plant. She sent another employee to make a second call to Mr. Newman to inform him that she had been unable to shut down the machine. (Tr. 310, 313, 363.)

36. Mr. Russ Lehman, the operations or production manager for Thoro, arrived at the facility between 8:00 a.m. and 8:15 a.m. on March 22, 1990, and turned off the "Chloromat" processing machinery producing bleach. (Tr. 310, 369; Compl. Exhs. 1, 16.)

37. Just after Mr. Lehman turned the machinery off, Fire Marshall Delay drove by Thoro, saw Thoro personnel standing outside the facility and was informed by them that the facility had experienced a chlorine release. The time at which Fire Marshall Delay was informed was sometime between 8:10 a.m. and 8:45 a.m. (variously described as: "approx. 0810"; "around 8:30, give or take"; "8:30, quarter of 9, 8:18, 8:20. It was towards the end of 8:30, quarter of 9. Somewhere in that vicinity."). (Tr. 32, 47, 55, 83, 310; Compl. Exhs. 10, 16.)

38. After learning of the nature and source of the release, Fire Marshall Delay radioed notification of the nature and source of the release with a message that the emergency response units and

personnel could stand down, "that the problem had been found and that it wasn't quite as bad as we had anticipated." The concentration of chlorine had dissipated to a safe level and the area was clear to be reopened. At approximately 8:30 a.m., fire equipment was moved, roadways were opened and the area "was released back to the community." (Tr. 44-45, 62, 83; Compl. Exh. 16.)

39. Shortly after Fire Marshall Delay learned of the nature and source of the release at the Thoro facility, Mr. Newman, President of Thoro, arrived. (Tr. 38, 44.)

40. Deputy Sheriff Gutke is a member of the LEPC for Jefferson County and is Chairman of its Data Collection Subcommittee. He also is Chairman of the Hazardous Substance Response Authority Board for Jefferson County which governs the county response team. Sergeant Merle Westling of the Arvada Police Department is a member of the LEPC for Jefferson County. Between 8:30 a.m. and 9:00 a.m. Deputy Sheriff Gutke and Sergeant Westling went to the Thoro facility where Mr. Newman met with them, explained what had happened, conducted a full on-site inspection and orientation to answer all of their questions, to address all of their concerns and to show them where everything was and the source of the problem. (Tr. 44-45, 58, 62-63, 71-72, 73-74, 367-68.)

41. At the time Mr. Newman and Fire Marshall Delay were at the Thoro facility it was not clear what quantity of chlorine had been released. Although Mr. Newman suspected a release which was above the RQ, the actual amount of chlorine which had been released

was not determined until approximately 4:00 p.m. on March 22, 1990. (Tr. 47-48, 367, 375.)

42. From 54 to 62 pounds of chlorine gas were released from the Thoro facility on March 22, 1990. (Tr. 120-21; Compl. Exhs. 1, 8, 30; Respondent's (Resp.) Exh. 3, 16.)

43. Deputy Sheriff Gutke, a member of the LEPC for Jefferson County, notified the State Health Department of the incident on March 22, 1990. (Compl. Exh. 16.)

44. Fire Marshall Delay's office and Thoro were deluged by telephone calls from the media, the public and other interested parties in the hours after the incident. (Tr. 45, 369.)

45. Mr. Newman of Thoro notified the NRC of the release by telephone sometime between 4:36 p.m. and 4:41 p.m. EST on March 23, 1990. (Tr. 98, 372; Compl. Exhs. 31, 32.)

46. The records of the SERC do not contain any record of a report of the release from Thoro to the SERC on March 22, 1990. There is a record of a report of the release from Thoro which was received at approximately 2:15 p.m. on March 23, 1990. (Tr. 146, 170, 185-86, 193; Compl. Exhs. 2, 23.)

47. A written follow-up notice was prepared, dated March 27, 1990, and mailed by Mr. Newman to the LEPC. (Tr. 380; Resp. Exh. 3.)

48. The follow-up notice was received by the LEPC. (Tr. 300-301.)

49. A written follow-up notice was prepared, dated March 27, 1990, and mailed by Mr. Newman to Fire Marshall Delay of the Arvada Fire Protection District. (Tr. 380; Resp. Exh. 3.)

50. Mr. Newman has heard Fire Marshall Delay acknowledge receipt of the letter. (Tr. 380-81.)

51. Mr. Newman testified that a similar written follow-up notice was prepared, dated March 27, 1990, and mailed by him to the SERC. (Tr. 381; Resp. Exh. 3.)

52. No written follow-up notice was found in the records of the SERC. (Tr. 192-93; Compl. Exh. 2.)

53. A copy of the written follow-up notice was sent to the SERC by Mr. Newman via telefax on July 13, 1990. (Tr. 192-93; Resp. Exh. 16.)

54. On March 22, 1990, Thoro had not submitted MSDS's for chlorine and other chemicals and/or lists of chemicals to the LEPC, the SERC and the Arvada Fire Protection District. (Tr. 39, 67, 148-49, 172, 311-12; Compl. Exhs. 2, 4, 6.).

55. Prior to the March 22, 1990 release, Mr. Newman asked Ms. Hannah to put together three sets of MSDS's to be sent out. Ms. Hannah had done this and they were on her desk on the day of the incident. (Tr. 311-12, 385-86.)

56. Thoro submitted MSDS's for chlorine and other chemicals and lists of chemicals to the LEPC, the SERC and the Arvada Fire Protection District on March 26, 1990. (Tr. 39, 67, 148-49, 172, 190, 228, 311-12; Compl. Exhs. 2, 4, 6, 23.)

57. On March 22, 1990 Thoro had not submitted an emergency and hazardous chemical inventory form (Tier I or Tier II form) for the preceding year to the LEPC, the SERC or the Arvada Fire Protection District. (Tr. 387-88; Resp. Exh. 6.)

58. Thoro submitted an emergency and hazardous chemical inventory form (Tier I or Tier II form) to the Arvada Fire Protection District on March 26, 1990. (Compl. Exh. 6.)

59. Thoro submitted an emergency and hazardous chemical inventory form (Tier I or Tier II form) to the LEPC on July 13, 1990. (Tr. 299; Resp. Exh. 15; Compl. Exh. 4.)

60. On March 23, 1990, a diligent search of the records of the SERC revealed that there was no emergency and hazardous chemical inventory form (Tier I or Tier II form) for Thoro products in those records. (Compl. Exh. 2.)

61. On July 13, 1990 emergency and hazardous chemical inventory forms (Tier I or Tier II forms) were found in the SERC file for Thoro. (Tr. 173, 190-91, 395-97; Compl. Exhs. 2, 13, 29.)

IV. Discussion and Conclusions as to Liability

Count I: This count alleges a failure to report the release immediately to the LEPC and the SERC in violation of Section 304(a) of EPCRA, 42 U.S.C. § 11004(a).

The Complainant contends that "Section 304(a) of EPCRA does not require knowledge on the part of the owner or operator of the facility as a condition precedent to reporting the release to the LEPC and the SERC. Rather, the statute simply requires that calls

be made immediately to those entities in the event of a release of an extremely hazardous substance in an amount equal to or greater than the reportable quantity."[1]

Under Section 304(a)(1), if a release of an extremely hazardous substance occurs from a facility at which a hazardous chemical is produced, used, or stored, and the release requires notification under Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), the owner or operator of the facility must immediately provide notice to the LEPC and SERC. Thus, Section 304(a)(1) of EPCRA and Section 103(a) of CERCLA are inextricably intertwined. Only if a release requires notification under Section 103(a) of CERCLA is notice required under Section 304(a)(1) of EPCRA. Therefore, the conditions set forth in Section 103(a) of CERCLA are conditions precedent to the reporting requirement in Section 304(a)(1) of EPCRA.

Under Section 103(a) of CERCLA any "person in charge of a . . . facility shall, as soon as he has knowledge of any release . . . of a hazardous substance from such . . . facility" equal to or in excess of its RQ, "immediately notify" the NRC of the release. Since the person in charge of the facility must have "knowledge" of a "release" of an extremely hazardous substance in an amount equal to or in excess of its RQ before the requirement of immediate notification must be met, I conclude that knowledge of a release of an RQ or more is likewise a condition precedent to the

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[1]Complainant's Brief in Support of Proposed Findings of Fact and Conclusions of Law (November 8, 1991) at 5.

requirement for immediate notification of the LEPC and the SERC. Under CERCLA it is "any person in charge of . . . a facility" who is required to possess such knowledge and to provide such notice. On the other hand, under EPCRA, it is the owner or operator of the facility who is required to provide the notice. I find that the condition precedent of knowledge which is incorporated into Section 304(a) of EPCRA may be met if (a) the owner or operator of the facility personally possesses the required knowledge or (b) the knowledge of the release of an RQ of a reportable substance which is possessed by the person in charge of the facility may be imputed, under the particular circumstances of the case, to the owner or operator of the facility.[2] I must reject Complainant's contention that Section 304(a) does not require knowledge on the part of Respondent as a condition precedent to reporting.

The Complainant would have me conclude that "to avoid a violation, the owner or operator must be aware of all releases of extremely hazardous substances above the RQ. This is entirely.

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[2]"Knowledge" is not confined to what has been personally observed, but it may be that which is gained by information or intelligence, and may include that which is imputed. 51 C.J.S. Knowledge. Imputed knowledge is based upon the law of agency, which includes the duty of the agent to make full disclosure to his principal of all material facts relevant to the agency (3 Am. Jur. 2d Agency § 211 (1986)), and the consequent general rule that knowledge is imputed to the principal "where the agent is acting within the scope of his authority and the knowledge pertains to matters within the scope of the agent's authority." Ford Motor Credit Co. v. Weaver, 680 F.2d 451, 457 (6th Cir. 1982). The knowledge of key employees of a corporation, obtained while acting within the scope of their employment and within the scope of their authority is imputed to the corporate employer. Acme Precision Products, Inc. v. American Alloys Corp., 422 F.2d 1395, 1398 (8th Cir. 1970); 18 B Am. Jur. 2d Corporations § 1671.

feasible if operations are properly monitored . . . ." This view may constitute sound public policy in the eyes of Complainant, but it is not a requirement found in EPCRA. Congress did not impose monitoring requirements upon owners and operators in Section 304 of EPCRA. EPCRA is essentially a reporting statute; it does not require owners or operators to take any specific measures to monitor operations in order to ensure that they are aware of a release of an RQ immediately at the time of its occurrence. Nor are there any such requirements in the regulations promulgated under EPCRA.

Under Section 304(a) the statutory obligation to provide notice to the SERC and the LEPC arises immediately after the owner or operator acquires knowledge of the release of an extremely hazardous substance in a quantity equal to or in excess of an RQ. There cannot reasonably be any obligation to provide notice prior to acquiring knowledge of the release of an RQ of the substance. One cannot report that which one does not know. Section 304(a) does not impose the reporting requirement immediately after a release begins; it does not impose the reporting requirement immediately after the owner or operator would have known of a release had the owner or operator used monitoring equipment or techniques deemed adequate by EPA; it does not impose the reporting requirement immediately after the owner or operator learns of a release; it does not impose the reporting requirement immediately after a release reaches a level at or above an RQ. Section 304(a) imposes a reporting requirement immediately after a release reaches

a level at or above an RQ and the owner or operator has knowledge that it has done so. Thus, the Complainant's emphasis on the word "immediately" to the exclusion of the knowledge requirement is misplaced and must be rejected. If all releases at or above an RQ had to be reported immediately regardless of whether the owner or operator knew of such a release, the knowledge requirement, which is implicated by the reference to Section 103(a) of CERCLA, effectively would be eliminated from the statute.

Assuming, under the particular circumstances, that whatever knowledge the person in charge may possess may not be imputed to the owner or operator, the question then to be resolved is what is the nature of the "knowledge" that must be personally possessed by the owner or operator in order to find a violation of Section 304(a)(1). In the preamble to the final rule for emergency planning and notification requirements under EPCRA, the EPA provided the following interpretation of the knowledge requirement:

> Another commenter felt that since section 304 imposes penalties for failure to "immediately" notify State and local authorities of a release of an extremely hazardous substance, it is implicit that this assumes "immediately after the releaser becomes aware" of the existence of a release. EPA agrees that a knowledge requirement is implicit under section 304. However, if the facility owner/operator should have known of the release, then the fact that he or she was unaware of the release will not relieve the owner/operator from the duty to provide release notification. EPA believes no change is needed in regulatory language.[3]

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[3]52 Fed. Reg. 13378, 13393 (April 22, 1987).

Under this reading of the statute it would appear that the knowledge requirement would be satisfied by actual knowledge or by constructive knowledge of a release of an RQ of an extremely hazardous substance.

The general term "knowledge" can include both actual knowledge and constructive knowledge.[4] Ordinarily, the word is held to mean actual knowledge, which is not necessarily absolute certainty.[5] Actual knowledge "is concerned with a fact that has happened or occurred; it is information as to such fact, and is an assurance of a fact or proposition founded on perception by the senses, or intuition."[6]

The term is also frequently used to denote constructive knowledge.[7] Constructive knowledge neither indicates nor requires actual knowledge but means knowledge of such circumstances as would

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[4]Words and Phrases, "Knowledge"; 51 C.J.S. Knowledge.

[5]51 C.J.S. Knowledge.

[6]Id.

[7]Constructive knowledge is traditionally referred to in the context of an employer's liability for injuries incurred in the workplace to an employee, under the principle in Master and Servant law that a master is liable for an injury to a servant caused by a defect or dangerous condition on his premises where he could have discovered it by the exercise of reasonable, proper and ordinary care and diligence in performing the duties of master. Urie v. Thompson, Missouri, 337 U.S. 163, 178 (1949); Miller v. Cincinnati, New Orleans and Texas Pacific Ry. Co., 317 F.2d 693, 698 (6th Cir. 1963); 56 C.J.S. Master and Servant § 248. That concept is applied to the similar situation in admiralty law to interpret the term "knowledge" in the Shipowner's Limitation of Liability Act, 46 U.S.C. § 183 et seq. In the Matter of Texaco, Inc., 570 F. Supp. 1272, 1278 (E.D. La. 1983); Hernandez v. M/V Rajaan, 841 F.2d 582, 591 (5th Cir. 1988); In re Complaint of Southwind Shipping Co., S.A., 709 F. Supp. 79, 84-85 (S.D.N.Y. 1989).

ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent person ought to exercise, to a knowledge of actual facts.[8] The failure to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law.[9]

I conclude that under Section 304(a) of EPCRA, if the owner or operator of a facility personally possesses either actual knowledge or constructive knowledge of a release of an extremely hazardous substance in an amount equal to or in excess of its RQ, or if the person in charge of the facility possesses knowledge of such a release which, under the circumstances of the case, may be imputed to the owner or operator, the immediate reporting requirements of the section must be met. Thus, to establish a violation of Section 304(a), the Complainant must present facts which show the following: first, that the owner or operator of the Respondent's facility had actual knowledge of a release of an RQ or more of an extremely hazardous substance or that he or she possessed knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent person ought to exercise, to a knowledge of a release of an RQ or more of an extremely hazardous substance, or that the person in charge of the facility possessed knowledge of such a release which, under the

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[8]Id. See also Words and Phrases, "Knowledge".

[9]Mungin v. Florida East Coast Ry. Co., 318 F. Supp. 720, 737 (D.M.D. Fl. 1970), aff'd., 441 F.2d 728 (5th Cir. 1971) cert. denied, Howard v. Florida East Coast Ry. Co., 92 S.Ct. 203, 404 U.S. 897, 30 L.Ed.2d 175 (1971).

circumstances of the case, may be imputed to the owner or operator, and, second, that the owner or operator failed to report the release immediately after such knowledge was acquired or may be constructed or imputed.

Pursuant to Section 102[10] of CERCLA, the RQ of chlorine has been established as ten (10) pounds.[11] At about 4:00 p.m. on March 22, 1990, Mr. Newman learned that the chlorine release exceeded the RQ and, hence, as the owner or operator of Respondent's facility, possessed at that time actual knowledge of a release which met the immediate reporting requirements of Section 304(a).[12]

Prior to that time, i.e., soon after he arrived at the facility around 8:45 a.m. to 9:00 a.m. on March 22, 1990, Mr. Newman suspected that the release exceeded the RQ. Having spoken with the authorities on the scene immediately after his arrival, he clearly possessed knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent person ought to exercise, to a knowledge of actual facts. It is unnecessary to determine whether the facility owner or operator (Mr. Newman) failed to exercise due diligence between 9:00 a.m. and 4:00 p.m. in order to establish liability here. It is clear that Thoro failed to report the incident to the SERC until nearly twenty-two (22) hours had

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[10]42 U.S.C. § 9602.

[11]40 C.F.R. § 302.4; 40 C.F.R. Part 355, Appendix A.

[12]Finding of Fact 41, supra.

passed after Thoro acquired actual knowledge of the amount of chlorine released. That alone is sufficient to establish liability on the part of Respondent.

Mr. Newman did not report the release to the SERC until approximately 2:15 p.m. on March 23, 1990.[13] Therefore, I find that Respondent violated Section 304(a) of EPCRA, 42 U.S.C. § 11004(a), by its failure to report the release to the SERC immediately upon acquiring knowledge that the release exceeded the RQ.

There is no evidence that Mr. Newman or anyone else employed by Thoro ever telephoned the LEPC to report the release.[14] However, there is no requirement that such notice be made by telephone. Indeed, the statute itself provides that the notice may be made "by such means as telephone, radio, or in person."[15]

Around 9:00 a.m. on March 22, 1990, soon after Mr. Newman arrived at the facility, he explained in person to two members of the LEPC what had happened. Together they conducted a full on-site inspection and Mr. Newman provided an orientation in order to answer all of the questions from these members of the LEPC, to address all of their concerns and to show them where everything was and the source of the problem.[16] Respondent also points out that "[i]f Thoro had called Mr. Cook [Chairman of the LEPC], prior to

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[13]Finding of Fact 46, supra.

[14]Tr. 264, 298-99; Compl. Exh. 4.

[15]42 U.S.C. § 11004(b)(1) (emphasis added).

[16]Finding of Fact 40, supra.

his office opening at 8:30 a.m. (by which time the release was over) . . . they would have received a recorded message to call the Sheriff's Department . . . Tr. at 298 . . . and been referred to the hazardous materials specialist who is the very same Deputy Sheriff Mark Gutke with whom Thoro was already meeting . . . Tr. 58 . . . . Thus, Thoro was already talking face to face with the very person who [sic] the recorded message would have referred them to."[17] The fact that Respondent otherwise did not seek to contact the LEPC, but relied upon the discussion with members of the LEPC who were already present on site, does not demonstrate a lack of compliance with the notification requirement.

No evidence was introduced to show that the personal notice which Respondent gave the LEPC at this time failed to meet the contents requirements of Section 304(b)(2) "to the extent known at the time of the notice and so long as no delay in responding to the emergency results."[18] Mr. Newman gave this personal notice to members of the LEPC long before the completion of the complex calculations which confirmed that the release exceeded the RQ and, hence, long before he had actual knowledge of the amount of the release. Complainant has offered no concrete evidence that the owner or operator of the facility possessed constructive knowledge of the release prior to this meeting. Indeed, Mr. Newman was not informed of the gas cloud which had accumulated in the low lying

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[17]Respondent's Reply Brief (January 10, 1992) at 2; See Finding of Fact 7, supra.

[18]42 U.S.C. § 11004(b)(2).

area some blocks from the facility when he received notification at his home of the chlorine leak at the facility.[19] Hence, he did not possess knowledge of circumstances which would have permitted him to connect the one to the other.

Complainant contends that Thoro should have reported the release when Ms. Hannah arrived for work and discovered the chlorine leak at 7:30 a.m. I reject this contention. There is no evidence that Ms. Hannah was aware of the cloud of chlorine gas several blocks away or was aware of any connection between it and the chlorine leak which she detected when she reported for work. There is no evidence that she possessed any actual or constructive knowledge that there had been a release of an RQ or more of chlorine. Additionally, Ms. Hannah, a secretary and receptionist at Thoro, was not the owner or operator of the facility nor was she a person in charge. The term "person in charge" does not extend to "every person who might have knowledge of [a release] (mere employees, for example), but only to persons who occupy positions of responsibility and power . . . [including] lower level supervisory employees."[20] No evidence was introduced to show that Ms. Hannah possessed any such supervisory responsibility and power.

Complainant relies upon a notation in Complainant's Exhibit 16 wherein Deputy Sheriff Gutke states in his report that Ms. Hannah had told him that "at about 0730 hours on 032290 she observed a green chlorine cloud coming from the stack." Complainant complains

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[19]Finding of Fact 34, supra.

[20]U.S. v. Carr, 880 F.2d 1550, 1554 (2nd Cir. 1989).

that "Ms. Hannah conveniently omitted this fact from her testimony at the hearing in this matter as did Mr. Luke Danielson, counsel for Respondent, in Respondent's brief."[21] It should be noted that this statement was in an exhibit introduced by Complainant and that Complainant had an opportunity at the hearing to question Complainant's witness, Deputy Sheriff Gutke, on direct examination as well as Ms. Hannah, on cross-examination, concerning the accuracy and substance of this statement in Deputy Sheriff Gutke's report. Counsel for Complainant failed to do so. Ms. Hannah's testimony on what she discovered at about 7:30 a.m. on the morning of the incident at the Thoro facility was as follows:

> When I drove up, I got out of [the] car and walked to the front door. I opened the front door, and I detected a strong smell of chlorine, so I immediately shut the door and went up to the 7-Eleven to call Mr. Newman.

Ms. Hannah made no reference to a "green chlorine cloud" in her testimony. Furthermore, even assuming the statement in Deputy Sheriff Gutke's report to be an accurate representation of what Ms. Hannah said to him, such a statement, standing alone, would not support a finding that she possessed knowledge that an RQ of chlorine had been released from the facility. Finally, there was no evidence that Ms. Hannah reported this observation to Mr. Newman.

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[21]Complainant's Reply Brief (January 10, 1992) at 3.

Relying upon the well-accepted principle that the knowledge of an employee is directly imputed to the corporation,[22] Complainant contends that "Ms. Hannah's knowledge of the release at 7:30 a.m. on March 22, 1990 is therefore directly imputed to Respondent . . . ." Even if what little information Ms. Hannah knew at 7:30 a.m. should be imputed to Thoro, it did not constitute knowledge that an RQ of chlorine had been released from the facility.

I conclude that Respondent provided the required notice to the LEPC before Respondent acquired actual knowledge of a release of an RQ of chlorine. I further conclude that Respondent provided the required notice to the LEPC as soon as the owner or operator of Respondent's facility possessed knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence, to a knowledge of the actual fact of a release of an RQ of chlorine. Therefore, I find that the alleged violation of Section 304(a) in this regard must be dismissed.

Count II: This count alleges that Respondent failed to provide a written follow-up emergency notice concerning the release, as soon as practicable thereafter, to the SERC in violation of Section 304(c) of EPCRA, 42 U.S.C. § 11004(c).

Section 304(c) of EPCRA, 42 U.S.C. § 11004(c), requires the owner or operator of a facility from which there has been a release requiring notification under Section 304(a) of EPCRA, 42 U.S.C.

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[22] U.S. v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir. 1987), cert. denied, 108 S. Ct. 328 (1987); U.S. v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730, 738 (W.D. Va. 1974); Camacho v. Bowling, 562 F.Supp. 1012, 1025 (N.D. Ill. 1983).

§ 11004(a), to provide a written follow-up emergency notice to the LEPC and SERC as soon as practicable after such release.

Mr. Newman testified that three written follow-up letters, the bodies of which were identical, and each dated March 27, 1990, were mailed to the LEPC, the SERC and the Arvada Fire Protection District, respectively.[23] Complainant does not contest Respondent's contention that the LEPC and the Arvada Fire Protection District received their letters.[24] The personnel who performed the SERC operations at the State Department of Health were unable to locate the letter addressed to them in their files.[25]

Respondent asserts that all three of these very similar letters were prepared and sent out at the same time; that it does not know whether the SERC received a copy and misplaced it or whether it was never received; but that there is no credible or logical reason why Thoro would mail two of these three letters but not the third one. Respondent contends that mailing a letter in the ordinary course of business creates a presumption of its receipt.

Proof that mail has been properly addressed, stamped and deposited in an appropriate receptacle has long been accepted as evidence of delivery to the addressee. If this has been shown, there is a strong, but rebuttable, presumption that if it cannot be

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[23]Findings of Fact 47, 49 and 51, supra.

[24]Findings of Fact 48 and 50, supra.

[25]Finding of Fact 52, supra.

located thereafter, the form was delivered in due course in the mails and that it was lost or misdirected or misfiled after reaching its destination.[26]

The burden of showing that the form was properly mailed is upon Respondent. Respondent has met that burden.[27] Moreover, it should be noted that each of the letters which were sent to the LEPC and the local fire department on March 27, 1990 showed a "cc" to the Colorado Department of Health. Finally, I must agree with Respondent's contention that there is no credible or logical reason why Thoro would prepare and send two notices but not the third.

In the absence of evidence to the contrary from the Complainant, it must be presumed that the letter was delivered to the SERC in due course in the mails. Moreover, in this case, the balance of the evidence would lead one to conclude that it is more likely that the letter was received and misplaced at its destination than it is likely that the letter was never sent at all. It has been found that the offices of the State Department of Health which are assigned SERC responsibilities have always been crowded and there is not a lot of filing space. There are in excess of 10,000 facility files. Consequently, there are times when things are misfiled or two files are created for the same facility. It is not always possible to pull files when they are requested. Occasionally, files are lost. Until recently, there

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[26]Legille v. Dann, 544 F.2d 1, 4-5, (D.C. Cir. 1976) and cases cited therein.

[27]Finding of Fact 51, supra.

has been a shortage of file cabinets and some files have been stored in cardboard boxes.[28]

Therefore, I find that Complainant has failed to establish by a preponderance of the evidence that Respondent did not provide the required follow-up notice to the SERC and the alleged violation of Section 304(c) as set forth in Count II of the complaint must be dismissed.

Counts III and IV: Count III alleges that Thoro failed to submit, on or before October 17, 1987, or three months after the owner or operator first became subject to OSHA, MSDS's for chlorine and lupranate MS or a list of such chemicals, to the LEPC, the SERC and the Arvada Fire Protection District, in violation of Section 311 of EPCRA.

Count IV alleges that Thoro failed to submit a completed annual emergency and hazardous chemical inventory form (Tier I or Tier II form) for 1989 by March 1, 1990, to the LEPC, the SERC and the Arvada Fire Protection District, in violation of Section 312(a) of EPCRA.

Section 311 requires the owner or operator of facilities subject to OSHA and regulations promulgated under that Act, to submit MSDS's, or a list of the chemicals for which the facility is required to have an MSDS, to the LEPC, the SERC and local fire departments. The facilities are required to submit the MSDS's or the alternative list by October 17, 1987, or three months after the

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[28]Finding of Fact 6, supra.

facility is required to prepare or have an MSDS for a hazardous chemical under OSHA regulations, whichever is later.

Under Section 312, owners and operators of facilities that must submit an MSDS under Section 311 are also required to submit additional information on the hazardous chemicals present at the facility. Beginning March 1, 1988, and annually thereafter, the owner or operator of such a facility must submit an inventory form containing an estimate of the maximum amount of hazardous chemicals present at the facility during the preceding year, an estimate of the average daily amount of hazardous chemicals at the facility, and the location of these chemicals at the facility. Section 312(a) requires owners or operators of such facilities to submit the inventory form to the appropriate LEPC, SERC and local fire department on or before March 1, 1988 (or March 1 of the first year after the facility first becomes subject to the OSHA MSDS requirements for a hazardous chemical) and annually thereafter on March 1.

Section 312 specifies that there be two reporting tiers containing information on hazardous chemicals at the facility in different levels of detail. Tier I, containing general information on the amount and location of hazardous chemicals by category, is submitted annually. Tier II, containing more detailed information on individual chemicals, is submitted upon request.

Respondent admits that the required forms were not in fact on file, including both the Tier I or Tier II forms and some MSDS

sheets which should have been on file and were not.[29] Clearly, chlorine is a hazardous chemical within the meaning of Section 329(5) of EPCRA, 42 U.S.C. § 11049(5) and an extremely hazardous substance within the meaning of Section 329(3) of EPCRA, 42 U.S.C. § 11049(3). Chlorine is included in the list of extremely hazardous substance which was published pursuant to Section 11002(a)(2) of EPCRA.[30] The threshold planning quantity for chlorine is 100 pounds[31] which is therefore the reporting threshold for chlorine under Section 311 of EPCRA. Chlorine in quantities in excess of 100 pounds were stored at the Thoro facility as early as 1989.[32] Therefore, Respondent was obligated to submit the required MSDS and the Tier I and Tier II forms to the SERC, LEPC and the Arvada Fire Protection District. Respondent admittedly failed to do so.

Therefore, I find that Respondent has violated Section 311 of EPCRA, 42 U.S.C. § 11021 and Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), as alleged in Counts III and IV of the complaint.

Count V: This count alleges that Respondent failed, as soon as it had knowledge of the release, to report the release immediately to the NRC, in violation of Section 103(a) of CERCLA, 42 U.S.C. § 9603(a).

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[29]Brief of Thoro Products Company (November 9, 1991) at 13, 15; Tr. 15, 17-18, 40.

[30]See 40 C.F.R. Part 355, Appendices A and B.

[31]Id.

[32]Finding of Fact 10, supra.

At about 4:00 p.m. on March 22, 1990, Mr. Newman learned that the chlorine release exceeded the RQ.[33] Thus, at that time the only person who could be considered to be "in charge of the facility," Mr. Newman, possessed actual knowledge of a release which met the immediate reporting requirements of Section 103(a). Mr. Newman did not report the release to the NRC until approximately 4:36 p.m. EST on March 23, 1990.[34] Respondent concedes that Mr. Newman's "report was not in fact finally made until the day after the incident."[35]

Therefore, I find that Respondent has violated Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), as alleged in Count V of the complaint.[36]

V. Discussion and Conclusions as to the Penalty

The Consolidated Rules of Practice provide, in pertinent part, at 40 C.F.R. § 22.27(b):

> (b) Amount of Civil Penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall

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[33]Finding of Fact 41, supra.

[34]Finding of Fact 45, supra.

[35]Brief of Thoro Products Company, at 16. Although Mr. Newman testified that he called what he thought was the number for the NRC on March 22, 1990, and got a busy signal (Tr. 372), I credit the testimony of Lieutenant Ernesto of the U.S. Coast Guard to the effect that the records of the NRC revealed that at no time on March 22, 1990, were all of the telephone lines at the NRC in use and, hence, no caller would have received a busy signal. (Tr. 90-91.)

[36]Thus to establish liability for the violation in Count V it is unnecessary to determine whether Thoro possessed constructive knowledge earlier in the day. See pp. 21-22, supra.

> 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. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

The Judicial Officer has held that "the requirement to give the guideline consideration is 'entirely in accordance with the settled rule that agency policy statements interpreting a statute are entitled to be given such weight as by their nature seems appropriate. [Citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)].'"[37]

While I must consider the civil penalty guidelines in determining the amount of the recommended civil penalty and must set forth specific reasons for assessing a penalty different in amount from that recommended by the Complainant, I am not bound to assess the same penalty as that proposed by the Complainant.[38] I may assess a different penalty if, upon consideration I conclude, for example, the guidelines have been improperly interpreted and applied by the Complainant; or circumstances in the case warrant recognition, or, where they may have been recognized by the

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[37]Bell and Howell Company, (TSCA-V-C-033, 034, 035) (Final Decision, December 2, 1983), at 10, n. 6, quoting the Presiding Officer's Initial Decision.

[38]In re: Electric Service Company, TSCA Docket No. V-C-024, Final Decision No. 82-2, at 20, n. 23.

Complainant, warrant a weight not accorded them by EPA;[39] or the penalty calculated and recommended by the Complainant under the guidelines is somehow not consistent with the criteria set forth in the Act.

EPA issued a Final Penalty Policy for Sections 302, 303, 304, 311 and 312 of EPCRA and Section 103 of CERCLA on June 13, 1990. The penalty policy provides for the determination of a preliminary deterrence (base) penalty which is calculated using the statutory factors under Section 109(a)(3) of CERCLA and Section 325(b)(1)(C) of EPCRA which apply to the violation: nature, circumstances, extent and gravity.

These factors are incorporated into one matrix for violations of Section 103 of CERCLA and of Sections 302, 303, 304 and 312 of

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[39]Thus, for example, the Judicial Officer has held that: "There is nothing in the guidelines which suggests that a presiding officer is required to assess a penalty in an amount which is identical to one of the amounts shown in the matrix . . . . The guidelines were never intended to establish an inflexible policy which would force the presiding officer to elect between one amount or the other . . . . Instead, it is better to view the amounts shown in the matrix as points along a continuum, representing convenient benchmarks for purposes of proposing and, in some instances, assessing penalties. Accordingly, <u>if warranted by the circumstances</u>, other points along the continuum may be selected in assessing a penalty. Although the guidelines do not purport to give specific guidance on how this should be done, <u>it seems evident that, at a minimum, the additional evidence adduced at a hearing can be used as a basis for justifying deviations</u> (up or down) from the amount shown in the matrix. In other words, by viewing the amounts shown in the matrix as benchmarks along a continuum, a range of penalties . . . becomes available to account for, among other things, some of the less tangible factors which the presiding officer is in a unique position to evaluate. Moreover, the existence of this range constitutes tacit acknowledgement of the fact that, no matter how desirable, mathematical precision in setting penalties is impossible." <u>Bell and Howell Co.</u>, (TSCA-V-C-033, 034, 035) (Final Decision, December 2, 1983), at 18-19 (emphasis added).

EPCRA and another matrix for violations of Section 311 of EPCRA. Two matrices are used because of the difference in the statutory maximum associated with the different violations. For Section 311 the maximum daily amount is $10,000; for Section 103 of CERCLA and Sections 302, 303, 304 and 312 of EPCRA the first violation maximum daily amount is $25,000. The matrix yields the base penalty.

Once the base penalty amount has been determined, upward or downward adjustments to the penalty amount are made in consideration of the factors which relate to the violator: the degree of culpability, history of prior violations, ability to pay/ability to continue in business, economic benefit or savings and such other matters as justice may require.

A. Calculation of Base Level Penalty

1. Counts I and V. The penalty assessments for Counts I and V are calculated jointly because the nature of the failure to notify the NRC as required under CERCLA § 103(a) and the nature of the failure to notify the SERC as required under EPCRA § 304(a) are classified as emergency response violations and because the same penalty matrix in the penalty policy is used for both types of violations.

The fundamental purpose behind the emergency planning and notification requirements of EPCRA and CERCLA is to protect the public in the event of dangerous chemical releases. The NRC and the SERC (as well as the LEPC) must be alerted to potentially dangerous chemical releases in order to ensure effective and timely

emergency response.[40] In the words of the penalty policy: "The main objectives of the emergency notification provisions are to alert local, State, and Federal officials in the event of chemical accidents so that an appropriate emergency response action can be taken and to prevent injuries or deaths to emergency responders from exposure to chemicals."[41]

In assessing the extent of the violation the penalty policy measures deviation from the immediate notification requirement in terms of timeliness because a delay in notification could seriously hamper Federal, state and/or local response activities and pose serious threats to human health and the environment. As the penalty policy states: "The immediate notification is required to allow Federal, State, and local agencies to determine what level of government response is needed and with what urgency the response must take place. Early and effective communication of the release event is crucial."[42]

The extent of each violation was classified by the EPA as Level I because there was a failure to notify both the NRC and the SERC within two (2) hours after the person in charge and the owner/operator, respectively, had knowledge of the release. EPA justified Level I because notices were "not in time for response entities to initiate any coordinated oversight or a mitigating

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[40]52 Fed. Reg. 13378, 13386 (April 22, 1987).

[41]Penalty Policy at 18.

[42]Penalty Policy at 10.

response . . . . [C]oncentration reached traffic and public in less than five minutes."[43]

In assessing the gravity of a violation the penalty policy utilizes the amount of the substance involved in relation to its RQ. The RQ scale for hazardous substances is a relative measure of the hazards posed by chemicals and therefore the potential threat to human health and the environment. In other words, the assumptions here are "the lower the RQ, the greater the potential threat to human health and the environment. The greater the amount released over the RQ, the greater the potential for the need for immediate notification."[44]

Since the amount of chlorine released was greater than five (5), but less than ten (10) times the RQ, the gravity of the violations was classified by the Agency at Level B. The Agency explained that a release in this quantity "indicates a great potential for harm; and thus, a great need for immediate notification."[45]

In assessing the circumstances of the violation, the penalty policy measures the potential for harm to human health and the environment resulting from Respondent's failure to report the release in the manner prescribed by the statutes. The factor of circumstances is described in the penalty policy as "the potential consequences of the violation." After determining the extent and

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[43]Compl. Exh. 18.

[44]Penalty Policy at 15.

[45]Compl. Exh. 18.

gravity of the violation, the matrix provides a dollar range for the base penalty amount. The specific dollar amount of the base penalty is determined by the circumstances surrounding the violation. The Agency selected the highest amount in the dollar range ($16,500 per count) because, as stated on the penalty calculation work sheet, "chlorine is powerful respiratory irritant. Can cause pulmonary edema . . . . Unmanned, unmonitored process, highly mechanical, indicates high probability. Densely populated areas immediately nearby; (busy street). High risk circumstances."

In assessing each of these three factors - extent, gravity and circumstances - the penalty policy and EPA's application of that policy in this case emphasize the need for immediate notification of the release and the potential consequences - the potential threat to human health and the environment - absent such immediate notification. I find that the Agency's assessment of these factors bears little relationship to the actual facts in the case and greatly exaggerates the potential consequences - the potential threat to human health and the environment in the Arvada area - as a result of Respondent's failure to report.

In determining the appropriate penalty, it must be emphasized that the focus must be upon the potential consequences of the <u>failure to report</u> the release - not upon the potential consequences of the release itself.

The potential consequences or the potential for harm which is determinative is that which results from the violation - namely the failure to report. Section 304 of EPCRA and Section 103 of CERCLA

do not penalize a party for the fact of a release itself; or for the size of a release; or for the seriousness or potential for harm resulting from a release; or for the failure to have installed mechanisms and procedures to prevent a release or to detect a release upon its inception or when it reaches the RQ; or for failure to have acquired knowledge of a release immediately after it reached its RQ. Section 304(a) of EPCRA and Section 103(a) of CERCLA only penalize a party for failure to report a release immediately after the party acquires knowledge of a release of an RQ or more of a hazardous substance. In other words, if an owner or operator/person in charge reports a release immediately upon acquiring knowledge of the release of an RQ or more of a hazardous material, no violation of Section 304(a) of EPCRA or Section 103(a) of CERCLA could be found, and hence, no penalty could be imposed, regardless of: (a) the fact that a release had occurred; (b) the size of the release; (c) the seriousness or potential for harm resulting from a release; (d) the failure to have installed mechanisms and procedures to prevent a release or to detect a release upon its inception or when it reaches the RQ; or (e) the failure to have acquired knowledge of a release immediately after it reached its RQ.

The statutory provisions which Respondent has violated are reporting provisions and the potential consequences or the potential for harm must be measured by the failure to report the release immediately upon acquiring knowledge that an RQ or more had been released. Mr. Newman, the owner and operator of the facility

and the person in charge, did not have actual knowledge of the amount of chlorine which had been released until approximately 4:00 p.m.[46] It was not clear to Mr. Newman or to anyone else arriving at the facility on the morning of March 22, 1990, what quantity of chlorine had been released.[47] Mr. Newman conceded that soon after he arrived at the facility, he suspected that the release exceeded the RQ.[48] Even assuming that such a suspicion, combined with the information which he acquired from the authorities on the scene, constituted constructive knowledge of a reportable release prior to 4:00 p.m., the potential consequences of his failure to report the release immediately after this suspicion arose (i.e., at approximately 8:45 a.m. to 9:00 a.m. on March 22, 1990) do not approximate or even approach those which the Agency describes.

By the time Mr. Newman had arrived on the scene, the nature and source of the release had been discovered by the local authorities, the cloud of chlorine gas had dissipated to a safe level, the emergency response units and personnel had been given word to stand down, roadways were opened and the area had been "released back to the community."[49] In other words, by no later than 9:00 a.m., the incident was basically over.[50]

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[46]Finding of Fact 41, supra.

[47]Id.

[48]Id.

[49]Finding of Fact 38, supra.

[50]Tr. 201.

There is no question that it would have been far more helpful to the responding authorities had Thoro been aware of the release and reported it to the NRC, the SERC and the LEPC early (circa 7:00 a.m. to 8:00 a.m.) on the morning of March 22, 1990. As EPA stated in its penalty calculation worksheet: "[notices were] not in time for response entities to initiate any coordinated oversight or a mitigating response"; "[there was] a great potential for harm; and thus, a great need for immediate notification"; "chlorine is powerful respiratory irritant . . . . Unmanned, unmonitored process, highly mechanical, indicates high probability . . . . High risk circumstances." However, these concerns are not reflective of the circumstances surrounding the failure to report in the situation here. They bear little relationship to the actual violation - the failure to report the incident immediately after Thoro acquired knowledge (be it constructive or actual) of a release of an RQ, i.e., at 8:45 a.m. to 9:00 a.m. or at 4:00 p.m. on March 22, 1990. Neither CERCLA nor EPCRA requires owners, operators or persons in charge of such facilities to be omniscient and omnipresent about such releases. At the early hour at which EPA would have preferred the NRC, the LEPC and the SERC to receive emergency notification, neither a person in charge nor the owner/operator possessed knowledge that an RQ of chlorine had been released. To repeat, one cannot report that which one does not know.

Having considered the "civil penalty guidelines issued under [EPCRA and CERCLA]", I have found the assumptions in those

guidelines and the application of those guidelines by the Agency not to be reflective of the situation here. Since the incident was essentially over before the duty to report arose, there was little, if any, potential for emergency personnel, the community and/or the environment to be exposed to hazards as the result of noncompliance with the reporting requirements. While the first responders and emergency managers encountered some real problems, these did not result from the failure to notify after knowledge of the release of an RQ was acquired by Respondent. These problems resulted from the release itself and a lack of knowledge about the nature and source of the chlorine cloud.

I conclude that a "penalty different in amount from the penalty recommended to be assessed in the complaint" should be assessed for the violations found in Counts I and V. A base level penalty of $7,000 will be assessed against Respondent for the violations found in Counts I and V, $3,500 for Count I and $3,500 for Count V.

2. Counts III and IV: The failure to submit the MSDS for each required hazardous chemical (or a list thereof) as required by Section 311(a) of EPCRA and the required inventory forms (Tier I or Tier II) as required by Section 312(a) of EPCRA to the SERC, the LEPC and the local fire department are classified as emergency preparedness/right-to-know violations. Since 4,000 pounds of chlorine were stored at the Thoro facility on August 11, 1989,[51] Respondent was required to file an MSDS for chlorine, or a list of

[51]Finding of Fact 10.

chemicals, with the SERC, the LEPC and the Arvada Fire Protection District within three months or no later than November 11, 1989. These documents had not been submitted by the date of the incident, March 22, 1990.[52]

Thoro was required to submit the required inventory report forms (Tier I or Tier II) to the SERC, the LEPC and the Arvada Fire Protection District on or before March 1, 1990. The forms were submitted to the Arvada Fire Protection District on March 26, 1990 and to the LEPC on July 13, 1990, and were discovered in the SERC file for Thoro on July 13, 1990.[53]

Since the Respondent had failed to submit these documents to one or more of the designated recipients within thirty (30) calendar days of the respective dates on which they were due, the extent of the violations in Counts III and IV is classified at Level I.

Since the amount of a hazardous chemical at Thoro at any time during the reporting period was greater than ten (10) times the reporting threshold, the gravity of the Section 311 violation is classified at Level A. Likewise, since an emergency and hazardous chemical inventory form had not been filed for chlorine which was present in greater than ten (10) times the reporting threshold, the gravity of the Section 312 violation is classified at Level A.

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[52]Finding of Fact 54.

[53]There was conflicting testimony as to whether the inventory report forms were submitted to and received by the SERC prior to this date, but Respondent has admitted that the required forms, in fact, were not on file. See FN 26, supra.

The factor of circumstances, as explained previously, refers to the potential consequences of the violation. The potential for harm may be measured by the adverse effect which noncompliance has on the statutory or regulatory purposes of the EPCRA program.

The underlying premise of the community right-to-know provisions of Sections 311 and 312 is broad access of individuals and local officials to complete information concerning all chemicals that may pose physical or health hazards to their communities. The need for broad access to such information is heightened by the potentially large number of groups who would use it, ranging from SERC's, LEPC's and local law enforcement departments, fire and health departments and other local government officials to local community organizations and the general public. It is especially important that MSDS and inventory information about hazardous substances present in the community be available to emergency response personnel when a release occurs.

These requirements are fundamental to the integrity of the EPCRA program and the failure to meet them can undermine the purposes of the statute by denying to government officials and to citizens their right to information regarding the chemical hazards which are present in the community.

Nevertheless, I cannot agree with the Complainant that the circumstances of either of these violations warrants the maximum penalty authorized under the penalty policy. The penalty policy advises that in the selection of the exact penalty amount within each range, consideration may be given to, inter alia, "any actual

problems that first responders and emergency managers encountered because of the failure to . . . submit reports . . . in a timely manner."[54]

Fire Marshall Delay testified that when he arrived at the Thoro facility he did not need the MSDS documents; if he had needed them, he would have asked for them.[55] He explained that he has 10,000 to 20,000 MSDS sheets in his office. The number is so voluminous that he cannot carry them with him in his vehicle. Therefore, he relies upon on-site MSDS sheets in responding to an incident.[56] MSDS sheets were at Respondent's facility on March 22, 1990.[57] Some of the information is extracted and entered into the computer and although he could have brought to the site a hazardous printout from the computer, he was not asked to do so.[58] Further, no evidence was introduced to show that there were any actual problems because of Respondent's failure to have submitted the emergency and hazardous chemical inventory forms (Tier I or Tier II forms) prior to the incident. Indeed there was no evidence that those who responded to the incident sought any information from the local or state repositories of these forms.

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[54]Penalty Policy at 19.

[55]Tr. 49.

[56]Tr. 48.

[57]Finding of Fact 55, supra.

[58]Tr. 48.

Therefore, I select $8,000 and $20,000 as the appropriate base level penalties for the violations of Section 311 and Section 312, respectively.

3. Summary of Base Level Penalty

To summarize the base level penalty:

Count I	$3,500.00
Count III	$8,000.00
Count IV	$20,000.00
Count V	$3,500.00
Total	$35,000.00

4. Adjustments Relating to the Violator

I find no basis in the record upon which to make an adjustment for these factors: the degree of culpability; history of prior violations; economic benefit or savings; or such other matters as justice may require.

Respondent contends that it lacks the ability to pay the penalty which EPA had proposed in this case because it is a company with a very limited cash flow and a very problematic financial future. Mr. Newman testified that Thoro is not operating profitably, that its workforce has shrunk from 16 to 5 in the last two (2) years and that it has not had sufficient funds to pay his salary for the past few months.[59] Thoro has been unable to secure a bank loan using the property on which its facility is located or property which it owns at Rocky Flats as collateral.[60] There is

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[59]Tr. 407.

[60]Tr. 405-06.

at present a pending EPA order under Section 106 of CERCLA directed to Thoro and another company, GWI, concerning suspected groundwater contamination at the Rocky Flats property.[61] As a result, it has not been possible to use this property as collateral for a bank loan.[62]

Mr. Roman Vilches, an accountant who has done the bookkeeping, accounting and tax preparation for Thoro since 1966,[63] testified that Thoro is losing money and does not have the ability to pay a penalty of $80,000 unless the company goes bankrupt or liquidates or sells the business.[64] In support of its contention that it lacks the ability to pay the proposed penalty and that the payment of the proposed penalty would put it out of business, Respondent offered copies of its U.S. Corporation Income Tax Returns for the period 1985 through 1990 and a "preliminary" balance sheet as of July 31, 1991.

Complainant avers that information which Respondent itself provided to Dun and Bradstreet shows total sales in the amount of $1.2 million for the latest reporting period.

Respondent has the burden to raise and establish its inability to pay proposed penalties. Thus, the inability to pay a penalty is

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[61] Id.; Tr. 329, 347-48, 358-60.

[62] Tr. 405-06.

[63] Tr. 316-17.

[64] Tr. 330, 333, 406.

an affirmative defense and the Respondent bears the burden of going forward with the evidence to establish it.[65]

Respondent has not met that burden in this case. I find that the tax returns are an unreliable indicia of Respondent's fiscal status for the years involved. First, each return was signed and dated by Mr. Newman on "6/21/91" and none were signed by the preparer, Mr. Vilches.[66] Mr. Vilches said that he never signed the returns as the preparer.[67] Second, the tax returns contained so many admitted errors that Mr. Vilches himself testified that the tax returns could not be relied upon.[68] For example, the assets at the close of the tax year of 1988 were reported as $591,225 while the assets at the beginning of the tax year of 1989 were reported as $479,605.[69] In other words, over $110,000 of assets "disappeared" between 1988 and 1989. Moreover, Mr. Vilches admitted under cross-examination that the total liabilities and stockholders' equity as shown on page 4 of the 1989 tax return should, but fails to, match the total assets of the company.[70] He also admitted that schedules which were required to be attached

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[65]Colonial Processing, Inc., Docket No. II EPCRA-89-1114, (Initial Decision, June 24, 1991) at 25.

[66]Tr. 321-22, 338; Resp. Exh. 34.

[67]Tr. 338.

[68]Tr. 431.

[69]Tr. 335-36; Resp. Exh. 34.

[70]Tr. 336-37; Resp. Exh. 34.

to the tax returns were not filed with them.[71] Finally, the "preliminary" balance sheet as of July 31, 1991, does not reflect $159,768 in "other investments" which was shown on the 1990 tax return in the balance at the end of the tax year.[72] This was subsequently described by Mr. Vilches as an "oversight" because he explained that the $159,768 had been applied to the purchase of the Rocky Flats land prior to 1990.[73] In sum, I find these tax returns to be a totally unreliable basis upon which to make a judgment as to Respondent's ability to pay or to continue in business should I assess a civil penalty of $35,000 in this matter.

Mr. John Mahan, a financial analyst for EPA, testified that to get a complete picture of the financial status of a small, closely held corporation such as Thoro, an examination of tax returns is only the beginning. Bank statements and other financial documents used in the preparation of tax returns should be examined. One must also examine audited or otherwise independently prepared financial statements, including balance sheets, income statements, statements of changes in stockholders' equity, statements of the changes of cash flow, and any loan filings or loan applications.[74] None of this information was offered into evidence by Respondent.

Mr. Mahan also emphasized the importance of examining the financial position of the owner/manager of a company such as Thoro.

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[71]Tr. 338.

[72]Tr. 349-50; Resp. Exh. 34.

[73]Tr. 428-29.

[74]Tr. 344, 351.

Management and owners are one and the same person in a very small company. If the officers and directors are in a decision-making role where they can determine dispositions of assets, or in any other way influence the business, their personal financial statements, and tax returns must be examined in order to get an adequate picture of what is actually occurring with the entire fiscal entity.[75] Again, none of this information was offered into evidence by Respondent.

As to the adequacy of the "preliminary" balance sheet, Mr. Mahan pointed out that it was not accompanied with the other financial statements that ordinarily would be attached to a balance sheet, an income statement, a statement of position--changes of position, or statement of cash flows.

Mr. Vilches testified that the preliminary balance sheet contains information that he was given by Respondent. He testified that he "didn't have too much time to do proper accounting." It is not an independently prepared or audited financial statement and was prepared on the Saturday just before the hearing.[76] As Complainant points out, since none of the underlying documentation upon which the balance sheet is based was provided to the Presiding Officer, there is no way to verify the accuracy of the balance sheet.

In summary, Respondent has failed to establish an inability to pay the proposed penalty of $84,500 sought by EPA, or to establish

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[75]Tr. 345, 351.

[76]Tr. 323.

that the proposed penalty would jeopardize its ability to remain in business as an entity functioning with that level of economic viability at which it had been functioning for the previous few years. Clearly, therefore, the lesser penalty of $35,000 which I propose to assess has not been shown to be beyond Respondent's ability to pay or to have an adverse effect on Respondent's ability to continue to do business. Therefore, no adjustment in the total base penalty amount is warranted.

5. Conclusion

Accordingly, I find that the appropriate penalty is as follows:

Count I	$3,500.00
Count III	$8,000.00
Count IV	$20,000.00
Count V	$3,500.00
Total	$35,000.00

ORDER[77]

Pursuant to Section 109 of CERCLA, 42 U.S.C. § 9609, a civil penalty in the amount of $3,500.00 is hereby assessed against Respondent, Thoro Products Company, Inc., for the violation of Section 103(a) of CERCLA. Pursuant to Section 325 of EPCRA,

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[77]Pursuant to 40 C.F.R. § 22.27(c), this initial decision shall become the final order of the Environmental Appeals Board within forty-five (45) days after the service upon the parties unless an appeal to the Environmental Appeals Board is taken by a party or the Environmental Appeals Board elects to review the initial decision upon its own motion. 40 C.F.R. § 22.30 sets forth the procedures for appeal from this initial decision.

42 U.S.C. § 11045, a civil penalty in the amount of $31,500.00 is assessed against Respondent, Thoro Products Company, for the violations of Sections 304, 311 and 312 of EPCRA.

IT IS ORDERED that Respondent, Thoro Products Company, pay a civil penalty to the United States in the sum of $3,500.00. Payment shall be made by cashier's or certified check payable to the "Hazardous Substance Superfund." The check shall be sent to:

U.S. Environmental Protection Agency
P.O. Box 371003M
Pittsburgh, PA 15251

IT IS FURTHER ORDERED that Respondent, Thoro Products Company, pay a civil penalty to the United States in the sum of $31,500.00. Complainant has stated that it "is amenable to payments over time as the Presiding Officer deems appropriate."[78] Therefore, I direct that this portion of the penalty be paid in three equal payments of $10,500, the second payment at a six-month interval after the first and the third payment at a six-month interval after the second. Payments shall be made by cashier's or certified check payable to "Treasurer, United States of America." The checks shall be sent to:

U.S. Environmental Protection Agency
P.O. Box 360859M
Pittsburgh, PA 15251

Respondent shall note on these checks the docket number specified on the first page of this initial decision. At the times of payment, Respondent shall send a notice of such payment and a copy of each check to:

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[78]Complainant's Reply Brief (January 10, 1992) at 18.

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region VIII
999 18th Street, Suite 500
Denver, CO 80202-2405

Attn: Joanne McKinstry

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: May 19, 1992
Washington, DC

CERTIFICATE OF SERVICE

I certify that the original of the INITIAL DECISION together with a copy of the record in this matter was sent pouch mail to the Headquarters Hearing Clerk.

I certify that a copy of the INITIAL DECISION was forwarded to the following on this the 27th day of May, 1992.

Luke J. Danielson
Robin C. Truitt
Gersh & Danielson
1775 Sherman Street
Suite 1875
Denver, CO

Certified Mail
Return Receipt Requested

Wendy Silver, Attorney
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Hand-Carried

Joanne McKinstry
Regional Hearing Clerk