UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR
Decision Published At Website - http://www.epa.gov/aljhomep/orders.htm

IN THE MATTER OF	)	
	)	
BITUMA-STOR, INC. d/b/a	)	**DOCKET NO. EPCRA-7-99-0045**
BITUMA CORPORATION AND GENCOR	)	
INDUSTRIES, INC.,	)	
	)	
RESPONDENT	)	

INITIAL DECISION

Emergency Planning and Community Right-To-Know Act of 1986: Pursuant to Section 325 of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 11045, also known as the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11045, Respondent, Bituma-Stor, Inc., doing business as Bituma Corporation and Gencor Industries, Inc., is assessed a civil administrative penalty of $59,576 for violating the reporting requirements of Sections 312 and 313 of EPCRA, 42 U.S.C. §§ 11022 and 11023, and the respective implementing regulations set forth in the Hazardous Chemical Reporting: Community Right-to-Know Rule, 40 C.F.R. Part 370, and in the Toxic Chemical Release Reporting: Community Right-to-Know Rule, 40 C.F.R. Part 372.

Issued: January 22, 2001

Barbara A. Gunning
Administrative Law Judge

Appearances:

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PROCEDURAL HISTORY

This civil administrative proceeding arises under Section 325 of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 11045, also known as the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"). 42 U.S.C. § 11045. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and Revocation, Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.[1/]

The United States Environmental Protection Agency (the "EPA" or "Complainant") initiated this proceeding by the filing of a Complaint against Bituma-Stor, Inc., doing business as Bituma Corporation and Gencor Industries, Inc. ("Respondent"), on July 30, 1999. The Complaint charges Respondent with four violations of the reporting requirements of Sections 312 and 313 of EPCRA, 42 U.S.C. §§ 11022 and 11023, and the regulations promulgated pursuant to EPCRA which are set forth in both the Hazardous Chemical Reporting: Community Right-to-Know Rule, 40 C.F.R. Part 370, and in the Toxic Chemical Release Reporting: Community Right-to-Know Rule, 40 C.F.R. Part 372. In the Complaint, the EPA seeks a civil administrative penalty of $59,576 for these alleged violations.

[1/] The Rules of Practice were revised effective August 23, 1999. Proceedings commenced before August 23, 1999, are subject to the revised Rules of Practice unless to do so would result in substantial injustice. The instant proceeding, which commenced on July 30, 1999, is subject to the revised Rules of Practice as there is no indication that doing so would result in substantial injustice.

Specifically, Count I of the Complaint charges that Respondent failed to submit an emergency and hazardous waste chemical inventory form for propane at its facility for the calendar year 1997 to the Local Emergency Planning Committee ("LEPC"), the State Emergency Response Commission ("SERC"), and the local fire department by March 1, 1998, in violation of Section 312(a) of EPCRA and the requirements in 40 C.F.R. Part 370, Subpart B. Count II charges that Respondent failed to submit a toxic chemical release inventory form ("Form R") for xylene at its facility for the 1997 calendar year to the EPA and to the State of Iowa by July 1, 1998, in violation of Section 313 of EPCRA and the requirements in 40 C.F.R. Part 372. Count III charges that Respondent failed to submit a Form R for xylene at its facility for the 1996 calendar year to the EPA and to the State of Iowa by July 1, 1997, in violation of Section 313 of EPCRA and the requirements in 40 C.F.R. Part 372. Count IV charges that Respondent failed to submit a Form R for xylene at its facility for the 1995 calendar year to the EPA and to the State of Iowa by July 1, 1996, in violation of Section 313 of EPCRA and the requirements in 40 C.F.R. Part 372.

Respondent filed an Answer to the Complaint on August 24, 1999. Respondent asserted five affirmative defenses in its Answer and argued that a civil penalty should not be imposed against it on the grounds that Respondent has a "blemish-free" history and exercised due diligence in its handling of propane and xylene, the chemicals at issue in this proceeding.

Respondent and the EPA entered into joint stipulations on March 28, 2000. Respondent stipulated to liability on all four counts of the Complaint.

A hearing in the instant matter was conducted in Kansas City, Kansas, on June 27, 2000, for the purpose of determining the appropriate penalty to be assessed against Respondent for its four EPCRA violations.

On September 12, 2000, Complainant filed its Proposed Findings of Fact and Conclusions of Law, Proposed Order, and Trial Brief in Support Thereof ("Complainant's Brief").

Counsel for Respondent submitted a statement on September 22, 2000, informing the undersigned Administrative Law Judge that Counsel had been instructed by Respondent to disclose that Respondent had filed a Petition for Bankruptcy under Chapter 11 of the United States Bankruptcy laws. Respondent had instructed

Counsel not to file proposed Findings of Fact and Conclusions of Law or a Trial Brief.

FINDINGS OF FACT

1. The EPA initiated this matter against Respondent by filing a Complaint and Notice of Opportunity For Hearing on July 30, 1999, pursuant to Section 325 of EPCRA. The Complaint was issued by the Director of the Air, Resource Conservation and Recovery Act, and Toxics Division of Region 7 of the EPA.

2. The Administrator of the EPA has delegated to the Regional Administrator for Region 7 of the EPA the authority to commence and pursue civil administrative actions under Section 325 of EPCRA, and the Regional Administrator has redelegated this authority to the Director of the Air, RCRA, and Toxics Division for Region 7 of the EPA.

3. The EPA has promulgated the Hazardous Chemical Reporting: Community Right-to-Know Rule, 40 C.F.R. Part 370, pursuant to Sections 311, 312, and 328 of EPCRA, 42 U.S.C. §§ 11021, 11022, 11048.

4. The EPA has also promulgated the Toxic Chemical Release Reporting: Community Right-to-Know Rule, 40 C.F.R. Part 372, pursuant to Section 313 of EPCRA, 42 U.S.C. § 11023.

5. The Complaint alleges one violation of Section 312(a) of EPCRA and the regulations set forth in 40 C.F.R. Part 370 for Respondent’s failure to submit an emergency and hazardous chemical inventory form for the hazardous chemical propane stored at its facility to the LEPC, the SERC, and the fire department with jurisdiction over Respondent’s facility by March 1, 1998 (Count I).

6. The Complaint alleges three violations of Section 313 of EPCRA and the regulations set forth in 40 C.F.R. Part 372. Specifically, Count II of the Complaint alleges that Respondent violated Section 313 of EPCRA and 40 C.F.R. Part 372 by failing to submit a Form R for xylene for calendar year 1997 to the Administrator of the EPA and to the State of Iowa by July 1, 1998. Count III of the Complaint

alleges that Respondent violated Section 313 of EPCRA and 40 C.F.R. Part 372 by failing to submit a Form R for xylene for calendar year 1996 to the Administrator of the EPA and to the State of Iowa by July 1, 1997. Count IV of the Complaint alleges that Respondent violated Section 313 of EPCRA and 40 C.F.R. Part 372 by failing to submit a Form R for xylene for calendar year 1995 to the Administrator of the EPA and to the State of Iowa by July 1, 1996.

7. In the Complaint, the EPA proposes civil administrative penalties of $13,750 for Count I, $10,126 for Count II, $18,700 for Count III and $17,000 for Count IV. The total proposed penalty against Respondent is $59,576.

8. Respondent is Bituma-Stor, Inc., doing business as Bituma Corporation and Gencor Industries, Inc. Respondent is an Iowa corporation that manufactures portable asphalt mixing plants. Respondent operates the facility located at 730 Bluff Road, Marquette, Iowa 52158 (the “Facility”).

9. Respondent is a “person” as defined by Section 329(7) of EPCRA, 42 U.S.C. § 11049(7), and is the owner or operator of a facility as defined by Section 329(4) of EPCRA.

10. Respondent had fifty or more full time employees at the Facility at all times relevant to the Complaint.

11. Respondent’s Facility had a Standard Industrial Code (“SIC”) of 3531 at all times relevant to the Complaint. Respondent’s Facility, therefore, had a SIC code between Major Group 20 and 39 at all times relevant to the Complaint.

12. The owner or operator of a facility that is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970 (“OSHA”), 29 U.S.C. 651 *et seq*., and regulations promulgated under that Act, must submit to the appropriate LEPC, the SERC, and the fire department with jurisdiction over the facility on or before March 1, 1988, and annually thereafter on March 1, an emergency and hazardous chemical inventory form containing Tier 1 information with respect to the preceding calendar year for chemicals meeting the threshold quantities set forth in the implementing regulations at 40 C.F.R. Part 370.

13. Propane is a hazardous chemical as defined under Section 312(c) of EPCRA and 40 C.F.R. § 370.2, and the minimum reporting threshold quantity for such a chemical under 40 C.F.R. § 370.41 is 10,000 pounds.

14. The owner or operator of a facility that: (a) has ten or more full-time employees; (b) has a SIC code of 20 through 39; and (c) manufactured, processed or otherwise used a toxic chemical listed under Section 313(c) of EPCRA and 40 C.F.R. § 372.65 in excess of the threshold quantity under Section 313(8) of EPCRA and 40 C.F.R. § 372.25 during the preceding calendar year at such facility must complete and submit a Form R. This Form R shall be submitted to the Administrator of the EPA and to the State in which the facility is located by July 1 for the preceding calendar year, and shall contain data reflecting releases during the preceding calendar year.

15. Xylene is a toxic chemical as defined under Section 313(c) of EPCRA and 40 C.F.R. § 372.65, and the threshold reporting amount for xylene is 10,000 pounds under 40 C.F.R. 372.25(b).

16. Respondent's Facility was inspected by Tommy Guenther, Grantee for the National Council of Senior Citizens, on or about October 27, 1998. Mr. Guenther, an authorized EPA representative, conducted this inspection to determine Respondent's compliance with EPCRA's Sections 312 and 313 reporting requirements. In his inspection report, Mr. Guenther stated that Respondent employs 250 people and that Respondent has estimated annual sales between 25 million and 100 million dollars.

17. The October 27, 1998, inspection of Respondent's Facility revealed that Respondent had a 20,000 gallon propane tank and that during the 1997 calendar year Respondent stored in excess of 10,000 pounds of propane at its Facility. The amount of propane stored at Respondent's Facility during calendar year 1997 was greater than 10,000 pounds but less than 50,000 pounds.

18. Respondent did not submit an emergency and hazardous chemical inventory form for propane for the 1997 calendar year to the LEPC, the SERC, or the local fire department by March 1, 1998. Respondent has not submitted an emergency

and hazardous chemical inventory form for propane for the 1997 calendar year to the LEPC, the SERC, and the local fire department.

19. The October 27, 1998, inspection of Respondent's Facility revealed that during the 1995, 1996, and 1997 calendar years Respondent otherwise used xylene at its Facility in excess of 10,000 pounds but less than 100,000 pounds.

20. Respondent failed to submit Form Rs for xylene for calendar years 1995, 1996, and 1997 to the EPA and the State of Iowa by July 1, 1996, 1997, and 1998, respectively. Respondent has not submitted to the EPA and the State of Iowa Form Rs for xylene for the calendar years 1995, 1996, and 1997.

21. Respondent and the EPA entered into joint stipulations on March 28, 2000, in which the parties stipulated to Respondent's liability on all four counts contained in the Complaint.

22. Respondent is listed in the Dun and Bradstreet database. According to Dun and Bradstreet, as of October 1, 1998, Bituma Corporation had 170 employees and 25 million dollars in estimated annual sales. The total corporate entity sales for Gencor Industries, Inc. were reported as one hundred and ninety-five million dollars.

23. Section 325(c)(1) of EPCRA authorizes a civil administrative penalty in an amount not to exceed $25,000 for each violation of Section 312 or 313 of EPCRA per day, which is adjusted to $27,500 for inflation.[2/]

24. Respondent's violation of Section 312 of EPCRA as described in Count I of the Complaint is an emergency preparedness/right-to-know violation under the Interim

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[2/] The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, requires the EPA, as well as other federal agencies, to periodically adjust maximum civil penalties to account for inflation. *See* 61 Fed. Reg. 69,360 (Dec. 31, 1996). Pursuant to the Civil Monetary Penalties Inflation Adjustment Rule, the maximum civil penalty under Section 325(c)(1) of EPCRA for violations that occur on or after January 31, 1997, is $27,500 per violation per day. *See* 40 C.F.R. Part 19.

Final Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act ("Interim Penalty Policy") dated January 8, 1998.[3/]

25. Under the Interim Penalty Policy, the extent of Respondent's Section 312 violation as charged in Count I of the Complaint is Level One, and the gravity component of the violation is Level C. The circumstances of the violation are such to warrant the highest assessment within the "cell" in the penalty matrix ("Penalty Matrix"). Interim Penalty Policy at 13-17. Applying the Penalty Matrix in the Interim Penalty Policy to this violation results in a base penalty in the amount of $13,750 for Count I.

26. Under the Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990) ("Section 313 Penalty Policy"), dated August 10, 1992, Respondent's violation of Section 313 of EPCRA as described in Count II of the Complaint is a Level 4 circumstance violation which is calculated according to a per-day formula. The extent of the violation is Level B. Applying the Penalty Matrix in the Section 313 Penalty Policy to this violation and calculating this penalty using the per-day formula for violations for failing to report in a timely manner results in a gravity-based penalty in the amount of $10,126 for Count II.[4/]

[3/] The Interim Penalty Policy has been superseded by the Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act dated September 30, 1999. Although the Interim Penalty Policy is applicable in this matter, the EPA states that calculating the proposed penalty for Count I under the September 30, 1999, policy would result in the same penalty as under the January 8, 1998, policy.

[4/] The EPA erred in its calculation of the proposed penalty by applying the Penalty Matrix for violations that occur prior to January 30, 1997, rather than the Penalty Matrix for

(continued...)

27. Under the Section 313 Penalty Policy, Respondent's violations of Section 313 of EPCRA as described in Counts III and IV of the Complaint are Level 1 circumstance violations and Level B extent violations. Applying the Penalty Matrix in the Section 313 Penalty Policy to these violations results in a gravity- based penalty in the amount of $18,700 for Count III and $17,000 for Count IV.

28. The EPA has submitted evidence concerning Respondent's general financial status from which Respondent's ability to pay the proposed penalty can be inferred.

29. Respondent has not shown that it is unable to pay the proposed penalty of $59,576.

30. No adjustments of the base penalty for Count I are warranted on the basis of ability to pay, prior history of violations, degree of culpability, economic benefit or savings resulting from the violation, or such other matters as justice may require. Additionally, no adjustments are warranted for size of business, attitude, Supplemental Environmental Projects ("SEPs"), or voluntary disclosure. No adjustments of the gravity-based penalties for Counts II, III, or IV are warranted on the basis of voluntary disclosure, history of prior violation(s), delisted chemicals, attitude, SEPs, ability to pay, or other matters as justice may require.

CONCLUSIONS OF LAW

1. Respondent is subject to the reporting requirements set forth in Section 312 of EPCRA and in the Hazardous Chemical Reporting: Community Right-to-Know regulations, 40 C.F.R. Part 370, promulgated thereunder. Respondent is also subject to the reporting requirements set forth in Section 313 of EPCRA and in the Toxic Chemical Release Reporting:

[4/] (...continued)
violations that occurred after that date. This error resulted in a slightly lesser proposed penalty for Count II ($353). The EPA chose not to change the amount of the proposed penalty upon its discovery of the mistake. Tr. at 40-41.

Community Right-to-Know regulations, 40 C.F.R. Part 372, promulgated thereunder.

2. Respondent violated Section 312 of EPCRA and 40 C.F.R. Part 370, Subpart B, when it failed to submit an emergency and hazardous chemical inventory form for propane for calendar year 1997 by March 1, 1998, to the LEPC, SERC, and the fire department with jurisdiction over the Facility.

3. Respondent violated Section 313 of EPCRA and 40 C.F.R. Part 372 when it failed to submit an EPA Form R for xylene for calendar year 1997 by July 1, 1998, to the EPA and the State of Iowa.

4. Respondent violated Section 313 of EPCRA and 40 C.F.R. Part 372 when it failed to submit an EPA Form R for xylene for calendar year 1996 by July 1, 1997, to the EPA and the State of Iowa.

5. Respondent violated Section 313 of EPCRA and 40 C.F.R. Part 372 when it failed to submit an EPA Form R for xylene for calendar year 1995 by July 1, 1996, to the EPA and the State of Iowa.

6. The Interim Penalty Policy is applicable to Respondent's violation of Section 312 of EPCRA and 40 C.F.R. Part 370 as described in Count I of the Complaint.

7. The Section 313 Penalty Policy is applicable to Respondent's violations of Section 313 of EPCRA and 40 C.F.R. Part 372 as described in Counts II, III, and IV of the Complaint.

8. The proposed civil administrative penalty of $59,576 for Respondent's violations of Sections 312 and 313 of EPCRA is authorized, and the amount of the penalty is in accordance with the statutory penalty criteria in Sections 325(b)(1)(C) and 325(b)(2) of EPCRA and the applicable EPA penalty guidelines issued under EPCRA. *See* Section 325 of EPCRA; Interim Penalty Policy; Section 313 Penalty Policy; Section 22.27(b) of the Rules of Practice, 40 C.F.R. § 22.27(b).

9. The EPA has established that the penalty of $59,576 is appropriate under the particular facts and circumstances of this case. *See* Section 22.24 of the Rules of Practice, 40 C.F.R. § 22.24.

DISCUSSION

Respondent admitted liability on each of the four counts set forth in the Complaint in the stipulations entered into with Complainant on March 28, 2000. Respondent failed to submit an emergency and hazardous chemical inventory form for propane for calendar year 1997 and an EPA Form R for xylene for calendar years 1995, 1996, and 1997 in violation of Sections 312 and 313 of EPCRA, respectively. Respondent's admission to liability was reiterated at the penalty hearing on June 27, 2000. Tr. at 7. On the basis of the parties' stipulations, the evidence in the record, and the hearing in this matter, Respondent is found to be liable for each of the four violations of the reporting requirements of Sections 312 and 313 of EPCRA as described in the Complaint. Thus, the only remaining issue before me is the appropriate penalty to be assessed against Respondent for these four violations.

The assessment of administrative and civil penalties for violations of the reporting requirements of Sections 312 and 313 of EPCRA are governed by Section 325(c)of EPCRA, which provides that any person who violates Section 312 or Section 313 "shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation" and that "[e]ach day a violation...continues shall...constitute a separate violation." [5/] Section 325(c)(4) further provides that the penalty may be assessed by administrative order or a civil action in federal district court. Section 325(c)(1), however, does not specify any factors for consideration by the Administrator or court in determining an appropriate civil penalty for violations of the Section 312 or 313 reporting requirements.

In the absence of prescribed statutory factors to be considered in the assessment of penalties for reporting violations under Sections 312 and 313 of EPCRA, I note that prior EPA administrative decisions have looked to the immediately preceding enforcement sections at Sections 325(b)(1)(C) and 325(b)(2) for guidance. Sections 325(b)(1)(C) and 325(b)(2) govern the assessment of civil penalties for Class I and Class II violations of EPCRA's emergency notification requirements, respectively.

[5/] *See* footnote 2.

In determining the amount of a penalty, Section 325(b)(1)(C) requires the Administrator to consider "the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." Section 325(b)(2) incorporates by reference the penalty assessment procedures and provisions of Section 16 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615. Penalty factors listed at Section 16 of TSCA are nearly identical to those in Section 325(b)(1)(C) of EPCRA, except that the factor of "effect on ability to continue to do business" is substituted for "economic benefit or savings."

Generally, Section 325(b)(2)of EPCRA, which governs Class II administrative penalties under EPCRA's emergency notification provisions, has been cited in administrative decisions for statutory guidance on the issue of penalty assessment for EPCRA reporting violations under Section 325(c)(1). *See e.g.*, *Apex Microtechnology, Inc*., EPCRA-09-92-00-07 (Initial Decision May 7, 1993) (discussing elements of Section 325(b)(1)(C) of EPCRA and Section 16 of TSCA and using Section 16 factors); *TRA Industries, Inc*., EPCRA 1093-11-05-325 (Initial Decision, Oct. 11, 1996) (using Section 16 of TSCA criteria as directed by Section 325(b)(2) of EPCRA in assessing penalty under Section 313 of EPCRA); *GEC Precision Corp*., EPCRA 7-94-T-381-E (Initial Decision, Aug. 28, 1996). Compare *Clarksburg Casket Co.*, EPCRA III-165 (Initial Decision, July 10, 1998) (using elements of Section 325(b)(1)(C) of EPCRA in discussing penalty factors under Section 325(c)(1)of EPCRA). In assessing a penalty for a violation of the EPCRA reporting requirements, I find that the TSCA factor of "effect on ability to continue to do business" is more relevant to that assessment than the factor of "economic benefit or savings." Rarely would there be a demonstrable or significant "economic benefit or savings" resulting from a failure to timely file a Form R or an emergency and hazardous chemical inventory form.

Additionally, the legislative intent of EPCRA and the stated reasons for the implementing regulations provide helpful insight into interpreting the statutory provisions concerning the assessment of penalties for violations of Sections 312 and 313 of EPCRA in the absence of express statutory language concerning such penalties. The purpose of EPCRA is "to provide the public with important information

on the hazardous chemicals in their communities and to establish emergency planning and notification requirements which would protect the public in the event of a release of hazardous chemicals." H.R. Conf. Rep. No. 99-962, 99th Cong., 2d Sess. 281, reprinted in U.S.C.A.A.N. 3374. This stated purpose for the enactment of EPCRA is echoed in the implementing regulations set forth at 40 C.F.R. Part 370 and at 40 C.F.R. Part 372. Section 370.1 with regard to the purpose of the Part 370 regulations states that "[t]hese regulations establish reporting requirements which provide the public with important information on the hazardous chemicals in their communities for the purpose of enhancing community awareness of chemical hazards and facilitating development of State and local emergency response plans." 40 C.F.R. § 370.1. Section 372.1 describes the purpose of the Part 372 regulation as "to inform the general public and the communities surrounding covered facilities about releases of toxic chemicals, to assist research, to aid in the development of regulations, guidelines, and standards . . . ." 40 C.F.R. § 372.1.

To ensure compliance with EPCRA's goals, Sections 312 and 313 of EPCRA impose requirements on owners and operators of facilities with hazardous chemicals at specified threshold levels to notify local and state committees, as well as the fire department, to enable these groups to prepare for and, if necessary, to respond to emergencies. These notification requirements serve an important public safety and health purpose in addition to meeting the public's right and need to know the reported information and the emergency response plans.[6/]

In assessing the proposed penalty in the instant matter, the EPA relies extensively upon its penalty policies issued under EPCRA which incorporate the above-cited statutory penalty factors into the penalty guidelines. Specifically, the EPA has calculated its proposed penalty by following the guidelines set forth in the Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990) ("Section 313 Penalty Policy"), dated August 10, 1992, and in the Interim Final Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental

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[6/] The public has the right to know the toxic chemical release information reported by the facilities, as well as the contents of the emergency response plans. *See Huls America, Inc. v. Browner*, 83 F.3d 445, 446-447 (D.C. Cir. 1996); see also *Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473, 474 (6th Cir. 1995).

Response, Compensation and Liability Act ("Interim Penalty Policy") dated January 8, 1998.

The Interim Penalty Policy is applicable to Respondent's violation of Section 312 of EPCRA and 40 C.F.R. Part 370 contained in Count I of the Complaint. The Interim Penalty Policy was issued by the EPA's Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance for the purpose of ensuring that the "enforcement actions for violations of CERCLA [Comprehensive Environmental Response, Compensation, and Liability Act] § 103(a) and EPCRA §§ 304, 311 and 312 are legally justifiable, uniform and consistent; that the enforcement response is appropriate for the violations committed; and that persons will be deterred from committing such violations in the future." Interim Penalty Policy at 3. The EPA considers the penalty factors in Section 325(b)(2) of EPCRA through its application of the Interim Penalty Policy.

The Section 313 Penalty Policy is applicable to Respondent's three reporting violations of Section 313 of EPCRA and 40 C.F.R. Part 372 set forth in Counts II, III, and IV of the Complaint. The Section 313 Penalty Policy was promulgated by the EPA's Office of Compliance Monitoring of the Office of Prevention, Pesticides and Toxic Substances in order to ensure that the EPA's enforcement actions for violations of Section 313 of EPCRA are arrived at in a fair, uniform, and consistent manner; that the enforcement response is appropriate for the violation committed; and that persons will be deterred from committing Section 313 violations. Section 313 Penalty Policy at 1. The EPA considers many of the penalty factors in Section 325(b)(2) of EPCRA through its application of the Section 313 Penalty Policy.

At this juncture, it is emphasized that under the Administrative Procedure Act, 5 U.S.C. §§ 551-559, which governs these proceedings, a penalty policy, such as the Section 313 Penalty Policy or the Interim Penalty Policy, is not unquestioningly applied as if the policy were a rule with "binding effect." See *In re Employers Insurance of Wausau and Group Eight Technology, Inc.*, TSCA Appeal No. 95-6, 6 E.A.D. 735, 755-762 (EAB, Feb. 11, 1997); *see also In re Steeltech, Limited*, EPCRA Appeal No. 98-6, at 10-16 (EAB, Aug. 26, 1999), *affirmed, Steeltech Limited v. United States Environmental Protection Agency*, 105 F.Supp.2d 760 (W.D. Mich. 2000). However, pursuant to Section 22.27(b) of the Rules of Practice, 40 C.F.R. § 22.27(b), which also governs these proceedings, the Administrative Law Judge is required to consider civil penalty guidelines issued under the Act and to state specific reasons for deviating from the amount of the penalty recommended to be assessed in the Complaint. The Administrative Law Judge "has the discretion either to adopt the rationale of an applicable penalty policy where

appropriate or to deviate from it where the circumstances warrant." *In re DIC Americas, Inc.*, TSCA Appeal No. 94-2, 6 E.A.D. 184, 189 (EAB, Sept. 27, 1995).

Proposed Penalty

Count I-Base Penalty

In the instant matter, Ms. Rita Ricks, an environmental protection specialist in the Chemical Risk Information Branch of Region 7 of the EPA, calculated Complainant's proposed penalty and prepared a memorandum, dated December 8, 1999, that describes how the final proposed penalty amount was determined. Ms. Ricks testified at the June 27, 2000, hearing regarding the penalty calculation. During her testimony, she described the basis for the proposed penalty amount.

Complainant has proposed that Respondent be assessed a total civil administrative penalty in the amount of $59,576 for its four EPCRA violations. Specifically, Complainant proposes that a penalty in the amount of $13,750 be imposed for Respondent's violation of Section 312 of EPCRA described in Count I of the Complaint. As to Respondent's three violations of Section 313 of EPCRA, Complainant proposes that Respondent be assessed penalties in the amounts of $10,126 for the violation described in Count II, $18,700 for the violation described in Count III, and $17,000 for the violation described in Count IV. Complainant maintains that the facts of the instant case do not indicate that a reduction in the proposed penalty is warranted on any basis.

The Interim Penalty Policy will be considered with regard to Respondent's violation of Section 312 of EPCRA described in Count I of the Complaint. The assessment of civil administrative penalties is governed by Section IV of the Penalty Policy. Interim Penalty Policy at 9. The penalty assessment is accomplished in two stages under the Interim Penalty Policy.

First, the preliminary deterrence ("base") penalty is calculated using the statutory factors that apply to the violation. Such factors include the nature, circumstances, extent, and gravity of the violation. *Id.* at 9-10. These factors are incorporated into the Penalty Matrix, which sets forth the appropriate penalty amounts. *Id.* at 10. Each statutory section has its own Penalty Matrix which sets forth the penalty ranges for the varying levels of extent and gravity. *Id.* at 19-20. The extent and the gravity of the violation(s) are the

two primary factors which are used in determining the appropriate penalty amount. *Id.* at 10.

Second, after the base penalty is calculated, the factors that relate to the violator are considered. Such consideration is accomplished by the upward or downward adjustments to the base penalty. Factors that are applicable to the violator include the violator's ability to pay or ability to continue in business, prior history of violations, degree of culpability, and economic benefit or savings resulting from the violation, and other matters as justice may require. *Id*. at 9. Additional consideration is given to the factors of: size of business, attitude, SEPs, and voluntary disclosure. *Id*. at 22.

Beginning with the determination of the base penalty, the first factor to be considered is the "nature of the violation." There are two general categories of violations under this factor: emergency response violations and emergency preparedness/right-to-know violations. *Id.* at 10-11. Emergency response violations consist of violations of Section 103(a) of CERCLA and violations of Sections 304(a), (b) and (c) of EPCRA. *Id*. at 10. Violations of Sections 311(a) and (c) and Section 312 of EPCRA are categorized as emergency preparedness/right-to-know violations. *Id.* at 11.

The determination of the base penalty then proceeds to an assessment of the "extent" factor. The category to which a violation is assigned under the "nature" factor determines what the "extent" factor measures. Each kind of violation corresponds to a specific extent level. Extent in the context of emergency response violations measures a violation's deviation from the statutory requirements in terms of the timeliness of the notifications of the reportable release and the submission of required reports. Extent in the context of emergency preparedness/right-to-know violations "reflects the potential deleterious effect the noncompliance has on: the federal, state, or local government's ability to properly plan for chemical releases, and the public's ability to access the information." *Id.* at 13. The extent levels for both categories of violations range from Level 1 to Level 3.

After the "extent" factor is determined, the penalty calculation process moves on to consideration of the gravity of the violation. Under the Interim Penalty Policy, this factor is dependent on the amount of the chemical involved in the violation. The underlying assumptions in the Interim Penalty Policy with regard to the gravity of a violation are that "the greater the quantity of chemical released, the more likely that a violation of the reporting requirements will undermine the emergency planning, emergency response, and right-to-know intentions of CERCLA § 103 and EPCRA; [and] the greater the amount of

chemical stored on site, the greater the need for fire departments and emergency planners to know of its existence and location prior to any explosion or unpermitted release." *Id.* at 15.

Gravity levels for emergency response violations are based on the amount of hazardous substance or extremely hazardous substance ("EHS") released. *Id.* at 15. The gravity levels for emergency preparedness/right-to-know violations are determined by "the number and/or amount of the chemical(s) in excess of the reporting threshold present at the facility." *Id.* at 16. Gravity levels for both categories of violations range from Level A to Level C. The gravity level is determined by the timeliness of notification or submission of the required report.

When the gravity level is determined, the range of the penalty amount can be determined from the applicable Penalty Matrix, a table of dollar amounts which correspond to combinations of extent and gravity levels. *Id.* at 18-21. The calculation of the penalty then proceeds to an assessment of the circumstances of the violation. The term "circumstances" "refers to the actual or potential consequences of the violation." *Id.* at 17. The circumstances of a violation are used to determine the specific amount of the penalty within the range set forth in the applicable Penalty Matrix. *Id.*

In the instant matter, Complainant proposes that Respondent be assessed $13,750 for its failure to submit an emergency and hazardous chemical inventory form for propane for calendar year 1997 to the LEPC, the SERC, and the local fire department as required by Section 312(a) of EPCRA and 40 C.F.R. Part 370, Subpart B. Complainant properly categorizes Respondent's violation of Section 312 as an "emergency preparedness/right-to-know" violation under the Interim Penalty Policy. Tr. at 26.

Turning now to the calculation of the base penalty for Count I, I find that Complainant properly characterizes this violation as Level 1 in extent under the Interim Penalty Policy because Respondent failed to submit the chemical inventory form for propane within thirty (30) days of the reporting deadline. *Id.* Complainant also correctly categorizes the gravity of this violation as Level C because the amount of propane not reported was greater than one but less than five times the reporting threshold. Applying the Penalty Matrix to the violation, which is based on the extent and gravity levels, the appropriate penalty for this violation ranges from $6,876 to $13,750. Interim Penalty Policy at 20. With regard to the circumstances of the violation, Complainant considered the potential harm to the health of emergency responders and to the environment, as well as the effect of

Respondent's failure to file the form with the local community. Tr. at 28. Complainant properly concluded, on the basis of its consideration of the circumstances of this violation, that Respondent should be assessed the highest penalty amount within the range of the cell, resulting in a proposed penalty of $13,750.

Adjustments to Base Penalty for Count I

In the EPA's determination of the proposed penalty for Count I, the EPA found that no adjustments to the penalty are warranted under the Interim Penalty Policy. I note that this penalty policy incorporates most of the penalty factors relating to the violator found in Sections 325(b)(1)(C) and 325(b)(2) of EPCRA. Such factors include the violator's ability to pay, prior history of such violations, degree of culpability, and economic benefit or savings resulting from the violation, and other factors as justice may require.

Specifically, in making the determination that no adjustments to the base penalty were warranted, the EPA made the following considerations. The Interim Penalty Policy provides that the penalty amount in the Penalty Matrix applies to first time violators. Interim Penalty Policy at 23. As Respondent had no history of prior violations, no upward adjustment to the penalty was made. Although EPCRA is a strict liability statute, some adjustment may be made for a violator's culpability under the Interim Penalty Policy. *Id.* at 25. Here, no adjustment was made because there was no information that Respondent's violation was willful, or that Respondent lacked sufficient knowledge of the potential hazard created by its conduct, or that it lacked control over the situation to prevent occurrence of the violation. No adjustment was made for the factor of economic benefit or savings resulting from the violation as the base penalty from the Penalty Matrix is considered to have adequately captured the economic benefit. With regard to consideration of other factors as justice may require, the EPA admitted that this factor was not considered at the time the Complaint was prepared. Tr. at 32. However, no information became available to show that an adjustment was warranted based on this factor. *Id.*

In addition, the EPA considered the following factors in determining the penalty for Count I pursuant to the Interim Penalty Policy: the size of Respondent's business; Respondent's attitude; SEPs; and voluntary disclosure. Under the Interim Penalty Policy, a base penalty can be reduced for first time violators whose business employs 100 or fewer people and whose annual total corporate entity sales are less than 20 million dollars. Reductions can be made based on a respondent's cooperation throughout the compliance

evaluation/enforcement process or pursuant to a settlement between the parties. Under the Interim Penalty Policy, reductions to the base penalty also can be made when the violator agrees to perform a SEP as part of a settlement or when the facility self-discloses violations under the EPA's Self-Policing Policy. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations Final Policy Statement, 60 Fed. Reg. 66,706 (December 22, 1995). No adjustments were made based on any of these factors as none of these factors was shown to apply to Respondent in the instant matter based on the information available to the EPA. Tr. at 32-33.

The question of whether an adjustment to the base penalty for Count I is warranted on consideration of the factor of Respondent's ability to pay will be addressed later as part of the discussion concerning this same adjustment to the gravity-based penalties for Counts II, III, and IV. The factor of ability to pay, which is common to all four counts, will be discussed after the determination of the gravity-based penalties for the remaining three counts.

Gravity-based Penalties for Counts II, III, and IV.

Thus, I now turn to the determination of the base penalties for Respondent's three violations of Section 313 of EPCRA. As outlined above, the Section 313 Penalty Policy provides guidance for the determination of penalties for violations of the requirements of Section 313 of EPCRA and will be applied to each of Respondent's three violations of the reporting requirements delineated in Section 313 of EPCRA and 40 C.F.R. Part 372. The Section 313 Penalty Policy establishes a two-step determination process for the assessment of a penalty: 1) determination of a gravity-based penalty and, 2) adjustments to the gravity-based penalty. Section 313 Penalty Policy at 7.

The gravity-based penalty is determined on the basis of the "circumstances" of the violation and the "extent" of the violation. *Id.* at 8. The circumstances of a particular violation take into account the "seriousness of the violation as it relates to the accuracy and availability of the information to the community, to states, and to the federal government." *Id*. The "extent" of a violation is determined by "the quantity of each EPCRA § 313 chemical manufactured, processed, or otherwise used by the facility; the size of the facility based on a combination of the number of employees at the violating facility; and the gross sales of the violating facility's total corporate entity." *Id*. The final amount of the gravity-based penalty is obtained from a

Penalty Matrix contained in the Section 313 Penalty Policy which establishes the penalty amounts for the varying levels of extent and circumstance. *Id*.

After the gravity-based penalty is determined, upward or downward adjustments to the penalty are made upon consideration of the following factors: voluntary disclosure, history of prior violations, delisted chemicals, attitude, other factors as justice may require, SEPs, and ability to pay. *Id*.

Respondent committed three reporting violations of Section 313 of EPCRA and its implementing regulations set forth at 40 C.F.R. Part 372 by failing to submit Form Rs to the EPA and to the State of Iowa as required by Section 313. As pointed out by the EPA, this reporting failure resulted in Respondent's toxic chemical emissions, if any, not being included in the Toxics Release Inventory database, "which prevented the public, industry, and state and local governments from having a basic tool for understanding and providing for the management and control of toxic chemicals in their community." Memorandum from Rita Ricks, Environmental Protection Specialist, EPA, to Julie Van Horn, Office of Regional Counsel, Dec. 8, 1999, at 4 ("Complainant's Exb. 2").

Sections 325(c)(1) and (3) of EPCRA authorize the assessment of a penalty of not more than $25,000 for each Section 313 violation each day the violation continues.[7/] The Section 313 Penalty Policy, consistent with Sections 325(c)(1) and (3) of EPCRA, directs that a separate penalty should be calculated for each reporting violation on a per-chemical and per-year basis. *Id*. at 11, 13. The Section 313 Penalty Policy, however, provides that "[a]ll violations are 'one day' violations unless otherwise noted." *Id*. at 11. Generally, penalty assessments are made on a "per day" basis only in two circumstances: 1) when a facility has received a complaint that has been resolved for failing to report under Section 313 for any two previous reporting periods or; 2) when a facility refuses to submit reports or corrected information within thirty (30) days after a complaint is resolved. Section 313 Penalty Policy at 13. The Section 313 Penalty Policy also sets forth a formula to be used only in calculating the per day penalty for "failure to report in a timely manner" violations in which the violator failed to report on or before July 1 of the year the report was due and before July 1 of the following year. *Id.* This formula is:

[7/] *See* footnote 2.

$$\text{Level 4 Penalty} + \frac{(\text{Number of days late} - 1) \times (\text{Level 1-Level 4 Penalty})}{365}$$

Id. at 14.

In Count II, Complainant proposes that Respondent be assessed a penalty in the amount of $10,126 for its violation of Section 313 of EPCRA and 40 C.F.R. Part 372 for failing to submit a Form R for calendar year 1997 for xylene to the EPA and to the State of Iowa by July 1, 1998. Complainant properly categorizes this violation as Level B in extent because the amount of xylene otherwise used was less than 10 times the reporting threshold, Respondent's annual sales were greater than $10 million, and Respondent had more than 50 employees. The circumstances level is properly characterized as Level 4 because the Form R was not submitted by July 1, 1998. According to the Penalty Matrix, such a violation corresponds to a gravity-based penalty in the amount of $17,000. [8/]

As the Form R in this violation was due by July 1, 1998, and the violation was identified on inspection on October 27, 1998, the per-day formula delineated in the Section 313 Penalty Policy is applicable. Consequently, Complainant calculated the penalty for Count II on a per-day basis using the per-day formula for failure to report in a timely manner contained in the Section 313 Penalty. Tr. at 36. This resulted in a gravity-based penalty for Count II in the amount of $10,126. [9/]

Complainant proposes that Respondent be assessed penalties of $18,700 and $17,000 for Respondent's violations of Section 313 of EPCRA and 40 C.F.R. Part 372 for failing to submit Form Rs for calendar years 1996 and 1995 for xylene to the EPA and to the State of Iowa by July 1, 1997, and July 1, 1996, respectively (Counts III and IV). Complainant properly categorizes these violations as having Level B extent levels because the amount of xylene otherwise used was less than 10 times the reporting threshold, Respondent's annual sales were greater than $10 million, and Respondent had more than 50 employees. The circumstances levels are properly characterized as Level 1 because the Form R for

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[8/] *See* footnote 4.

[9/] $\$6,600 + \frac{(118 - 1) \times (\$17,000 - \$6,000)}{365} = \$10,126.$ Complainant's Exb. 2 at 7.

1996 was not submitted by July 1, 1997, and the Form R for 1995 was not submitted by July 1, 1996. The applicable Penalty Matrices yield gravity-based penalties of $18,700 and $17,000 for Counts III and IV, respectively.

Adjustments to the Gravity-based Penalties for Counts II, III, and IV

In the EPA's determination of the proposed penalties for Counts II, III, and IV, the EPA found that no adjustments to the penalty were warranted under the Section 313 Penalty Policy. Adjustments factors that relate to the violator include the following: voluntary disclosure; history of prior violation(s); delisted chemicals; attitude; other factors as justice may require; SEPs; and ability to pay.

Specifically, in making the determination that no adjustments to the gravity-based penalties were warranted, the EPA made the following considerations. The Section 313 Penalty Policy does not provide reductions in penalties for voluntary disclosure if an inspection is in progress or has been performed. Section 313 Penalty Policy at 14-16. Here, the violations were identified during the EPA inspection and, thus, no reduction is applicable. Tr. at 42. The Section 313 Penalty Policy provides for an upward adjustment where a violator has demonstrated a history of violating EPCRA. *Id*. at 16-17. As Respondent has no history of prior violations, no upward adjustment to the penalties was made. Tr. at 42. No adjustment was made based on the factor of delisted chemicals as xylene has not been delisted. Tr. at 42. In addition, the EPA considered the following factors in determining the penalties for Counts II, III, and IV pursuant to the Section 313 Penalty Policy: attitude; other factors as justice may require; and SEPs. No adjustments were made based on these factors as none of these factors was shown to apply to Respondent in the instant matter based on the information available to the EPA. Tr. at 43.

Appropriateness of Proposed Penalty

The EPA has the burden of showing that the proposed penalty is appropriate and such showing must be made by a preponderance of the evidence. The federal regulations governing the burdens of presentation and persuasion in proceedings before an Administrative Law Judge state as follows:

> (a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following Complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.
> (b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

40 C.F.R. § 22.24.

The Environmental Appeals Board ("EAB") has consistently held that the complainant, pursuant to Section 22.24 of the Rules of Practice, 40 C.F.R. § 22.24, bears the burden of proving that the proposed penalty is appropriate after considering all the applicable statutory penalty factors. *See, e.g., In re B.J. Carney Industries, Inc.*, CWA Appeal No. 96-2, 7 E.A.D. 171, 217 (EAB, June 9, 1997); *In re Employers Insurance of Wausau and Group Eight Technology, Inc.*, TSCA Appeal No. 95-6, 6 E.A.D. 735, 756 (EAB, Feb. 11, 1997); *In re James C. Lin and Lin Cubing, Inc.*, FIFRA Appeal No. 94-2, 5 E.A.D. 595, 599 (EAB, Dec. 6, 1994); *In re New Waterbury, Ltd.,* TSCA Appeal No. 93-2, 5 E.A.D. 529, 538 (EAB, Oct. 20, 1994). However, as previously discussed, the instant matter arises under the authority of Section 325(c) of EPCRA, and this statutory provision does not specify any penalty factors to be considered in assessing a civil administrative penalty. Under such circumstances, the EAB has found that the complainant must nevertheless prove that the proposed "penalty is appropriate in light of the particular facts and circumstances of the case." *In re Woodcrest Manufacturing, Inc.*, EPCRA Appeal No. 97-2, 7 E.A.D. 757, 773-774 (EAB, July 23, 1998) (emphasis removed) (citation omitted). Thus, under the EAB's holding in *Woodcrest Manufacturing, supra*, Complainant, to prevail in the instant matter, must establish that the proposed penalty of $59,576 is appropriate under the particular facts and circumstances of this case.

In cases where the governing statute specifies penalty factors to be considered in assessing the penalty, the EAB has found that the required consideration of the statutory factors "does not mean that there is any specific burden of proof with respect to any individual factor." *New Waterbury*, *supra*, at 539. Rather, the "complainant's burden focuses on the overall appropriateness of the proposed penalty in light of all the statutory factors, rather than any particular

quantum of proof for individual statutory factors." *Woodcrest Manufacturing, supra,* at 773 (emphasis removed) (citation omitted).

Respondent, in its pleadings and at the hearing, did not contest the determination of the base penalty for Count I or the gravity-based penalties for Counts II, III, or IV. Respondent does not contend that an adjustment to the base penalty or the gravity-based penalties should be made on any basis other than Respondent's ability to pay. The record before me discloses that the proposed penalties are authorized by statute and that they were properly calculated under the applicable penalty policies.

The only aspect of the appropriateness of the proposed penalty that has been placed at issue is Respondent's ability to pay. In *New Waterbury, supra,* the EAB construed the complainant's burden in this regard as requiring the production of "some evidence regarding the respondent's general financial status from which it can be inferred that the respondent's ability to pay should not affect the penalty amount." [10/] *New Waterbury, supra* at 541 (emphases removed) (citation omitted). Thus, although there is no "particular quantum of proof" for establishing a violator's ability to pay, it is incumbent upon the EPA to come forward with some evidence concerning a violator's financial status from which its ability to pay can be inferred.

Again, it is noted that the EAB's analysis of the complainant's burdens of presentation and persuasion concerning ability to pay in *New Waterbury* is made in the context of a statute that specifies ability to pay as a penalty factor that must be considered in determining the appropriateness of a

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[10/] In *New Waterbury, supra*, the EAB noted that inability to pay a proposed penalty is not an affirmative defense because the statute governing that proceeding, TSCA, requires the EPA to consider this factor as one of several factors in establishing the appropriateness of the penalty. *New Waterbury, supra*, at 540. The EAB also found that inability to pay is more appropriately characterized as a "potential mitigating consideration in assessing a civil penalty" rather than as a defense which would preclude imposition of a penalty. *Id.* Although the governing statutory provision in the instant matter, Section 325(c)(1) of EPCRA, does not specify any factors for consideration in determining an appropriate penalty, the applicable penalty policies require consideration of ability to pay.

proposed penalty. Although there are no statutorily prescribed penalty factors to be considered in the instant matter under Section 325(c) of EPCRA, the applicable penalty policies require consideration of ability to pay. Also, as previously discussed, the statutory penalty factors delineated in Sections 325(b)(1)(C) and 325(b)(2) of EPCRA, which include ability to pay, generally have been considered for statutory guidance on the issue of penalty assessment for EPCRA reporting violations under Section 325(c)(1) of EPCRA and these statutory penalty factors are incorporated in the applicable penalty policies. As such, I find that the EAB's analysis in ***New Waterbury*** concerning the burden of proof for ability to pay may be properly considered in the instant case by analogy.

Here, in determining Respondent's ability to pay the proposed penalty, the EPA relies on the financial information concerning Respondent contained in the October 1, 1998, report from the Dun and Bradstreet database and the absence of probative rebuttal evidence. The EPA argues that Respondent has waived its objection to the proposed penalty by failing to provide sufficient information to enable the EPA to determine its ability to pay the proposed penalty. Complainant's Brief at 19. The EPA maintains, therefore, that the proposed penalty should not be reduced on the basis of "ability to pay."

Respondent argues that it is unable to pay any civil penalty amount and, accordingly, seeks the reduction or elimination of the proposed penalty. Respondent first raised the issue of inability to pay in its prehearing exchange dated January 13, 2000. Respondent asserted in its prehearing exchanges[11/] that federal regulators have halted trading in company stock, that the company stock has been removed from all public stock indices, that the company has a negative cash flow, that the company is negotiating with its lenders and creditors for short-term relief, that Respondent does not have any agreements with its lenders or creditors, and that on April 5, 2000, creditors filed proceedings to force Respondent into bankruptcy. On September 22, 2000, Respondent stated that it had filed a petition for bankruptcy under Chapter 11 of the United States Bankruptcy Code and that this bankruptcy

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[11/] Respondent filed Respondent's Revised Prehearing Exchange dated February 25, 2000, and Respondent's Second Revised Prehearing Exchange dated June 22, 2000.

is pending in the United States Bankruptcy Court for the Middle District of Florida.[12/]

At the penalty hearing on June 27, 2000, the EPA introduced into evidence a Dun and Bradstreet database report for Respondent dated October 1, 1998. According to the financial information contained in this report, Respondent's annual sales are estimated to be twenty-five million dollars and its annual total corporate entity sales are one hundred and ninety-five million dollars. These amounts of gross sales support the finding that Respondent has the ability to pay the $59,576 penalty. *See In re Helena Chemical Co.*, FIFRA Appeal No. 87-3, 3 E.A.D. 26 (CJO, Nov. 16, 1989). At a minimum, such information constitutes some evidence concerning Respondent's general financial status from which its ability to pay the proposed penalty can be inferred. Thus, the burden of proof as to ability to pay shifts to Respondent.

In response, Respondent presented at the hearing a barely legible document containing financial information concerning Respondent. Tr. at 8. This document was marked "Confidential" and it had not been filed with the Regional Hearing Clerk. The document had been served on the EPA just a few days before the hearing. Respondent explained that it sought to designate the document as confidential because it did not contain "verified final information from the auditors." Tr. at 10. The document was conditionally admitted into evidence over the EPA's objections on the basis of Respondent's representations that the document had been prepared by independent auditors and that it had only become available on June 23, 2000. *Id.* at 11-14. Respondent stated that the full audit of Respondent's finances would be proffered when it became available. *Id*. at 11. I permitted the admission of this document on the conditions that the document be properly filed with the Regional Hearing Clerk [13/] and that Respondent submit the full audit when it became available. *Id*. at 12. Since the date of the hearing, Respondent has filed no additional documents concerning its financial status.

[12/] Respondent submitted no documentary proof of the bankruptcy filing.

[13/] Respondent was advised of the regulatory requirements under Section 22.5(d) of the Rules of Practice, 40 C.F.R. § 22.5(d), concerning the filing of documents where a business confidentiality claim is asserted with regard to any information contained in the document. Tr. at 10-11.

Respondent has failed to present any reliable and probative evidence to rebut the EPA's evidence regarding Respondent's general financial status from which it can be inferred that Respondent's ability to pay should not affect the penalty amount.[14/] The barely legible financial report submitted at the hearing is not sufficiently reliable or probative to accurately show Respondent's financial status. The report is an incomplete summary and it is not corroborated or supported by audited financial statements or tax returns. By Respondent's own admission, the report does not contain "verified final information from the auditors." Tr. at 10. The report is not specific evidence showing that Respondent, despite its sales volume, cannot pay any penalty.

Similarly, Respondent's filing for Chapter 11 bankruptcy, in itself, is not specific evidence that it cannot pay any penalty and it, standing alone, is not sufficient to rebut the EPA's evidence. I observe that under the EAB's analysis in ***New Waterbury, supra,*** the EPA need not "specifically and separately prove that a respondent has the funds necessary to pay a proposed penalty before a penalty can be assessed" as the issue "is not whether the respondent can, in fact, pay a penalty, but whether a penalty is appropriate." ***New Waterbury, supra,*** at 539. While Respondent's ability to pay is a factor to be considered in determining the appropriateness of the proposed penalty, bankruptcy is not a bar to the imposition of a penalty. The EAB, in ***In re Britton Construction Co.,*** CWA Appeal Nos. 97-5 & 97-8, 1999 EPA App. LEXIS 9, at *73 n.21 (EAB, Mar. 30, 1999), found that "[t]he specter of bankruptcy is not necessarily a reason to avoid assessing a penalty." Although enforcement of this Order assessing a penalty against Respondent is subject to control of the Bankruptcy Court, the mere fact of filing for bankruptcy does not indicate an inability to pay the penalty.

Moreover, Complainant's argument that Respondent has waived its objection to the proposed penalty by failing to provide sufficient information to enable the EPA to determine its ability to pay the proposed penalty is persuasive. The EAB in ***New Waterbury, supra,*** found that:

[14/] In the Joint Motion for Postponement of Hearing filed on April 5, 2000, the parties stated that "at this time no reliable financial information concerning Respondent's current ability to pay exists."

> [I]n any case where ability to pay is put in issue, the Region must be given access to the respondent's financial records before the start of such hearing. The rules governing penalty assessment proceedings require a respondent to indicate whether it intends to make an issue of its ability to pay, and if so, to submit evidence to support its claim as part of the pre-hearing exchange.[23] In this connection, where a respondent does not raise its ability to pay as an issue in its answer or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the Region may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived under the Agency's procedural rules[24] and thus this factor does not warrant a reduction of the proposed penalty.[15/]

New Waterbury, *supra*, at 542.

Here, Respondent did not raise its ability to pay as an issue in its Answer. Respondent did not give Complainant access to its financial records prior to the hearing nor did it produce in its prehearing exchange the financial documents that were described in the Prehearing Order to support a claim of inability to pay. Furthermore, Respondent has failed to comply with my two Orders directing Respondent to produce certain financial documents to support its claim of inability to pay, including certified copies of financial statements or tax returns.[16/] In view of Respondent's failure to comply with the Orders to produce the financial documents within its control, I am compelled to draw the inference that the requested documents

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[15/] The EAB's footnotes cite the pertinent provisions of 40 C.F.R. §§ 22.15(d), 22.19(b), and 22.19(f)(4) governing prehearing exchanges, discovery, and answers.

[16/] In an Order on Complainant's Motion for a Complete Prehearing Exchange entered on February 18, 2000, Respondent was directed to submit documentation such as certified copies of financial statements or tax returns in support of its claim of inability to pay the proposed penalty. Respondent did not produce such records as directed by the Order. In an Order entered on June 23, 2000, Respondent was directed to produce an SEC Form 10-K and if this document was unavailable, then Respondent was directed to submit a financial document which was similar in content. Respondent failed to comply with this Order.

would be adverse to Respondent. *See* 40 C.F.R. § 22.19(g)(1).

In conclusion, it is found that the EPA, as part of its prima facie case, has presented evidence regarding Respondent's general financial status from which its ability to pay the proposed penalty can be inferred. Respondent has failed to present any reliable and probative evidence to rebut the EPA's prima facie case. Thus, there is evidence in the record showing that the EPA considered Respondent's ability to pay in assessing the penalty. Further, the EPA has sustained its burden of proving that the penalty is appropriate in light of the particular facts and circumstances of this case. The penalty is authorized and is in accordance with the penalty assessment factors set forth in EPCRA and the guidance provided in the applicable penalty policies.[17/]

As a final matter, I address any due process concerns that might arise from Respondent's failure to file a post-hearing brief in this matter. First, I observe that the Rules of Practice do not require the filing of proposed findings of fact, conclusions of law, and order or a brief in support thereof. 40 C.F.R. § 22.26. Second, it is noted that Respondent has chosen not to file these post-hearing documents and that such a tactical decision does not suggest a violation of due process even if such decision is related to Respondent's bankruptcy.

ORDER

1. Respondent, Bituma-Stor, Inc., doing business as Bituma Corporation and Gencor Industries, Inc., is assessed a civil administrative penalty of $59,576.

2. Payment of the full amount of this civil penalty shall be made within thirty (30) days of the service date of the final order by submitting a cashier's check or certified check in the amount of $59,576, payable to the "Treasurer, United States of America," and mailed to:

[17/] In *Woodcrest Manufacturing,* the EAB found that proof of a complainant's adherence to the applicable penalty policy, in that case the Section 313 Penalty Policy, can legitimately form a part of the complainant's prima facie penalty case and ultimately be considered in assessing the appropriateness of the penalty. *Woodcrest Manufacturing, supra*, at 774.

Attn: Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 7
P.O. Box 360748M
Kansas City, KS 15251

3. A transmittal letter identifying the subject case and EPA docket number (EPCRA 7-99-0045), as well as Respondent's name and address, must accompany the check.

4. If Respondent fails to pay the penalty within the prescribed statutory period after the entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency, unless an appeal is filed with the Environmental Appeals Board within thirty (30) days after service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this decision.

Original signed by undersigned
_____
Barbara A. Gunning
Administrative Law Judge

Dated: 1-22-01
Washington, DC