UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
APEX MICROTECHNOLOGY, INC.,	)	Docket No. EPCRA-09-92-00-07
	)	
Respondent	)	

EPCRA: Section 325: Pursuant to Section 325 of EPCRA, 42 U.S.C. § 11045, a civil penalty in the amount of $6,339.90 is assessed for the violation of Section 313, 42 U.S.C. § 11023 previously found herein.

Appearances:

For Complainant:
Ann H. Lyons, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region IX
75 Hawthorne Street, 16th Fl.
San Francisco, California 94105

For Respondent:
Peter G. Schmerl, Esquire
1428 E. Elm Street
Tucson, Arizona 85719

Before: Henry B. Frazier, III
Chief Administrative Law Judge

INITIAL DECISION

I. Background - Interlocutory Order Granting Complainant's Motion for Partial Accelerated Decision

On November 5, 1992, an Interlocutory Order for Partial Accelerated Decision (Partial Accelerated Decision) was issued in this case. That Order, issued on motion of the U.S. Environmental Protection Agency (EPA, Complainant, or the Agency), found that Apex Microtechnology, Inc. (Respondent, Apex), had violated Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) [a.k.a. Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA)], 42 U.S.C. § 11023 and the regulations promulgated pursuant thereto, 40 C.F.R. Part 372, as alleged in Counts I and II in the complaint. More particularly, it was found that Respondent failed to submit to EPA and/or to the State of Arizona, by July 1, 1990 and July 1, 1991, Forms R for the chemical Freon 113 which Respondent used at its facility during calendar years 1989 and 1990 in excess of the established threshold level for reporting such chemical.

II. Background - Processing of the Case and Hearing

On February 2, 1993, a hearing, which had been requested by Respondent, was held in Tucson, Arizona, for the purpose of deciding the sole remaining issue of the amount, if any, of the civil penalty which appropriately should be assessed for the two violations previously found.

In the complaint EPA had proposed a Class II administrative penalty of $17,000 for each of the two violations of Section 313 found for a total penalty of $34,000. With its prehearing

exchange, Complainant submitted a revised proposed civil penalty. The revised proposed penalty was based on the Enforcement Response Policy (ERP) for Section 313 of the Emergency Planning and Community Right-to-Know Act that was issued by EPA on August 10, 1992. The revised proposed civil penalty based on the August 10, 1992, ERP was $9,057, which includes a proposed penalty of $5,000 for Count I (failure to submit by July 1, 1990 the 1989 report) and $4,057 for Count II (failure to submit by July 1, 1991 the 1990 report). At the hearing Complainant contended that the $9,057 penalty was appropriate; Respondent contended that the proposed penalty was unfair and unreasonable and should be abated or reduced to a nominal amount.

Following the hearing, Complainant and Respondent submitted proposed findings of fact and conclusions of law together with supporting briefs and proposed orders on April 1, 1993, and March 31, 1993, respectively. Reply briefs were filed by Respondent on April 15, 1993 and by Complainant on April 16, 1993.

II. Findings of Fact

In addition to the findings of fact previously made in my Partial Accelerated Decision, and incorporated by reference to the extent not otherwise inconsistent with the findings of fact herein, 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. An unannounced EPA inspection of Apex was conducted on March 17, 1992. (Tr. 36-37, 49.)

2. Following the inspection, Apex personnel compiled the required information and prepared Forms R for Freon 113 usage in 1989 and 1990. The forms were signed on March 31, 1992 and were received by EPA on April 6, 1992. (Tr. 12, 43-45.)

3. The Form R for 1989 was due on July 1, 1990; therefore, Apex's Form R for 1989 was more than one year late. (Tr. 16-17; Complainant's Exhibit (Compl. Exh.) 3.)

4. The Form R for 1990 was due on July 1, 1991; therefore, Apex's Form R for 1990 was less than one year late. (Tr. 16-17; Compl. Exh. 3.)

5. Respondent was unaware of the requirement to file a Form R until the EPA inspection was conducted. EPA had not contacted Respondent regarding Form R reporting requirements prior to that time. (Tr. 62-64, 66, 68.)

6. The number of Apex employees which had been reported to Dun and Bradstreet as of April 1992 was 110. Apex has 125 employees in 1993. (Tr. 16, 61; Compl. Exh. 3.)

7. The gross annual sales of Apex which had been reported to Dun and Bradstreet as of April 1992 were approximately $6.5

million. The gross sales of Apex for 1991 was about $8.0 million and for 1992, about $7.2 million. (Tr. 16, 61; Compl. Exh. 3.)

8. There is no evidence of a history of prior violations of EPCRA by Apex. (Tr. 4, 18.)

9. Respondent had filed reports with the Pima County Air Quality Control District in 1989 and 1991 providing information concerning the annual usage of Freon 113. In contrast to a Form R report, these reports showed the usage in gallons rather than pounds and the reporting periods were from May to June rather than from January through December. (Tr. 52-53; Respondent's Exhibits (Resp. Exhs.) 2, 3.)

10. Respondent was cooperative and responsive during the EPA inspection. (Tr. 43-44; 49-51.)

11. The filing of the required Forms R by Respondent following the inspection was speedy and completely in compliance with EPCRA. (Tr. 44-45, 51-52, 69.)

III. Contentions of the Parties

Complainant contends that Respondent's liability has been established, and Respondent has not claimed that it is financially unable to pay the proposed penalty. Complainant asserts that it has presented testimony and evidence demonstrating that it correctly and appropriately determined a civil penalty of $9,057 and requests an order directing Respondent to pay the proposed penalty.

Respondent admits that it failed to file timely Forms R as required by EPCRA, but maintains that it did, in fact, disclose the

equivalent information by filing with Pima County, Arizona, local forms which contained information like that required by Forms R.

Respondent argues that because Complainant has not taken into account all mitigating factors provided for in the ERP and because Respondent, by filing nonconforming forms with the county, met the spirit and intent of Section 313 disclosure requirements, the recommended penalty proposed by Complainant should be abated.

Complainant counters by insisting that Respondent has not provided any defense to the penalty and that the only evidence presented by Respondent was that it had filed some forms with the county environmental agency. Complainant contends that this is not relevant to calculating an appropriate penalty. There is no discussion in either Section 325 of EPCRA or the ERP of reducing penalties because the violator happens to have complied with other environmental laws.

Although Respondent's witnesses testified that they were unaware of the reporting requirements under Section 313 of EPCRA, Complainant asserts that EPCRA is a strict liability statute, and ignorance of the law is no basis for a defense to the penalty.

Finally, Complainant maintains that EPA's failure to provide Respondent with actual notice of Section 313's filing requirements is not a defense or a basis for reducing the penalty. EPA engages in outreach and attempts to inform companies of their legal requirements through publications, trade associations, seminars and workshops. But not every company will receive this information, despite the agency's best efforts, and it would severely undermine

the EPA's ability to deter future violations of EPCRA to reduce the penalty against Respondent on this basis.

IV. Assessment of 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 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.

Turning first to the statute,[1] Section 325(c)(1) of EPCRA governs the assessment of civil and administrative penalties for violations of the Section 313 reporting requirements. It permits the Administrator to assess a civil penalty of not more than $25,000 per violation. Section 325(c)(3) provides that each day a violation continues constitutes a separate violation for purposes of Section 325(c).

Section 325(c) of EPCRA does not expressly provide criteria to be considered in assessing a penalty for a violation of the reporting requirements of Section 313. However, Section 325(b)

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[1]This discussion of the statutory provisions is taken from my initial decision In the Matter of Pease and Curren, Inc., EPCRA-I-90-1008 (March 13, 1991) slip op. at 9-12.

sets forth the criteria which must be considered in assessing penalties for violations of the emergency notification requirements under Section 304.

Section 325(b) establishes two types of administrative penalties which may be assessed for a violation of the emergency notification requirements of Section 304 of EPCRA: Class I administrative penalties and Class II administrative penalties.[2]

Section 325(b)(2) of EPCRA, 42 U.S.C. § 11045(b)(2), which provides for Class II administrative penalties, requires that civil penalties be assessed in the same manner and subject to the same provisions, as civil penalties are assessed under Section 2615 of Title 15. Section 2615 of Title 15 governs the assessment of penalties under the Toxic Substances Control Act (TSCA). Section

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[2]Section 325, 42 U.S.C. § 11045, provides, in pertinent part:

> (b) Civil, administrative and criminal penalties for emergency notification
>
> (1) Class I administrative penalty
>
> (A) A civil penalty of not more than $25,000 per violation may be assessed by the Administrator in the case of a violation of the requirements of section 11004 of this title.
>
> * * * * * * *
>
> (C) In determining the amount of any penalty assessed pursuant to this subsection, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.
>
> (2) Class II administrative penalty
>
> A civil penalty of not more than $25,000 per day for each day during which the violation continues may be assessed by the Administrator in the case of a violation of the requirements of section 11004 of this title . . . . Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected under section 2615 of Title 15.

2615(a)(2)(B) of Title 15 provides that in "determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require." (Section 16(a)(2)(B) of TSCA.)

In contrast, Section 325(b)(1)(C) prescribes the following criteria for determining the amount of a Class I penalty: "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." Thus, the only differences between the criteria which must be considered in assessing Class I and Class II civil penalties under Section 325(b) of EPCRA are that (1) the effect on the ability of the violator to continue to do business be taken into account for a Class II penalty but not for a Class I penalty, and (2) the economic benefit or savings (if any) resulting from the violation be taken into account for a Class I penalty but not for a Class II penalty.

Since EPCRA itself is silent as to the criteria which should be applied in assessing civil penalties under Section 325(c), the question is whether reference should be made to either or both sets of criteria which are utilized under Section 325(b). The legislative history of EPCRA fails to provide any guidance. It

would appear that by setting only a maximum penalty of $25,000 for each violation of Section 313, Congress did intend that the penalties which are assessed under Section 325(c) be subject to some degree of discretion. Since Section 304, like Section 313, establishes reporting and notification requirements, it appears reasonable to conclude that the criteria utilized in assessing penalties under Section 325(b) for violations of Section 304, although not binding, could serve as general guidelines for assessing penalties under Section 325(c) for violations of Section 313.

The penalties in this case are being assessed by an order made on the record after opportunity for hearing in accordance with Section 554 of the Administrative Procedure Act (APA). Because of the cross-reference to Section 2615 of TSCA found in Section 325(b)(2), Class II penalties for violations of Section 304 of EPCRA are also assessed by an order made on the record after opportunity for a hearing in accordance with Section 554 of the APA. (This is in contrast to Class I penalties which are assessed by EPA through less formal administrative procedures.) Therefore, it would appear reasonable to rely upon the criteria spelled out in Section 2615(a)(2)(B) of TSCA.

The ERP[3] establishes a system for determining penalties in civil administrative actions brought pursuant to Section 313 of EPCRA. A penalty is determined in two stages: (1) determination

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[3]Supra, at 3.

of a "gravity-based penalty" and (2) adjustments to the gravity-based penalty.

To determine the gravity-based penalty, the "circumstances" of the violation and the "extent" of the violation are considered.

The circumstance levels of the penalty matrix 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. Circumstance levels for failure to report in a timely manner are based upon the "category" of the failure. Form R reports that are submitted one year or more after the July 1 due date are classified as category I, and Form R reports that are submitted after the July 1 due date but before July 1 of the following year are classified as category II. A circumstance level one penalty will be assessed against a category I violation. A "per day" formula is used to determine category II penalties. Therefore, according to the ERP the circumstance level for Count I in this case is "level 1" and for Count II is "level 4" with a "per day" formula to be applied.

The extent level of a violation is based on the number of employees and the gross sales at the time the civil administrative complaint is issued in determining the extent level of a violation. Since Apex used less than ten times the threshold amount[4] of Freon 113 and had less than $10 million in total corporate entity sales

[4]Interlocutory Order for Partial Accelerated Decision (November 5, 1992) at 4-5.

and more than 50 employees, the extent level is classified as "level C."

To determine the gravity-based penalty, both the circumstance level and the extent level factors are incorporated into a matrix which establishes the appropriate gravity-based penalty amount except for those penalties which are calculated on a per day basis.

For Count I the penalty matrix yields a $5,000 penalty. For Count II the per day formula yields the following:

$$\$1,000 + \frac{(280 - 1)\ (\$5,000 - \$1,000)}{365} = \text{Penalty}$$

$$\$1,000 + \frac{279 \times \$4,000}{365} = \text{Penalty}$$

$$\$1,000 + \frac{\$1,116,000}{365} = \text{Penalty}$$

$$\$1,000 + \$3,057 = \$4,057$$

Thus, the gravity based penalty for Count II would be $4,057.

Having determined the gravity based penalties for Counts I and II, I turn now to the adjustment factors which may be applied to calculate the final penalty. The adjustment factors are:

Voluntary Disclosure
History of prior violation(s)
Delisted chemicals
Attitude
Other Factors as Justice May Require
Supplemental Environmental Projects
Ability to Pay

There was no voluntary disclosure by Respondent of the violations. The violations were discovered during the inspection; consequently, no adjustment is appropriate. There is no history of prior violations of EPCRA and, hence, no adjustment is appropriate for this factor. (Downward adjustments under this factor are not

permitted.) It was not alleged nor was it established that Freon 113 was a delisted chemical and, therefore, no adjustment is called for.

I find that an adjustment in the gravity based penalty is appropriate for Respondent's attitude. The ERP provides that an adjustment of up to 15% may be made for Respondent's cooperation with EPA throughout the "compliance evaluation/enforcement process" and that an additional reduction of up to 15% may be made in consideration of the facility's good faith efforts to comply with EPCRA, and the speed and completeness with which it comes into compliance.

Based upon the testimony of EPA's case developer that Respondent had been cooperative and responsive during the EPA inspection and that Respondent was speedy and complete in its compliance with EPCRA's reporting requirement following the inspection,[5] I conclude that a 15% reduction is appropriate for each of the two components of attitude: cooperation and compliance. In so concluding, I reject Complainant's contention that the attitude adjustment factor may be considered only during settlement negotiations and may be applied only if Respondent agrees to a settlement without a hearing. Such a restriction would prevent its consideration by the Administrative Law Judge following a hearing. I find no basis in the ERP for such a position.

There are no grounds upon which an adjustment can be justified under other factors as justice may require. Apex has not offered

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[5] Supra, at 5. (Findings of Fact 10 and 11.)

to make expenditures for supplemental environmental projects, nor has Apex raised inability to pay as a defense in this matter.

There is no basis in the ERP to support a reduction or mitigation of the penalty because other reports were filed with local authorities. Such filings do not constitute the filing of "invalid Forms R." Clearly Respondent failed to provide EPA with the inventory and disclosure information required by EPCRA. Although Respondent's witnesses testified that Apex was unaware of the reporting requirements under Section 313 of EPCRA, that does not provide a basis upon which to reduce the penalty. Respondent, like everyone else, is charged with knowledge of the United States Code and rules and regulations duly promulgated thereunder.[6] Moreover, Respondent was legally obligated to submit the required Forms R by their due dates regardless of whether it had received any information concerning the EPCRA reporting requirements through EPA's "outreach" efforts. Respondent's arguments seem to constitute a plaintive plea by a relatively small business concerning the burdens of similar reporting requirements imposed by different agencies and levels of government and of the difficulties in trying to become informed as to what those requirements are. Such a plea must be presented in forums other than this adjudicatory proceeding under the Administrative Procedure Act.

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[6]44 U.S.C. § 1507. The Supreme Court has said: "Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents." Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-385 (1947).

Therefore, the final penalty calculation is:

Gravity Based Penalty Count I:	$5,000.00
Gravity Based Penalty Count II:	$4,057.00
Total Gravity Based Penalty:	$9,057.00
Adjustment Factor	x .30
Adjustment Amount	$2,717.10
	$9,057.00
	- 2,717.10
Final Penalty Amount	$6,339.90

ORDER[7]

Pursuant to Section 325 of EPCRA, 42 U.S.C. § 11045, a civil penalty in the amount of $6,339.90 is assessed against Respondent, Apex Microtechnology, Inc., for the violations of Section 313 of EPCRA.

IT IS ORDERED that Respondent, Apex Microtechnology, Inc., pay a civil penalty to the United States in the sum of $6,339.90. Payment shall be made by cashier's or certified check payable to "Treasurer, United States of America." The check shall be sent to:

EPA - Region 9
(Regional Hearing Clerk)
P.O. Box 360863M
Pittsburgh, PA 15251

Respondent shall note on the check the docket number specified on the first page of this initial decision. At the time of

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[7]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.

payment, Respondent shall send a notice of such payment and a copy of the check to:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105

Attn: Steven Armsey

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: May 7, 1993
Washington, DC

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In the Matter of	)	Docket No. EPCRA-09-92-0007
	)	
Apex Microtechnology	)	CERTIFICATE OF SERVICE
	)	
	)	
	)	
Respondent	)	

To: Peter G. Schmerl, Esq.
1428 E. Elm Street
Tucson, AZ 85719

Ann Lyons, Esq.
U. S. Environmental Protection Agency
75 Hawthorne Street, RC-1
San Francisco, CA 94105

PLEASE TAKE NOTICE that, on behalf of the U.S. Environmental Protection Agency, I have this day filed with the Regional Hearing Clerk of the U.S. Environmental Protection Agency, Region 9, Initial Decision, a copy of which is attached hereto and hereby served upon you by mail.

May 11, 1993
Date

Danielle E. Carr,
Administrative Clerk