UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:

Robert K. Tebay, Jr.	**)**	
d/b/a	**)**	
Tebay Dairy Company[1]	**)**	**Docket No. EPCRA-III-236**
	)	
Respondent,	**)**	
	)	

INITIAL DECISION

This case involves facilities that store hazardous chemicals, in this instance gasoline and diesel fuel, and the filing responsibilities that attend such storage. It was initiated on September 30, 1998 by the filing of a complaint pursuant to Section 325 of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11045. Complainant, the United States Environmental Protection Agency ("EPA") subsequently filed two amended administrative complaints, the first on April 22, 1999[2], and the second on June 10, 1999. The Court granted the second motion to amend the Complaint on October 13, 1999. In its second amended form, the Complaint charges Tebay Dairy

[1]By stipulation the parties agreed that the individual respondent should be 'Robert,' not 'John,' Tebay.

[2]Following Respondent's May 7, 1999 reply to EPA's first Motion to Amend the Complaint, EPA withdrew the motion and subsequently filed its Second Motion to Amend. The Second Amended Complaint clarified the time period involved in Count I, dropped charges regarding Tebay's alleged failure to submit Emergency and Hazardous Chemical Inventory Forms to the Local Emergency Planning Committee ("LEPC") for Counts II and III, and dismissed entirely Count IV. As a consequence of these amendments, the proposed penalty was reduced.

Company ("Tebay" or "Respondent") with three counts of violating EPCRA. In Count I, EPA alleges that Tebay failed to submit either Material Safety Data Sheets ("MSDS" or "data sheets") or a list of hazardous chemicals, identifying regular grade gasoline, plus grade gasoline, supreme grade gasoline, and diesel fuel to the West Virginia State Emergency Response Commission ("SERC") by at least April 1, 1995, and that such failure constitutes a violation of section 311 of EPCRA[3]. Count II alleges that Tebay failed to submit an Emergency and Hazardous Chemical Inventory Form ("EHF" or "Tier II Form") to the SERC for the calendar year 1994 for regular grade gasoline, plus grade gasoline,

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[3]Section 311(a)(1) of EPCRA, 42 U.S.C. § 11021(a)(1), provides in pertinent part the following with respect to the submission of an MSDS or list:

> The owner or operator of any facility which 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]...shall submit a material safety data sheet for each such chemical, or a list of such chemicals...to each of the following:
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> (A) The appropriate local emergency planning committee.
> (B) The State emergency response commission.
> (C) The fire department with jurisdiction over the facility.

A list submitted in lieu of an MSDS, pursuant to section 311(a)(2), must include the following:

> (i) A list of hazardous chemicals for which a [MSDS] is required under [OSHA] and regulations promulgated under that Act, grouped in categories of health and physical hazards....
> (ii) The chemical name or the common name of each such chemical as provided on the [MSDS].
> (iii) Any hazardous component of each such chemical as provided on the [MSDS].

supreme grade gasoline, and diesel fuel, in violation of section 312 of EPCRA,[4] while Count III, alleging the same violation as Count II, pertains to calendar year 1995. Complainant seeks a penalty in the amount of $7,500 for Count I, and $1,500 each for Counts II and III, for a total penalty of $10,500. An evidentiary hearing was held on October 19 and 20, 1999 in Parkersburg, West Virginia.

For the reasons that follow, the Court finds that the Tebay Dairy Company is not liable for Count I of the Complaint, as EPA failed to prove a violation of Section 311 of EPCRA and that, while Tebay conceded the fact of violation for Counts II and III, these violations warrant no more than a nominal penalty in this instance.

Findings and Conclusions

The violations alleged in this case arose out of an inspection, conducted by EPA in August

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[4]Section 312(a)(1) of EPRCA, 42 U.S.C. § 11022(a)(1) provides in relevant part, the following:

> The owner or operator of any facility which 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]...shall prepare and submit an emergency and hazardous chemical inventory form [EHF] to each of the following:
>
> (A) The appropriate local emergency planning committee.
> (B) The State emergency response commission.
> (C) The fire department with jurisdiction over the facility.

Section 312(d)(1) provides that the information in the form is to include, annually, in aggregate form for each category, an estimate of the maximum amount of hazardous chemical, an estimate of the average daily and the general location of the chemical.

1997, of the Tebay Dairy facility in Parkersburg, West Virginia. Tebay Dairy is a sole proprietorship owned by Robert K. Tebay, Jr. His son, John Tebay, is employed by Tebay Dairy as well. A misnomer now, "Tebay Dairy" has not operated as a dairy since 1989. Since then the facility has operated only as a Chevron Gasoline station and a convenience store. R's Post-Hearing Brief at 1.

In pursuit of its Food and Kindred Products Enforcement Agreement Initiative, EPA sent, in November 1996, a compliance assistance letter to facilities believed to be subject to this undertaking, asking them whether they were required to report to EPA under EPCRA. Testimony of Carole Dougherty, Tr. at 77.[5] EPA sent this letter to Tebay because it believed it was a dairy.[6] Facilities that failed to respond to the initial compliance letter were then sent show cause letters asking them to demonstrate why they need not report under EPCRA. Id. When Tebay failed to respond to the initial letter, EPA sent a show cause letter to the facility. After Tebay did not respond to the show cause letter, EPA targeted the facility for inspection. Id. at 80. On July 31, 1997, EPA telephoned Tebay, informing that it had been targeted for inspection by its failure to respond to the earlier letters.

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[5]Carole Dougherty is the Emergency Planning and Community Right-to-Know Coordinator for EPA Region III in Philadelphia. Testimony of Dougherty, Tr. at 71. Ms. Dougherty's responsibilities include targeting EPCRA inspections, determining compliance with EPCRA, and preparing enforcement actions. Id. at 72-3. In this capacity, Ms. Dougherty works with the SERCs, LEPCs, and with local fire departments that initiate the contact. Id.

[6]At the time of the mailings, EPA believed the Tebay facility operated as a dairy. Such operations fell within the scope of EPA's initiative. From 1975 to 1989, the current Tebay location was used for the processing, bottling, and sales operations of the dairy. C's Exhibit 1. However, the facility had not operated as a dairy since 1989. According to EPA, it did not know that the facility had ceased to carry on dairy operations when it was targeted for inspection. Apparently, it was not until the time of inspection that EPA learned of the operations of the facility.

Testimony of Kenneth Wright.[7] Tr. at 33, 65. Thereafter, on August 27, 1997, Bob Donahue[8], and Kenneth Wright arrived at the facility to conduct the inspection. At that time they presented Tebay with a notice of inspection. The purpose of the inspection was to determine the facility's compliance with the regulations listed in the notice. Id. at 38; C's Exhibit 1, Attachment A. By inspecting, EPA sought to assess whether Tebay stored any hazardous chemicals at the facility in quantities exceeding the regulatory thresholds. The inspection revealed the storage of regular grade unleaded gasoline, plus grade unleaded gasoline, supreme grade unleaded gasoline, and diesel fuel, all of which are hazardous chemicals. R's Post Hearing Brief at 1-2. These stored hazardous chemicals were determined to be in amounts in excess of the EPCRA reporting thresholds. R's Answer at ¶ 3. During the calendar years 1994 and 1995, Tebay stored these chemicals at the site in amounts greater than the 10,000 pound threshold for each chemical. Upon the conclusion of the inspection, EPA inspectors informed Respondent that because it stored gasoline and diesel fuel in quantities greater than the threshold for reporting, it was subject to the requirements under EPCRA sections 311 and 312.[9] Id. at 51.

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[7]Mr. Wright is an environmental consultant with Dynamac Corporation, which contracts with EPA through Booz-Allen Hamilton, to provide support with enforcement and pollution prevention. Tr. at 27. In this capacity, Mr. Wright performs EPCRA inspections. Id.

Typically, EPA provides a targeted facility with two weeks notice of the pending inspection. In the case at hand, EPA afforded Tebay proper notice by informing Tebay over two weeks in advance of the inspection.

[8]Bob Donahue also is a Dynamac employee.

[9]During the time of the alleged violations, owners or operators of a facility were required to submit MSDS forms and EHF forms to the SERC and other entities for "all hazardous chemicals present at the facility at any one time in amounts equal to or greater than 10,000 pounds...." 40 C.F.R. § 370.20(1) and (2). Subsequently, on June 8, 1998, EPA proposed modifications to this rule, increasing the reporting threshold for hazardous chemicals. 63 Fed. Reg. 31,268 (1998). See also discussion infra at 12-14. The rule became final on February 11, 1999 with the new thresholds set at

Count I

Failure to submit MSDSs or List to the SERC by April 1, 1995

With respect to Count I, as discussed above, EPA charged Respondent with a violation of EPCRA § 311, alleging that it failed to submit data sheets or a list of hazardous chemicals stored at the Tebay Dairy facility by April 1, 1995. The data sheets provide information regarding hazards and safety concerns for the particular chemicals identified. Tr. 91-92. EPA argues that Respondent, as an "owner or operator" of a "facility," under EPCRA § 311, was responsible for preparing the data sheets, or a list, for hazardous chemicals stored at its facility where they met or exceeded the specified threshold levels and for providing the SERC with those forms. C's Post-Hearing Brief at 7.

EPA maintains that there is no evidence demonstrating that Tebay submitted the data sheets or lists in question to the SERC.[10] C's Post-Hearing Brief at 8. According to the testimony of EPA witness Laverne Muncy, the Secretary for the West Virginia SERC, several searches of the SERC files failed to reveal these documents. Tr. 125. Lending support to EPA's argument, Mr. Wright testified

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75,000 gallons for gasoline and 100,000 gallons for diesel fuel. See 40 C.F.R. § 370.20.

[10]While not determinative of liability, it is still worth noting that in its original Complaint EPA alleged that Tebay had not submitted MSDSs or a list of hazardous chemicals to *either* the SERC or the Local Emergency Planning Committee ("LEPC"). Tebay's Answer denied liability and noted that it had found, within its own records, a copy of the MSDS report filed with the LEPC and that another copy of a filed MSDS report had been found at the local fire department. From the very beginning, Tebay challenged the reliability of the recordkeeping for the state and local authorities, asserting that their filings were haphazard at best. Thereafter, EPA filed a Second Amended Complaint in which, after reiterating the obligation to file with both the LEPC and the SERC, it dropped the claim that Tebay had failed to file the MSDS with the LEPC. The section at issue, EPCRA Section 311, 42 U.S.C. § 11021, requires that a MSDS be submitted to the LEPC, the SERC and the fire department with jurisdiction over the facility. Thus, implicitly, the Court is being asked to accept that Tebay, with no allegation that it failed to comply with submitting MSDSs either to the LEPC or to the local fire department, nevertheless failed to submit the MSDS to one of the three required entities, the SERC.

that during the on-site inspection of the facility Tebay did not provide any documentation supporting its claim that indeed it had submitted the forms to the SERC. Tr. at 41. EPA claims that, based on the testimony offered by these witnesses, it has made a prima facie case that the Respondent never submitted the required documents to the SERC. C's Post-Hearing Brief at 9.

EPA also points to case law it views as supportive of its arguments against Tebay, observing that the "presumption of regularity" applies to an agency's recordkeeping. In the instant matter EPA argues that the presumption operates to support its assertion that the SERC never received the required documents from Respondent. In making this argument, EPA relies primarily on two Toxic Substances Control Act ("TSCA") administrative decisions: In the Matter of Chematar Inc., 1987 WL 109690 (EPA June 12, 1987), and In the Matter of Chemisphere Corporation, 1987 WL 109688 (EPA May 8, 1987). These cases focus on the proof of delivery for required paperwork submitted to the United States Customs Agency by private parties. In both cases, the respondents, as importers of chemical substances, were required to provide certification at the point of entry of a shipment, that a particular shipment was or was not subject to TSCA. The importers in these cases used third party brokers to assist with this process. Brokers typically prepared the package of documents for the importers, after which they were delivered to Customs by private messenger service. Customs did not provide the importers with a receipt confirming that the certification accompanied the shipment. In both cases, when the package of documents reached Customs, it found that the shipments did not contain the proper certification. Upon this determination, Customs contacted EPA, which then initiated the administrative actions. Even though various witnesses for the respondents in those cases testified that the shipments indeed were prepared with a certification, the judge found that EPA had made a prima

facie case that no certification was received by Customs and that the respondents did not present evidence that convincingly rebutted EPA's argument.

EPA suggests that these cases present analogous issues and provide precedent to the questions in issue here. It asserts that based on the fact that the SERC has no record of the MSDS forms or lists in dispute, a prima facie case that Tebay failed to submit these materials to the SERC has been established. EPA urges the Court to find in its favor in the instant matter, arguing that, as in Chematar and Chemisphere, the Respondent in this case failed to present adequate rebuttal evidence demonstrating that it did in fact submit the required documents.

In response to EPA's argument that the "presumption of regularity" applies in this case, Tebay argues that, in contrast to the customs cases, the recordkeeping practices at the West Virginia SERC were unreliable, casting doubt on EPA's assertion that Tebay did not submit to the SERC the required MSDS forms or lists at least by April 1, 1995. In challenging EPA's assertion that it did not submit the required forms to the SERC, Tebay points out that the SERC did not maintain in its files copies of documents that were submitted by Respondent in previous years. R's Post-Hearing Brief at 4-5. To illustrate this, Tebay asserts that the Tier II reports it submitted to the SERC, the Local Emergency Planning Commission (LEPC), and the local fire department, for calendar years 1988 and 1992, were not found within the SERC records. Id. Tebay additionally challenges the presumption of regularity by calling into question the procedures used at the SERC to safeguard submitted documents. It notes that the records on file at the SERC were stored in an unlocked file cabinet in a room that also functioned as a kitchen and conference site. Tr. at 152-53. In her testimony, West Virginia SERC Secretary Ms.

Muncy conceded that many people come in and out of the room where the documents are held. Id. The fact that the documents housed at the SERC were not secured, Tebay asserts, supports its position that the documents were submitted by Tebay, but were mishandled once they arrived at the SERC. R's Post-hearing Brief at 4-5.

Tebay also points to the testimony of William Ferguson, the former fire chief of the local fire department, to which these forms also were required to be sent.[11] Mr. Ferguson testified that the fire department began receiving MSDS forms, lists, and Tier II reports in approximately 1987 or 1988. Tr. 271. At that time, the fire department began receiving the documents from Tebay, and according to Mr. Ferguson, Tebay was the only gasoline retailer or distributor in the area to submit this information to the fire department. Tr. 272. In fact, Mr. Ferguson stated that Tebay was the only gasoline retailer in the area ever to submit these documents.[12] Id. Tebay argues that the testimony of Mr. Ferguson demonstrates that it acted consistently in the past with respect to the submission of the forms in question. As such, Tebay concludes that the poor recordkeeping practices of the SERC inevitably led to the disappearance of the documents Tebay alleges it submitted.[13]

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[11]William Ferguson was a member of the Blennerhasset Fire Department from 1967 to 1993, where he was fire chief for 25 years. Tr. 266.

[12]Fire Chief Ferguson also testified that Tebay sent Tier II reports to the fire department every year, and that they always contained the same information. Tr. at 273-274.

[13]Tebay has raised a claim that, as applied, the EPCRA provisions involved in this litigation violate its due process rights. This argument is based on the claim that the burden to prove that the filings were received by the state agency has been placed on the respondent even though there is no requirement for certified or registered mailings. As the state agency has the duty to monitor filings, it is incumbent upon it to have a mechanism for notice of receipt of those filings. Tebay also asserts that the regulation fails to give fair notice of the prohibited conduct and the penalty that could be imposed. Last, Tebay asserts that EPA's change to the regulation, raising the threshold reporting requirements,

Additionally, Robert Tebay testified that in 1987, when the regulations went into effect, he attended at least one seminar given by Chevron on the subject of these reporting requirements. Tr. 183. He identified a Retail Marketers Guidebook, provided at that seminar, which he consulted for filing the data sheets. Tr. 186. Having attended the seminar, he affirmed that he knew that Tebay was subject to the EPCRA reporting requirements and he disclosed that he kept a copy of the MSDS reports for calendar year 1988 in the guidebook. Id. To his knowledge, Chevron never notified him of any change in the MSDS data after that time. Tr. 193.

Based on the testimony presented at the hearing, the Court is persuaded that Respondent has adequately rebutted the charges made against it by EPA. A number of considerations lead to this conclusion. First, Ms. Muncy testified that the SERC was not the original responsible agency for maintaining these reporting requirements. She informed:

> When EPCRA was signed into law in 1986, the Department of Natural Resources in the State of West Virginia, and then the Bureau for Public Health were, at that time, the responsible

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demonstrates that the regulation did not serve the purpose for which it was enacted. In response, EPA asserts that there was sufficient notice of the inspection and the potential penalties, and it interprets Tebay's arguments as a claim that the penalty sought is so grossly disproportionate as to constitute a violation of due process. EPA counters that de minimus penalties have no deterrent effect and risk being regarded as merely a cost of doing business.

The due process claim is rejected. Tebay miscasts the burden of proof. It is EPA that has the burden to show that the forms were not received, a burden it met, initially, through the testimony of the Secretary of the West Virginia SERC, as aided by the presumption of regularity. However, as noted infra, the Court finds that Respondent successfully rebutted the prima facie case. Further, there is no valid claim as to either notice of the violative conduct or the potential penalties, as the statute and regulations clearly spell these out. The Court also notes that the total $10,500 penalty EPA seeks in this matter compares with the statutory provisions which allow up to a $10,000 penalty for a Section 311 violation and up to $25,000 for each Section 312 violation. Given that the statute would permit up to a $60,000 total penalty for the three Counts, the penalties sought here can not be viewed as so disproportionate as to violate Respondent's due process.

> agencies. It went from DNR to Health, and then *in 1988*, those records resided in our office.

Tr. 140 (emphasis added).

Although the Court accepts that several reviews of the SERC records failed to show any MSDS submission by Tebay, the absence of such records must be measured against the fact that the records had been transferred twice before eventually residing with the SERC. To this the Court also must consider that Mr. Robert Tebay displayed a responsible attitude toward these new reporting obligations, by attending a seminar regarding these data submissions in 1987, that he testified that he submitted the forms in 1988, that Fire Chief Ferguson testified that the local fire department received these forms from Tebay in 1986 or 1987 and that, among the three entities that are to receive the MSDSs, EPA alleges only that the Respondent failed to submit the forms to one of them, the SERC.

Even though the Court views those considerations as more than sufficient to rebut EPA's prima facie showing of liability for the alleged Section 311 violation, additional factors casting doubt on the reliability of the SERC records were also raised. The testimony given by Ms. Muncy informed that the SERC failed to provide any security for documents stored in its office. This fact independently casts doubt on the reliability of the SERC's recordkeeping practices, and lends additional support to Tebay's claim that it did indeed submit the materials in question.[14] While the Court has considered EPA's

[14]Further, it is observed that, aside from the records being unsecured, the SERC's own recordkeeping history was not pristine. In response to a question from Respondent as to whether the SERC kept a "master list" of their Tier II mailings to companies, Ms. Muncy acknowledged that such a list was maintained but that in 1998 her computer "crashed" and they "lost every bit of information [they] had." Tr. 128. Beyond that, she revealed that, while the office had backup tapes for this

argument, drawing a parallel to the issues involved in the cited TSCA cases with those presented in this case, it disagrees with EPA's conclusions. The situations are vastly distinguishable because Tebay cast doubt on the reliability of the SERC recordkeeping and presented testimony from fire chief Ferguson and Robert Tebay to demonstrate that it had submitted the data sheets. Accordingly, the Court finds that Respondent, in rebuttal, made a sufficient showing evidencing the submission of MSDS,[15] or lists, to the SERC and therefore, applying the preponderance of evidence standard, Tebay is found not liable for Count I.

Counts II and III

Respondent's Failure to Submit Hazardous Chemical Inventory Forms to the SERC

In contrast to its stance for Count I, for Counts II and III, Tebay has stipulated that it cannot find any evidence to establish that it submitted Emergency Hazardous Chemical Inventory Forms identifying regular grade gasoline, plus grade gasoline, supreme grade gasoline, or diesel fuel for the calendar years 1994 and 1995. *See* Stipulations; R's Post-Hearing Brief at 2. As Tebay has conceded the fact of violation for Counts II and III, and EPA has made a prima facie showing of the violations, the Court finds Respondent liable for these violations of EPCRA Section 312.

Determination of an Appropriate Penalty for Counts I and II

Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1), provides in relevant part that "[a]ny

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information, "it turned out that the backup tapes were also corrupt, and we didn't know that until after the computer had crashed." Id.

[15]The submission of the MSDS is, absent the discovery of "significant new information concerning an aspect of a hazardous chemical," a one-time filing obligation. See 42 U.S.C.§ 11021(d) and In the Matter of Mafix, Inc., Respondent, Docket No. EPCRA-III-113, February 12, 1998, 1998 WL 99997 (E.P.A.).

person...who violates any requirement of section 11022 [EPCRA § 312]...of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation." EPA notes that, for violations of EPCRA Section 311 and 312, there are no statutory factors to be considered in the assessment of penalties, as the provisions establish only the maximum penalty for those sections.[16] Despite this lack of specific statutory guidance for determining a penalty, EPA did evaluate the nature, circumstances, extent and gravity of the violations, along with the respondent's ability to pay, prior history of such violations, the degree of culpability, any economic benefit from noncompliance, and other matters as justice may require. C's Post-hearing brief at 18. EPA did this by utilizing its Interim Final Enforcement Response Policy ("Response Policy") for EPCRA Sections 304, 311, and 312.

In its Post-hearing brief, EPA noted that, in arriving at its proposed penalty, it had adopted the conclusions directed by the matrices for the Response Policy. For the "extent" factor, measuring the late filings, this translated into a "level 1" category for all counts. The "nature" of the violation considered the lateness as well. For the "gravity" aspect, EPA considered the extent that the unreported gasoline exceeded the threshold reporting amount. In this case, with 66,700 lbs. of unleaded gasoline involved,[17] and the threshold for reporting at 10,000 lbs. the amount involved was calculated to be six and one half times greater than the threshold. The matrix, in turn, designates that amount as a level 'B' gravity category.

Once the extent and gravity determinations have been made, a range of possible penalties is set

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[16]The maximum penalty for a Section 311 violation is $10,000, while a Section 312 violation carries a maximum $25,000 penalty.

[17]This figure represents the largest quantity of fuel for any category at Tebay's facility; the other gasoline grades and diesel fuel quantities were less.

forth in the Response Policy. The "circumstances" of the violation are then factored into the calculation to arrive at a penalty from within the range dictated by the extent and gravity determinations. The "circumstances" aspect examines the "actual or potential consequences of the violation." C's Post-hearing brief at 20. In this regard EPA maintains that emergency response personnel were "at risk of exposure" had there been a release and that the SERC cannot plan for a hazardous chemical release "if its presence at Respondent's facility is unknown." Id. at 21. EPA also believed the "safety of the surrounding community" was impacted by the hazardous chemicals being unknown. Id.

For all counts, EPA determined that, upon consideration of the ability to pay, degree of culpability, and economic benefit, no adjustments to the penalty were appropriate. Nor did EPA feel that any adjustment was in order under the factor of "other matters as justice may require." Id. at 22. EPA then imposed a flat penalty of $1,500 per violation for Counts II and III of the Complaint. EPA argues that this penalty is appropriate, maintaining that it took into account the adjustment factors discussed above and the changes made to the regulation. Id.[18]

Although not identified as a factor in proposing a penalty, EPA's post-hearing brief refers to "equitable issues" raised in this case. Under this subject, EPA addressed the June 8, 1998 proposed rule to amend the EPCRA reporting requirements. It acknowledges that the proposal was made before the complaint in this matter was filed and that some four and half months after the filing of the complaint a final rule was promulgated, with the effect of raising the threshold for reporting. This change, EPA concedes, has the effect of making the quantity of gasoline and diesel fuel stored at Tebay's Dairy no longer reportable. However EPA contends this change should have no impact on the penalty it seeks.

[18]See supra note 8. See also discussion infra at 12-14.

From its perspective, the penalty analysis should examine only whether the amount in question was reportable at the time of the violation. To credit a Respondent with a subsequent change in the regulation would, it argues, amount to a "windfall." Further, EPA maintains that it would create "havoc" to its enforcement schemes to treat proposed rule changes and the factual assertions set forth in the proposals as if they were "cast in stone" or a final rule. Such a result, it submits, could tempt the regulated community to disregard current rules when an agency is merely pondering a change.

Respondent opposes Complainant's proposed penalty for Counts II and III, arguing that it is excessive. In making this argument, Respondent contends that its violation of EPCRA § 312 did not result in any harm to the public or have any negative impact on the rights of the public or to emergency personnel in that there was no spill of gasoline, and it was obvious to the public and emergency responders that the Respondent stored gasoline at the Tebay facility. Respondent testified that a Chevron sign at the site prominently displayed prices of the various grades of gasoline and diesel fuel, and that it placed advertisements to this effect in the local newspaper. Thus, Respondent argues that the public and emergency personnel were well aware that these chemicals were stored at the facility. Tr. at 195. Respondent also notes that it had not been charged with any violations of Section 312 prior to the pending action, and that it had acted in good faith to obey the law. Additionally, Respondent observes that, because the regulations have changed, since February 1999 it has no longer been required to report under EPCRA Section 312, as the quantities of gasoline it stores are no longer reportable. Accordingly, it believes that any penalty imposed should be nominal.

The Consolidated Rules of Practice governing this proceeding direct the presiding officer to determine the amount of the recommended civil penalty based on the record evidence and in accordance

with any penalty criteria set forth in the applicable Act. This requires that the judge explain in detail how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. In addition, the judge is to consider any civil penalty guidelines issued under such Act, and if the judge departs from the penalty proposed by the complainant, to provide specific reasons for any such departure. 40 C.F.R. § 22.27(b).

In determining the appropriate penalty in this matter, the Court initially considered the penalty policy used by EPA, as well as the arguments of the parties. Having considered the policy and the arguments for its use, the Court departs from its application in this instance for the following reasons. First, with regard to Counts II and III, Ms. Dougherty testified that she looked to the penalty policy. However, it is clear from her testimony that she considered her penalty assessment for Count I in determining an appropriate penalty for Counts II and III. Tr. 96. For example, in measuring Respondent's culpability for Counts II and III, the witness folded into her analysis the alleged failure by Respondent to submit the information required by Section 311, the section which formed the basis for the violation alleged in Count I. The witness did this despite the fact that Counts II and III involved independent violations of another EPCRA provision, Section 312. Tr. 98. Apart from the questionable practice of weaving different Counts together in determining the appropriate penalty for distinct violations, by not independently evaluating each Count, the validity of the witness' evaluation hinged upon all of the alleged violations being upheld. The Court, having concluded that Count I was not proven by a preponderance of the evidence, the witness' use of the policy in this manner necessarily causes its application to collapse for Counts II and III.

Further, the witness, after agreeing that the primary purpose for passing EPCRA was for

emergency responders, admitted that at the time she calculated the penalty she did not know that the local fire department had the required hazardous chemical information. Tr. at 105, 107. Despite that acknowledgment, the witness maintained she could not state whether that knowledge would have caused her to change her penalty calculation. This response was ostensibly based on the claim that the fire department might not know the amount of chemicals present or their location at the facility.[19] Tr. 107. Yet, the witness then conceded that the typical gas station would not have tanks with a capacity in excess of 600 gallons. Tr. 108. EPA's failure to consider, as part of the circumstances of the violation, the fact that the local fire department had the required hazardous chemical information forms an additional basis for the Court's rejection of the application of the penalty policy in this case.

Having rejected the application of the penalty policy, the Court is guided by two factors in assessing an appropriate penalty. First, while the statutory provision for Section 312 violations provides for penalties up to $25,000 per violation, EPA's penalty analysis, though flawed by consideration of Count I, yielded a penalty of $1,500 each for Count II and Count III. Thus the EPA figures represent the agency's view of the uppermost amount of an appropriate penalty for the violations involved here. Second, to arrive at an appropriate penalty, implicitly the Court must consider all the circumstances attending the violations.

Examining these circumstances, the Court notes that although Tebay concedes the two Section 312 violations, the violations reflected in Counts II and III do not represent a complete failure to comply with this section, as EPA withdrew its original assertion that the Tier II ("EHF") form was not submitted

[19]It is also noted that EPA's final rule, amending these EPCRA reporting thresholds, refutes the witness' claim, as well as EPA's factitious assertion that the hazardous chemicals' presence was unknown and placed emergency personnel at risk.

to the LEPC and it had never claimed a failure to submit the EHF form to the local fire department. EPA testimony would indicate that, of the three entities to receive these reports, the more important sources to have this information are the LEPC and the local fire department. Next, it is observed that this partial failure to comply with Section 312 represents Tebay's first EPCRA violation. Restated, Tebay has no history of prior violations. Further, EPA has not alleged any associated violations with the underground storage tank ("UST") regulations.

Beyond these considerations, Tebay was cooperative with the EPA inspectors during the inspection of the facility.[20] In addition it is worth noting that Mr. Robert Tebay displayed a responsible attitude toward Tebay's EPCRA reporting duties by attending an EPCRA compliance seminar, held by Chevron, its gasoline distributor, in 1987. It is also observed that the Section 312 violation did not result in any harm to the public; both the public and emergency responders knew that gasoline and diesel fuel was stored at the Tebay Dairy facility by virtue of the prominent signs announcing that fact.

Last, there is the consideration that the violations in issue here are no longer cognizable as violations by virtue of EPA's rulemaking. At the time of the violations of EPCRA § 312 by Respondent, for calendar years 1994 and 1995, the reporting threshold stood at 10,000 pounds for each of the types

[20]While not a basis for excusing the Section 312 violations, it seems appropriate to note that the impetus for EPA's inspection was for a purpose other than determining Respondent's compliance with reporting for gasoline and diesel fuel. Rather it was driven by the Agency's focus on whether facilities, such as Tebay, had anhydrous ammonia, chlorine, sulfuric acid, nitric acid or phosphoric acid present. Exhibit 1, attachment 2. Thus, there is some credence to Tebay's assertion that, once at its facility, and discovering that Tebay was no longer a dairy, EPA endeavored to find whatever other violations it could. While this consideration does not operate to reduce any penalty for the violations, it is nevertheless a circumstance surrounding the inspection and highlights the fact that EPA was not at the Tebay facility to deal with reports of gasoline or diesel fuel problems.

of gasoline and diesel fuel Respondent stored at the Tebay facility.[21] At that time Respondent stored quantities greater than this threshold for each of the hazardous chemicals at issue. The inspection report shows that for calendar years 1994 and 1995, Respondent stored 66,700 pounds of regular grade unleaded gasoline, 40,020 pounds of plus grade unleaded gasoline, 40,020 pounds of supreme grade unleaded gasoline, and 43,500 pounds of diesel fuel at the facility. C's Exhibit 1.

However, prior to the filing of the Complaint in the instant action, EPA proposed changes to 40 C.F.R. § 370.40, the regulation that defines the reporting requirements under EPCRA § 312.[22] Specifically, EPA proposed to increase the reporting thresholds for gasoline and diesel fuel stored underground at retail gasoline stations. 63 Fed. Reg. 31,268 (1998). In the proposed rule, EPA recommended increasing the reporting thresholds for all grades of gasoline combined to 75,000 gallons from 10,000 gallons, and to 100,000 gallons for diesel fuel. Id. It is noted that although the proposed change to the rule was made after the violations had occurred, this was prior to the filing of the Complaint.[23] Had these increased thresholds been in effect when Respondent committed the violations, Respondent would not have been subject to the reporting requirements, and thus, would not have been in violation of EPCRA § 312. In fact, today, due to these changes, Respondent is not subject to the reporting requirements under either Section 311 or Section 312.

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[21] See supra note 9.

[22] See supra note 9. Carole Dougherty, who calculated the penalty, testified that she was aware of the proposed regulations, but stated that when she made the calculations, she was uncertain as to when the proposed rule actually would be promulgated. Tr. at 109.

[23] This observation should in no way be interpreted to imply that a proposed rule has any effect on the *validity or enforcement* of an existing rule.

In its proposed rule, EPA explained how it arrived at the decision to propose an increase for the reporting thresholds for gasoline and diesel fuels at retail gasoline stations. In making an assessment as to whether the public would be harmed if the threshold levels were raised, EPA stated that

> [t]he public and local emergency officials are generally familiar with the location of retail gas stations, are aware that these facilities have gasoline and diesel fuel, and can typically discern the general storage location of the gasoline and diesel fuel at the facility. In fact, retail gas stations prominently advertise the presence of gasoline and diesel fuel at their facilities, encourage the public to come on site,
>
> and often permit the public to dispense the gasoline and diesel fuel themselves.

63 Fed. Reg. 31, 270 (1998).

EPA also took into account awareness of hazards associated with gasoline and diesel fuel, concluding that both the public and emergency officials generally understand the dangers, as well as the fact that fuels stored at retail gasoline stations typically are held in underground storage tanks. Id. EPA noted that storing gasoline and diesel fuels in tanks that are entirely underground generally "mitigates the risk of catastrophic release." Id. These considerations supported EPA's position on increasing the reporting thresholds. Id. By increasing the thresholds EPA sought to "streamline" the reporting requirements so that a balance could be achieved between the usefulness and the benefit of the information reported Id. at 31,269.

The Court takes note of EPA's point that consideration of a proposed rule in determining an appropriate penalty would be completely improper. Proposed rules, as EPA expresses it, can not be treated as if they were "cast in stone" or as a "final rule." The Court agrees. However, that perspective can not ignore the reality that the proposed rule involved in this case in fact became a final rule eight

months before the hearing, and that it also became effective upon the date of publication in the Federal Register. EPA opted to exempt the rule from the usual thirty day waiting period after publication in the Federal Register and provided instead that the rule would become effective immediately.

In the Final Rule EPA acknowledged its longstanding awareness that the affected community believed the reports in issue were unnecessary:

> Over the years since EPCRA was enacted, EPA has heard from many stakeholders that the section 311 and 312 reports for gasoline and diesel fuel from retail gas stations are unnecessary for emergency planning and community right-to-know purposes. Stakeholders have pointed out that the public and emergency planners and responders are generally aware of the locations of gas stations and of the hazards of gasoline and diesel fuel, without the need for EPCRA reporting. Further, they have pointed out that some of the information reported by retail gas stations under EPCRA sections 311 and 312 duplicates some of the information already reported under UST requirements. EPA has evaluated this issue, and believes that section 311 and 312 reporting is not warranted nationwide, for gasoline and diesel fuel stored entirely underground at retail gas stations that are in compliance with UST requirements.

64 Fed. Reg. 7033-7034 (1999).

Adopting the reasoning advanced at the time of the proposed rule, EPA noted that where gasoline and diesel fuel is stored entirely underground at retail gas stations that are in compliance with UST requirements, a special situation exists warranting higher reporting thresholds. This special situation took into account that public and local emergency officials are generally familiar with the location of retail gas stations, that such officials generally are aware of the hazards associated with these fuels, that the tanks in which such fuels are stored are usually underground, thereby mitigating the risk of catastrophic release, and that the underground tanks are regulated under the UST program of the Resource Conservation and Recovery Act. Id. at 7034.

The Court recognizes that the Environmental Appeals Board ("EAB" or "Board") has discussed the appropriate use of the "other factors as justice may require" aspect in penalty determinations. The Board has noted that the application of this factor to reduce penalties "should be used to reduce the penalty 'when the other adjustment factors prove insufficient or inappropriate to achieve justice.'" In re Steeltech, Limited, EPCRA Appeal No. 98-6, August 26, 1999, 1999 WL 673227 (E.P.A.) quoting from In re Spang & Co., 6 E.A.D. 226, 249-50 (EAB 1995). See also In re Catalina Yachts, Inc., EPCRA Appeal Nos. 98-2 & 98-5, (EAB, March 24, 1999), 1999 WL 362893 (E.P.A.). Thus, the Board's reference to this factor has been made in the context of applying it when the other factors do not produce a just result. The Board also has expressed that the circumstances for application of this factor must be such that its use not undermine the statutory scheme and that a reasonable person would determine that failing to give some credit would be a manifest injustice. See In re: Pepperell Associates, CWA Appeal Nos. 99-1, 99-2, May 10, 2000, 2000 WL 576426 (EPA EAB).

The Court notes that none of these cases have involved application of the "justice" factor where the conduct once comprising a violation is no longer considered a violation. With the threshold now raised, eliminating Tebay's EPCRA reporting requirements in these circumstances, recognition of this change in assessing the penalty can hardly be viewed as undermining the statutory scheme. To the contrary, in the Court's view, failing to consider that the very conduct comprising these violations is no longer viewed as a violation would produce an unjust result and amount to a manifest injustice.

In light of EPA's decision to raise the thresholds, it is doubtful that a gasoline retailer subject to the old threshold levels would cause any harm to the public by failing to report. In fact, as discussed above, Respondent displayed a Chevron sign at the facility and advertised in the local newspaper that it was a

retail gasoline store and had gasoline and diesel fuel on the premises. Tr. at 195. As noted, Tebay has been in full compliance with the underground storage tank requirements and pays a license fee every year to store the fuels at is facility. Tr.. at 193, 195. Furthermore, no incidents have occurred at the facility that would place the public in danger. Tr. at 276.

Conclusion

Based on the foregoing, it is determined that a total penalty of $1,000 (One thousand dollars), i.e. $500 (Five hundred dollars) *each* for Counts II and III, is an appropriate amount to be assessed in this case.

ORDER

For the reasons set forth above, Respondent, Tebay Dairy Company, is found to have violated EPCRA § 312, 42 U.S.C. § 11022, as set forth in Counts II and III of the Complaint. For these violations a civil penalty in the amount of $500 (Five hundred dollars) is assessed for each Count. As specified in 40 C.F.R. § 22.27, this decision constitutes an Initial Decision which, unless appealed in accordance with that section or unless the Administrator elects to review the same, sua sponte, will become the final order of the Administrator in accordance with 40 C.F.R. § 22.27(c). Payment shall be submitted by a certified check or cashier's check payable to Treasurer, United States of America and

mailed to:

Mellon Bank
EPA Region 3
Regional Hearing Clerk
P.O. Box 360515
Pittsburgh, PA 15251

A transmittal letter identifying the subject case and the EPA docket number, plus the Respondent's name and address must accompany the check. Failure of the Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalties. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of the Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the EAB is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.30(a), within thirty (30) days after the Initial Decision is served upon the parties; or (3) the EAB elects, upon its own initiative, under 40 C.F.R. §22.30(b), to review the Initial Decision.

So Ordered.

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William B. Moran
United States Administrative Law Judge

Dated: November 28, 2000

In The Matter of Robert K.Tebay, Jr., d/b/a Tebay Dairy Company, Respondent
Docket No. EPCRA-III-236

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision**, dated November 28, 2000, was sent this day in the following manner to the addressees listed below:

Original by Regular Mail to:

Lydia A. Guy
Regional Hearing Clerk
U.S. EPA
1650 Arch Street
Philadelphia, PA 19103-2029

Copy by Regular Mail to:

Attorney for Complainant:

Rodney Travis Carter, Esquire
Assistant Regional Counsel
U.S. EPA
1650 Arch Street
Philadelphia, PA 19103-2029

Copy by Certified Mail Return Receipt to:

Attorney for Respondent:

Robert Kent Tebay, III, Esquire
Lantz & Tebay
331 Juliana Street
Parkersburg, WV 26101

_____

Maria Whiting-Beale
Legal Staff Assistant

Dated: November 28, 2000