

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
GEC Precision Corporation,) EPCRA Docket No. VII-94-T-381-E
)
Respondent)

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: August 28, 1996

Appearances

For Complainant: Anne E. Rauch, Esq.
I. Pearl Fain, Esq.
U.S. Environmental Protection Agency
726 Minnesota Avenue
Kansas City, Kansas 66101

For Respondent: Patricia A. Hoffman, Esq.
A.B. Dick Company
5700 West Touhy Avenue
Niles, Illinois 60714-4890

I. Overview

This case arises under the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"). 42 U.S.C. § 11001 *et seq.* The U.S. Environmental Protection Agency ("EPA") seeks a civil penalty against GEC Precision Corporation ("GEC Precision") pursuant to Section 325 of EPCRA. 42 U.S.C. § 11045. Specifically, EPA charges GEC Precision with four counts of violating EPCRA Section 313, 42 U.S.C. § 11023, for failing to submit certain toxic chemical release forms ("Form Rs") in a timely manner. EPA seeks a total civil penalty of \$68,000 for the four violations. GEC Precision concedes the fact of violation as to all four counts, but argues that the penalty sought by the Agency is excessive.

A hearing on the penalty issue was held in Wichita, Kansas, on February 29, 1996. For the reasons that follow, GEC Precision is assessed a civil penalty totaling \$51,750 for the four Section 313 violations.

II. Stipulations

1. The Respondent is a corporation incorporated under the laws of the State of Kansas.
2. The Respondent is a person as defined by Section 329(7) of EPCRA and is an owner or operator of a facility as defined by Section 329(4) of EPCRA.
3. A May 17, 1994, inspection by an authorized Environmental Protection Agency (EPA) representative of Respondent's facility located at 1515 Highway 81 North, Wellington, Kansas, revealed that in calendar year 1992 Respondent used 1,1,1 Trichloroethane in excess of 10,000 pounds.
4. Respondent has ten (10) or more full-time employees, as defined at 40 C.F.R. § 372.3, at said facility.
5. Respondent's facility has a Standard Industrial Classification (SIC) code of 20 through 39.
6. 1,1,1, Trichloroethane is a toxic chemical listed under Section 313(c) of EPCRA and 40 C.F.R. § 372.65.
7. Respondent failed to submit a Form R for 1,1,1, Trichloroethane to the Administrator of EPA and to the State of Kansas by July 1, 1993.
8. Respondent's failure to submit a Form R for 1,1,1, Trichloroethane by July 1, 1993, is a violation of EPCRA § 313, 42 U.S.C. § 11023, and of the requirements of 40 C.F.R. Part 372.
9. The May 17, 1994, inspection of Respondent's facility revealed that in calendar year 1992 Respondent otherwise used methyl ethyl ketone (MEK) in excess of 10,000 pounds.
10. Methyl ethyl [k]etone (MEK) is a toxic chemical listed under Section 313(c) of EPCRA and 40 C.F.R. § 372.65.
11. Respondent failed to submit a Form R for methyl ethyl [k]etone (MEK) to the Administrator of EPA and to the State of Kansas by July 1, 1993.
12. Respondent's failure to submit a Form R for methyl ethyl ketone (MEK) by July 1, 1993, is a violation of EPCRA § 313, 42 U.S.C. § 11023, and of the requirements [o]f 40 C.F.R. Part 372.
13. The May 17, 1994, inspection of Respondent's facility revealed that in calendar year 1991 Respondent otherwise used methyl ethyl ketone (MEK) in excess of 10,000 pounds.

14. Methyl ethyl [k]etone (MEK) is a toxic chemical listed under Section 313(c) of EPCRA and 40 C.F.R. § 372.65.

15. Respondent failed to submit a Form R for methyl ethyl [k]etone (MEK) to the Administrator of EPA and to the State of Kansas by July 1, 1992.

16. Respondent's failure to submit a Form R for methyl ethyl ketone (MEK) by July 1, 1992, is a violation of EPCRA § 313, 42 U.S.C. § 11023, and of the requirements [o]f 40 C.F.R. Part 372.

17. The May 17, 1994, inspection of Respondent's facility revealed that in calendar year 1990 Respondent otherwise used methyl ethyl ketone (MEK) in excess of 10,000 pounds.

18. Methyl ethyl [k]etone (MEK) is a toxic chemical listed under Section 313(c) of EPCRA and 40 C.F.R. § 372.65.

19. Respondent failed to submit a Form R for methyl ethyl [k]etone (MEK) to the Administrator of EPA and to the State of Kansas by July 1, 1991.

20. Respondent's failure to submit a Form R for methyl ethyl ketone (MEK) by July 1, 1991, is a violation of EPCRA § 313, 42 U.S.C. § 11023, and of the requirements [o]f 40 C.F.R. Part 372.

(Joint Exhibit 1).

III. Discussion

A. The Statutory Framework

The Emergency Planning and Community Right-To-Know Act was enacted as Title III of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (1986). The purpose of EPCRA is to provide communities with information on potential chemical hazards within their boundaries and to foster state and local emergency planning efforts to control any accidental releases. To achieve this end, EPCRA imposes a system of notification requirements on industrial and commercial facilities, as well as mandating the creation of state emergency response commissions and local emergency planning committees. The local emergency planning committees are charged with developing emergency response plans based on the information provided by the facilities (42 U.S.C. §§ 11001-11003), and the public in turn has the right to know the information reported by the facilities, as well as the contents of the emergency response plans (42 U.S.C. § 11044). See *Huls America, Inc. v. Browner*, 83 F.3d 445, 446-447 (D.C. Cir. 1996); see also, *Atlantic States Legal Found. v. United Musical*, 61 F.3d 473, 474 (6th Cir. 1995).

Section 313, the statutory section at issue in this case, requires owners and operators of facilities that manufacture, process, or otherwise use certain toxic chemicals in quantities exceeding a prescribed threshold amount to file Form Rs with both EPA and designated state officials.¹ The toxic chemicals subject to this reporting requirement are listed at 40 C.F.R. § 372.65. Information reported on the Form Rs includes an estimate as to the maximum amount of the toxic chemical present at the facility during the reportable calendar year, the methods for disposing of the toxic chemical, and the annual quantity of the toxic chemical disposed of by each method. Section 313(g) and 40 C.F.R. § 372.85. See *In re Spang & Company*, EPCRA Appeal Nos. 94-3 & 94-4 (EAB, October 20, 1995), at 4.

Form Rs must be filed with EPA and the state by July 1 of the following year. Section 325(c)(1) of EPCRA provides for the assessment of a civil penalty of up to \$25,000 for each violation of Section 313. 42 U.S.C. § 11045(c)(1).

B. The Violations

Count I involves respondent's use of 1,1,1 Trichloroethane in 1992. Counts II, III, and IV involve respondent's use of MEK in 1990, 1991, and 1992. Both toxic chemicals were used by GEC Precision during the cited years in excess of 10,000 pounds, thus triggering the Form R reporting requirement of Section 313. GEC Precision admits that it did not file the Form Rs with the Administrator and with the State of Kansas by July 1 of the succeeding calendar years and thus violated Section 313 as alleged in each of the four counts. Jt. Ex. 1, Stips. 14, 20, 26, and 32.

C. The Penalty Assessment

As noted, Section 325(c)(1) of EPCRA provides for the assessment of a civil penalty of up to \$25,000 for each violation of Section 313. Section 325(c)(1), however, does not set forth the criteria to be considered in determining the appropriate penalty. Accordingly, the penalty criteria contained in Section 325(b)(2) for assessing a penalty for a violation of EPCRA Section 304 may be looked to for guidance. See *In re Apex Microtechnology, Inc.*, EPCRA-09-92-00-07, (May 11, 1993), at 9.²

¹ Both toxic chemicals involved in this case, 1,1,1 Trichloroethane and MEK, have a reporting threshold of 10,000 pounds. Section 313(f)(1)(A), 42 U.S.C. § 11023(f)(1)(A).

² This position was advanced by EPA. See Compl. Br. at 15. GEC Precision did not, however, comment on the specific penalty criteria to be considered. In addition, the same penalty amount would have resulted in this case through application of the penalty criteria contained in EPCRA Section 325(b)(1)(C). See *In the matter of Pacific Refining Company*, EPCRA-09-92-0001, (Dec. 14, 1993), at 8.

The penalty provisions of Section 325(b)(2) incorporate by reference the penalty provisions of Section 16 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615. TSCA Section 16 in turn provides:

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.

In this case, EPA seeks a civil penalty of \$17,000 for each of the four violations, for a total of \$68,000. This penalty amount was calculated by Mark Smith, an environmental scientist with EPA. Tr. 12, 15. In calculating the penalties, Smith followed the penalty assessment approach set forth in EPA's "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)" (the "Enforcement Response Policy" or "ERP"). Tr. 15; Compl. Ex. 5. The penalty considerations set forth in the ERP are essentially the same as the penalty criteria contained in TSCA Section 16. See Compl. Br. at 27; see also, Tr. 25-26. In addition, the penalty calculation for each of the four violations was identical. Compl. Ex. 1; Tr. 19-24.

With respect to the Enforcement Response Policy, EPA calculated the \$17,000 gravity-based penalty through the application of its penalty matrix. See Compl. Ex. 5 at 11. EPA determined that the violations were a Circumstance Level 1 because the Form Rs were not submitted within one year.³ Next, EPA concluded that the violations were an Extent Level B, taking into account the quantity of toxic chemicals involved, as well as the size of respondent's facility and its gross sales.⁴ Application of a Circumstance Level 1 violation and an Extent Level B violation on the penalty matrix resulted in a \$17,000 penalty proposal.

Having determined the gravity-based penalty for each of the four violations, the final step in EPA's penalty proposal process was the consideration of whether an upward or downward penalty adjustment was justified. ERP at 8. Factors considered by the Agency

³ "The circumstance levels of the 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." ERP at 8.

⁴ "The extent level of a violation is based on 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." ERP at 8.

were voluntary disclosure, history of prior violations, delisted chemicals, attitude, other factors as justice may require, supplemental environmental projects, and ability to pay. *Ibid.* Upon considering these factors, EPA concluded that no penalty adjustments were warranted in this case. Compl. Ex. 1; Tr. 26-33.

In arguing for a substantial penalty, EPA correctly states the important role of EPCRA Section 313 in providing the federal, state, and local governments, as well as the general public, with access to information regarding the release of toxic chemicals. In that regard, the Seventh Circuit recently observed that the "'Right-to-Know' component ... aims to compile accurate, reliable information on the presence and release of toxic chemicals and to make that information available at a reasonably localized level." *Citizens For A Better Environment v. The Steel Company, a/k/a Chicago Steel and Pickling Company*, No. 96-1136, 1996 U.S. App. LEXIS 18262, at *4 (7th Cir. July 23, 1996). See *In the matter of Riverside Furniture Corp.*, EPCRA-88-H-VI-406S (Sept. 28, 1989), at 10 ("It needs no citation of authority to state that the filing of such [Form R] reports was intended ... to be timely, complete and accurate.")

It follows then, that the "success of EPCRA can be attained only through voluntary, strict and comprehensive compliance with the Act." *In the matter of Riverside Furniture Corp.*, *ibid.* Without the information contained in timely and accurately filed Form Rs, communities will be denied information on potential chemical hazards within their boundaries and state and local emergency planning committees will be hampered in preparing a response to any accidental chemical releases. See *Huls America, Inc. v. Browner*, 83 F.3d 445, 446-447 (D.C. Cir. 1996), discussing purposes of the Act; see also, Tr. 54.

Here, it has been established that GEC Precision was more than one year late in filing the form Rs for the toxic chemicals 1,1,1 Trichloroethane and MEK. Resp. Exs. 4, 5, 6 & 7. EPA witness James Hirtz, an environmental engineer and the Toxic Release Inventory Coordinator for EPA Region VII, explained the significance of respondent's late-filing. Hirtz testified:

... [I]f the information is submitted after a year, EPA is not able to put this information into the toxic release inventory which is the computer system. This computer system is used to help organize and identify information associated with the submissions from industry. Now, this organization is used to help develop national reports as well as state diskettes which the communities as well as the general community use to help identify the emissions in their geographical location.

Now, if the information is submitted within the year, EPA has the ability to help speed along getting this information into the national report, so the harm is much less if we receive it

shortly after the deadline reporting date, but as the days expand getting closer to a year it impedes the EPA

Tr. 56-57.

As Hirtz's testimony shows, the failure of GEC Precision to timely file Form Rs for 1,1,1 Trichloroethane and MEK for the years 1990 through 1992 constituted significant violations. Nonetheless, EPA's explanation for the proposed assessment of \$17,000 per violation is not quite supported by the facts of the case. In that regard, it is worth noting that while EPA's Enforcement Response Policy does provide guidance in the determination of civil penalties, "[s]trict and faithful allegiance must at all times be paid to the underlying EPCRA statute." *In the matter of Pacific Refining Co.*, EPCRA-09-92-0001 (Dec. 14, 1993), at 6. Indeed, as expressed in *Pacific Refining Co.*, *supra*, "[p]enalty assessments are not a matter for slide rule calculation." *Ibid.* Application of the statutory penalty criteria to the facts of this case results in a penalty less than the one sought by EPA.

One problem with the EPA's civil penalty approach involves its penalty proposal for Count IV. There, the Agency made no downward adjustment to the gravity-based \$17,000 proposed penalty despite the fact that the EPA case review officer who calculated the penalty believed that Count IV was a "borderline violation". In that regard, EPA witness Mark Smith testified:

- Q. Was there any considerations of other matters as justice may require reduction in relation to any of the counts set forth in this complaint or could there be?
- A. There could be, yes.
- Q. And can you give me an example?
- A. For example, I believe it's Count IV in which GEC otherwise used 10,101 pounds is in my opinion on the borderline, and therefore, in my opinion would qualify for a reduction as other factors as justice may require.
- Q. And what type of reduction does the penalty policy allow for a \$17,000 penalty?
- A. The other matters as justice may require reduction is up to 25 percent reduction.
- Q.. And that would be specific to that count?

A. Yes, it would.

Tr. 32-33. Smith later added that Count IV was a borderline violation justifying a reduction under the "as justice may require" criterion because GEC Precision was only 101 pounds over the threshold reporting amount. Tr. 47.

In its brief, EPA cites to Smith's testimony stating that the case review officer "could" have reduced the proposed penalty for Count IV, and the fact that a reduction was not made is consistent with EPCRA. Compl. Br. at 24. EPA's effort to explain away Smith's testimony must fail. Plainly read, Smith believed Count IV to be a "borderline" violation and worthy of a penalty reduction. The court agrees. Accordingly, a 25 percent downward penalty adjustment is warranted under the "as justice may require" penalty criterion. This results in a decrease of \$4,250, or a penalty of \$12,750 for Count IV.

Another problem with respect to EPA's proposed civil penalty is that it did not adequately take into account certain facts favorable to respondent. In that regard, EPA witness Smith viewed GEC Precision as being "cooperative" in this case and as being in compliance with EPCRA at the time of the hearing. Tr. 31. Indeed, at closing argument counsel for EPA conceded that "GEC Precision is a company that acted in good faith and did not intentionally violate the regulations or the statute." Tr. 88-89. Moreover, there is no evidence that respondent previously violated EPCRA or any other Federal environmental statute.

While these facts may not serve as a defense for failing to file the requisite Form Rs, they also cannot be ignored at the penalty assessment stage. These facts warrant an adjustment of \$3,000 for each of the four violations. Therefore, the civil penalty being assessed for Counts I, II, and III is \$14,000 for each violation, and the civil penalty being assessed for Count IV is \$9,750. As discussed below, GEC Precision has failed to show that these penalty amounts should be further reduced.

First, GEC Precision argues that its failure to submit the Form Rs for the cited years was inadvertent. In that regard, respondent states that for the years 1990, 1991, and 1992, it timely filed "Inventory Emission Forms" with the State of Kansas with respect to 1,1,1 Trichloroethane and MEK. GEC Precision further states that it relied upon the Kansas state representation that "[i]nformation you provide is entered into the National Emission Data System maintained by the United States Environmental Protection Agency." Resp. Br. at 1. In a related argument, respondent states that prior to the EPA inspection in May of 1994, it was unaware of its obligation to submit the Form Rs for 1,1,1 Trichloroethane and MEK.

Respondent's arguments are not persuasive. The filing of Inventory Emission Forms with the State of Kansas does not constitute compliance with EPCRA Section 313 and does not result in the mitigation of any penalty assessed for a Section 313 violation. The provisions of

Section 313 require the filing of certain information with both the Administrator for EPA as well as designated state officials, not just with the state. More importantly, Inventory Emission Forms and Form Rs perform completely different functions.

In that regard, EPA witnesses Mark Smith and James Hirtz explained the differences between the two chemical reporting systems. Smith testified that the emissions inventory report submitted by respondent to the State of Kansas is a requirement of the Clean Air Act and that the information is used to track emissions to the air so as to help determine what control strategies are necessary in a particular region of the county. He testified further that, by contrast, the EPCRA Form R reports record emissions to air, land, and water, and include information regarding waste treatment, pollution prevention, and recycling activities. Tr. 34. Smith added, "the biggest difference is the fact that [the EPCRA] information is publicly available whereas the emissions inventory while it is available to the public under Freedom of Information Act requests is not available to the extent the toxics release inventory is, for example, at public libraries, in public data releases and that type of information." Tr. 34-35; see Tr. 39-40.

Hirtz similarly testified that the information for a particular chemical contained in the National Emission Data System is not the same as that contained in the EPCRA Form R reports. Tr. 60. Hirtz explained:

The reason there's two separate reportings is that the primary responsibility of the EPCRA requirements is to allow the community to have access -- readily access to information associated with chemical specific emissions. The information submitted under the National Emission Inventory System is associated with general profile of keeping track of air emissions. And this is typically used at the state and federal levels versus at the community levels.

Tr. 62.

GEC Precision's witnesses did not dispute Smith's and Hirtz's testimony, which is accorded significant weight.

In addition, respondent's asserted ignorance of EPCRA Section 313's reporting obligations also cannot serve as a basis for a penalty reduction. GEC Precision cites no authority to support the proposition that its ignorance of the law justifies a reduction in the civil penalty. At the subject facility, GEC Precision employs between 500 to 700 workers engaged in the manufacturing of aircraft parts. Its sales are in the 45 to 55 million dollar

range. Tr. 82. It must be held responsible for learning the environmental obligations attendant to the use of toxic chemicals in its manufacturing process.⁵

Second, GEC Precision argues that the imposition of the proposed \$68,000 civil penalty will adversely impact the community of Wellington, Kansas. Resp. Br. at 2. Respondent submits that “[i]f ... forced to pay such a penalty, it is likely that such an unplanned expenditure will reduce the size of the contributions and donations which Respondent would otherwise make to the community – the same community which EPCRA is intended to benefit and protect.” *Ibid.* See Tr. 84-85.

Again, GEC Precision cites no supporting authority, statutory or case law. While EPA itself doesn't address this argument, the court is of the opinion that

adoption of respondent's position would do severe harm to EPCRA. The remedial purpose of EPCRA has been discussed earlier in this opinion. Allowing violators of this reporting statute the benefit of a reduced penalty out of fear that the company's employees or the surrounding community might somehow be harmed would serve to blunt one of EPA's important enforcement tools, the threat of a civil penalty, in seeking compliance with EPCRA. In other words, acceptance of respondent's reasoning would do more public harm than good.

Finally, GEC Precision seeks a penalty reduction on the ground that it is attempting to reduce the amount of 1,1,1 Trichloroethane and MEK which it uses in its operation. Resp. Br. at 2. This argument, however, likewise must be rejected. GEC Precision violated EPCRA not for using these toxic chemicals, but for failing to timely report their usage when the toxic chemicals' 10,000 pound reporting threshold was exceeded.

⁵ There is a dispute as to whether complainant informed respondent about an EPCRA Section 313 Reporting Workshop held in 1994. Compl. Br. at 28; Resp. Br. at 2. Inasmuch as this dispute concerns an EPCRA Reporting Workshop held after the submission deadlines for the Form Rs involved in this case, resolution of this poorly developed argument would have no effect upon the penalty question presented here.

ORDER

Accordingly, GEC Precision Corporation is ordered to pay a civil penalty of \$51,750 pursuant to Section 325 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11045, for the four violations of Section 313. 42 U.S.C. § 11023. Payment of the penalty shall be made within 60 days of the date of this order by mailing, or presenting, a cashier's or certified check made payable to the Treasurer of the United States, to the Regional Hearing Clerk, U.S. EPA Region VII, P.O. Box 360748M, Pittsburgh, Pennsylvania, 15251.⁶

Carl C. Charneski

Carl C. Charneski
Administrative Law Judge

⁶ Unless this decision is appealed to the Environmental Appeals Board ("EAB") in accordance with 40 C.F.R. § 22.30, or unless the EAB elects to review this decision *sua sponte*, it will become a final order of the EAB. 40 C.F.R. § 22.27(c).