UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Trinity Industries Inc.	)	Docket No. EPCRA-6-99-006
Fort Worth, Texas	)	
	)	
Respondent	)	
	)	

Initial Decision

Emergency Planning and Community Right-to-Know Act of 1986. This proceeding is commenced by the U.S. Environmental Protection Agency, pursuant to Section 325(c) of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), for alleged violations by Respondent of Section 313 of EPCRA regarding the submission of toxic chemical release inventories by an owner or operator of covered facilities. **HELD**: Respondent is found liable for failure to file Form Rs for Toluene for the calendar year 1995, Chromium and Nickel for 1997, and Zinc Compounds, Cadmium and Lead between 1994 and 1997. Respondent is assessed a penalty in the total amount of **$90,351**.

Before: Stephen J. McGuire
United States Administrative Law Judge

Date: April 24, 2002

APPEARANCES:

For Complainant:

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For Respondent:

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I. INTRODUCTION

This is a civil administrative proceeding instituted by the issuance of a Complaint on September 9, 1999, by the United States Environmental Protection Agency, Region VI, Dallas, Texas ("Complainant" or "EPA"). The Complainant commenced this action pursuant to Section 325(c) of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. § 11045(c), and pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Consolidated Rules").

Section 313 of EPCRA requires the owner or operator of a facility to submit a toxic chemical release inventory, commonly referred to as a Form R, to the Administrator of EPA and to the State in which the subject facility is located by July 1, for the preceding calendar year for each toxic chemical known by the owner or operator to be "manufactured, processed, or otherwise used" in quantities exceeding the established threshold quantity during that preceding calendar year. See EPCRA § 313(a). The Complaint charged Respondent with fifteen violations of EPCRA Section 313. Specifically, Count I alleges that the Respondent failed to file a Form R for Toluene for calendar year 1995, Counts II and III allege the failure to report Chromium and Nickel for 1997.[1] Counts IV through VII allege the failure to report Zinc Compounds between 1994 and 1997, while Counts VIII through XI allege the failure to report Cadmium from 1994 through 1997. Counts XII through XV allege the failure to report Lead from 1994 through 1997. The Complainant proposed a penalty of $225,183 for these alleged violations.

Respondent answered the Complaint and requested a hearing on October 8, 1999. The Respondent filed a Motion to Dismiss and for Partial Accelerated Decision as to Respondent's liability for the violations. By Order issued November 29, 2000, the Respondent's Motion was denied.

An evidentiary hearing was held in Dallas, Texas on May 9 and 10, 2001, on the issues of Respondent's liability, and the proposed penalty assessment. EPA offered into evidence forty-two exhibits, Complainant's Ex. 1 through 42, and called two fact witnesses. Respondent introduced thirty-nine exhibits, Respondent's Ex. 1 through 39, and called one fact witness.

II. FINDINGS OF FACT

1. The Respondent is a Delaware corporation doing business in the State of Texas, which owns and operates a facility located at 2548 NE 28th Street, Forth Worth, Texas. (Complaint at 2, ¶¶ 1-3; Answer at 2, ¶¶ 6-8.) The Respondent employs ten or more full time employees. (Answer at 2, ¶ 11.)

2. The Respondent's facility is in an applicable SIC code, namely SIC code 3743. (Complaint at 3, ¶ 7; Tr. at 135-36.)

[1] The Respondent concedes liability for Counts I – III. (Tr. at 6.)

3. Toluene, Chromium, Nickel, Zinc Compounds, Cadmium and Lead are listed toxic chemicals as defined under 40 C.F.R. § 372.65. The reporting threshold for a toxic chemical "otherwise used" at a facility is 10,000 pounds per calendar year. See 40 C.F.R. § 372.25(b). (Tr. at 37.) The reporting threshold for toxic chemicals "manufactured or processed" at a facility during the time in question is 25,000 pounds per calendar year. See 40 C.F.R. § 372.25(a). (Tr. at 37.)

4. The Chromium and Nickel for which Respondent is cited are components of stainless steel brought to the facility. (Respondent's Ex. 12.) The cutting of the steel plates causes the release of Chromium and Nickel. (Tr. at 397, 410.)

5. During the manufacturing process for the production of highway guard rails, Respondent's operation consisted of placing the guard rail in a acid pickling bath. This is followed by a water cleaning. Zinc Chloride and Ammonium Chloride are mixed together and a chemical reaction occurs which results in the production of Zinc Ammonium Chloride. The guard rail is then placed into a molten bath (called galvanizing) and a thin layer of the Zinc ammonium chloride is placed on the guardrail and protects it from undergoing oxidation which would result in the formation of rust. (Tr. at 120-25.)

6. Lead is present in the molten bath to add fluidity to the galvanizing operation. (Tr. at 170.) In the galvanizing process the Respondent coincidentally manufactured Zinc ammonium chloride and then otherwise used it during the process of preventing oxidation on the guardrail. (Tr. at 126, 452.)

7. "Manufacture" means to produce, prepare, import, or compound a toxic chemical. See 40 C.F.R. § 372.3. A toxic chemical is also "manufactured" if it is produced coincidentally during the manufacture, processing, use, or disposal of another chemical or mixture of chemicals, including a toxic chemical that is separated from that other chemical or mixture of chemicals as a byproduct, and a toxic chemical that remains in that other chemical or mixture of chemicals as an impurity. See id.

8. "Otherwise used" means any use of a toxic chemical, including a toxic chemical contained in a mixture or other trade name product or waste, that is not covered by the terms "manufacture" or "process." See 40 C.F.R. § 372.3. The otherwise use of a toxic chemical does not include disposal, stabilization (without subsequent distribution in commerce), or treatment for destruction unless:

> (1) The toxic chemical that was disposed, stabilized, or treated for destruction was received from off-site for the purposes of further waste management; or
>
> (2) The toxic chemical that was disposed, stabilized, or treated for destruction was manufactured as a result of waste management activities on materials received from off-site for the purposes of further waste management activities. Relabeling or

> redistributing of the toxic chemical where no repackaging of the toxic chemical occurs does not constitute otherwise use or processing of the toxic chemical.

See 40 C.F.R. § 372.3.

9. "Process" means the preparation of a toxic chemical, after its manufacture, for distribution in commerce:

> (1) In the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such substance, or
>
> (2) As part of an article containing the toxic chemical. Process also applies to the processing of a toxic chemical contained in a mixture or trade name product.

See 40 C.F.R. § 372.3.

10. The Respondent otherwise used 12,301 pounds of Toluene in 1995. (Complainant's Ex. 7.) Thus, the Respondent exceeded the 10,000 pound reporting threshold by 2,301 pounds.

11. The Respondent processed 401,915 pounds of Chromium in 1997. (Complainant's Ex. 10.) Thus, the Respondent exceeded the 25,000 pound reporting threshold by 376,915 pounds.

12. The Respondent processed 193,512 pounds of Nickel in 1997. (Complainant's Ex. 10.) Thus, the Respondent exceeded the 25,000 pound reporting threshold by 168,512 pounds.

13. The Respondent manufactured and otherwise used 44,600 pounds of Zinc Ammonium Chloride in 1997, 71,107 pounds in 1996, 31,058 pounds in 1995 and 66, 177 pounds in 1994. (Complainant's Exs. 11, 34.) Thus, the Respondent exceeded the 10,000 pound reporting threshold by 34,600 pounds, 61,107 pounds, 21,058 pounds, and 56,177 respectively.

14. The Respondent otherwise used 14,026.84 pounds of Cadmium in 1997, 13,124.65 pounds in 1996, 13,304.11 pounds in 1995, and 12,577 pounds in 1994. (Complainant's Exs. 11, 35.) Thus, the Respondent exceeded the 10,000 pound reporting threshold by 4,026.84 pounds, 3,124.65 pounds, 3,304.11 pounds, and 2,577 pounds respectively.

15. The Respondent otherwise used 42,080.52 pounds of Lead in 1997, 39,373.95 pounds in 1996, 39,912.33 pounds in 1995 and 37,731.765 pounds in 1994. (Complainant's Exs. 11, 36.) Thus, the Respondent exceeded the 10,000 pound reporting threshold by 32,080.52 pounds, 29,373.95 pounds, 29,912.33 pounds, and 27,731.765 pounds respectively.

16. Mr. Morton Wakeland, the enforcement coordinator for Region VI EPCRA Section 313 cases, testified that Mr. Larry Stranne, Mr. Rajen Patel, and he coordinate together to

"target" which number of facilities each year to inspect. (Tr. at 30.) Mr. Patel also testified that inspections were determined by targeting. (Tr. at 84.)

17. Due to limited resources, the EPA only inspects a limited number of companies. (Tr. at 227.) Mr. Wakeland testified that when identifying companies to inspect, the EPA uses a national database for facilities that qualify under Section 313 of EPCRA and cross-reference it with the Toxic Release Inventory ("TRI") database. (Tr. at 33.) Trinity was selected because of its "pattern of reporting" which Mr. Patel testified was inconsistent. (Tr. at 86.)

18. On August 13, 1998, EPA Region VI conducted a Compliance Evaluation Inspection ("CEI") at Respondent's facility. (Complainant's Ex. 16.) Although Trinity had been filing TRI reports from 1990 through 1997, the inspector found that Respondent failed to submit the following:

Form R for Toluene for calendar year 1995
Form R for Chromium for calendar year 1997
Form R for Nickel for calendar year 1997
Form A for Zinc Compounds for calendar years 1994 and 1997
Form R for Zinc Compounds for calendar years 1995 and 1996
Form R for Cadmium for calendar years 1994 to 1997
Form R for Lead for calendar years 1994 to 1997

(Complainant's Ex. 16; Tr. at 85.)

19. Respondent's Form R for Toluene for the year 1995 was due to the EPA and the State of Texas by August 1, 1996. (Complainant's Ex. 31.) Respondent filed its Form R report for Toluene for the year 1995 on August 4, 1999. (Id.) Respondent is therefore liable for its failure to report it's "otherwise use" of Toluene in a timely manner under the Section 313 reporting provisions for the year 1995. (Tr. at 6, 18.)

20. Respondent's Form R for Chromium for the year 1997 was due to the EPA and the State of Texas by July 1, 1998. (Complainant's Exs. 15, 32.) Respondent filed its Form R report for Chromium for the year 1997 on October 19, 1998. (Complainant's Ex. 32.) Respondent is therefore liable for its failure to report it's "processing" of Chromium in a timely manner under the Section 313 reporting provisions for the year 1996. (Tr. at 6, 18.)

21. Respondent's Form R for Nickel for the year 1997 was due to the EPA and the State of Texas by July 1, 1998. (Complainant's Exs. 15, 33.) Respondent filed its Form R report for Nickel for the year 1997 on October 19, 1998. (Id.) Respondent is therefore liable for its failure to report it's "processing" of nickel in a timely manner under the Section 313 reporting provisions for the year 1997. (Tr. at 6, 18.)

22. Respondent's Form A for Zinc Compounds for the year 1994 was due to the EPA and the State of Texas by July 1, 1995. (Complainant's Exs. 15, 34.) Respondent filed its Form A

report for Zinc Compounds for the year 1994 on August 27, 1998. (Complainant's Ex. 34.) Respondent is therefore liable for its failure to report it's "otherwise use" of Zinc Compounds in a timely manner under the Section 313 reporting provisions for the year 1994.

23. Respondent's Form R for Zinc Compounds for the year 1995 was due to the EPA and the State of Texas by August 1, 1996. (Complainant's Exs. 15, 34.) Respondent filed its Form R report for Zinc Compounds for the year 1995 on August 26, 1998. (Complainant's Ex. 34.) Respondent is therefore liable for its failure to report it's "otherwise use" of Zinc Compounds in a timely manner under the Section 313 reporting provisions for the year 1995.

24. Respondent's Form R for Zinc Compounds for the year 1996 was due to the EPA and the State of Texas by September 8, 1997. (Complainant's Exs. 15, 34.) Respondent filed its Form R report for Zinc Compounds for the year 1996 on August 26, 1998. (Complainant's Ex. 34.) Respondent is therefore liable for its failure to report it's "otherwise use" of Zinc Compounds in a timely manner under the Section 313 reporting provisions for the year 1996.

25. Respondent's Form R for Zinc Compounds for the year 1997 was due to the EPA and the State of Texas by July 1, 1998. (Complainant's Exs. 15, 34.) Respondent filed its Form R report for Zinc Compounds for the year 1997 on August 27, 1998. (Complainant's Ex. 34.) Respondent is therefore liable for its failure to report it's "otherwise use" of Zinc Compounds in a timely manner under the Section 313 reporting provisions for the year 1997.

26. The Respondent's Form A and R submissions identified the Zinc Compounds as "otherwise used" and "manufactured." (Complainant's Ex. 34.)

27. At hearing, the Respondent's witness, David West, the regional environmental manager, testified that the Form A and R report for Zinc Compounds for the years 1994 to 1997 were correct. (Tr. at 452.)

28. Respondent's Form R for Cadmium for the year 1994 was due to the EPA and the State of Texas by July 1, 1995. (Complainant's Exs. 15, 35.) Respondent filed its Form R report for Cadmium for the year 1994 on August 26, 1998. (Complainant's Ex. 35.) Respondent is therefore liable for its failure to report it's "otherwise use" of Cadmium in a timely manner under the Section 313 reporting provisions for the year 1994.

29. Respondent's Form R for Cadmium for the year 1995 was due to the EPA and the State of Texas by August 1, 1996. (Complainant's Ex. 15.) Respondent filed its Form R report for Cadmium for the year 1995 on August 26, 1998. (Complainant's Ex. 35.) Respondent is therefore liable for its failure to report it's "otherwise use" of Cadmium in a timely manner under the Section 313 reporting provisions for the year 1995.

30. Respondent's Form R for Cadmium for the year 1996 was due to the EPA and the State of Texas by September 8, 1997. (Complainant's Exs. 15, 35.) Respondent filed its Form R report for Cadmium for the year 1996 on August 26, 1998. (Complainant's Ex. 35.) Respondent

is therefore liable for its failure to report it's "otherwise use" of Cadmium in a timely manner under the Section 313 reporting provisions for the year 1996.

31. Respondent's Form R for Cadmium for the year 1997 was due to the EPA and the State of Texas by July 1, 1998. (Complainant's Exs. 15, 35.) Respondent filed its Form R report for Cadmium for the year 1997 on August 26, 1998. (Complainant's Ex. 35.) Respondent is therefore liable for its failure to report it's "otherwise use" of Cadmium in a timely manner under the Section 313 reporting provisions for the year 1997.

32. The Respondent's Form R submissions identified the Cadmium as "otherwise used." (Complainant's Ex. 35.)

33. Respondent's Form R for Lead for the year 1994 was due to the EPA and the State of Texas by July 1, 1995. (Complainant's Ex. 15, 36.) Respondent filed its Form R report for Lead for the year 1994 on August 26, 1998. (Complainant's Ex. 36.) Respondent is therefore liable for its failure to report it's "otherwise use" of Lead in a timely manner under the Section 313 reporting provisions for the year 1994.

34. Respondent's Form R for Lead for the year 1995 was due to the EPA and the State of Texas by August 1, 1996. (Complainant's Exs. 15, 36.) Respondent filed its Form R report for Lead for the year 1995 on August 26, 1998. (Complainant's Ex. 36.) Respondent is therefore liable for its failure to report it's "otherwise use" of Lead in a timely manner under the Section 313 reporting provisions for the year 1995.

35. Respondent's Form R for Lead for the year 1996 was due to the EPA and the State of Texas by September 8, 1997. (Complainant's Exs. 15, 36.) Respondent filed its Form R report for Lead for the year 1996 on August 26, 1998. (Complainant's Ex. 36.) Respondent is therefore liable for its failure to report it's "otherwise use" of Lead in a timely manner under the Section 313 reporting provisions for the year 1996.

36. Respondent's Form R for Lead for the year 1997 was due to the EPA and the State of Texas by July 1, 1998. (Complainant's Exs. 15, 36.) Respondent filed its Form R report for Lead for the year 1997 on August 26, 1998. (Complainant's Ex. 36.) Respondent is therefore liable for its failure to report it's "otherwise use" of Lead in a timely manner under the Section 313 reporting provisions for the year 1997.

37. The Respondent's Form R submissions identified the Lead as "otherwise used." (Complainant's Ex. 36.)

38. The Respondent certified each of the Form R submissions as accurate and has not taken steps to correct or amend the toxic chemical classifications. (Tr. at 454-55; Complainant's Exs. 34-36.)

39. On July 22, 1999, Mr. Patel sent a letter to Mr. David West regarding the August 1998 inspection. This letter requested threshold calculations for the chemicals in question which was not apparent in the Form R filings and information regarding chemicals for which no Form Rs were submitted. (Tr. at 100; Complainant's Ex. 5.) The EPA deems this information necessary because a company may not have a release but still be required to report the use of the chemicals. (Tr. at 108.) Mr. Patel contacted the Respondent a number of times before the information was submitted. (Tr. at 106, 109.) The Respondent reviewed its records and provided the information. (Complainant's Exs. 7-11.)

40. On December 22, 1997 the Respondent sent a letter to the EPA requesting assistance in determining if its Lead usage qualified for an article exemption. (Complainant's Ex. 37; Tr. at 443.)

41. On January 5, 1998, EPA Headquarters provided a written response to the Respondent which provided guidance as to whether the article exemption applied to Lead in Zinc slabs used in the Respondent's hot dip galvanizing process. (Complainant's Ex. 37.) The letter however, reflected the EPA's conclusion that the Lead in question did not qualify for the article exemption. (Id.)

42. Mr. Patel testified regarding the EPA's calculation of the penalty. Mr. Patel testified that he relied on the factors enumerated in Section 325(c) of EPCRA as interpreted in EPA's 1992 Enforcement Response Policy (ERP). This penalty policy discusses the calculation of a gravity-based penalty and adjustment factors which can either increase or decrease the gravity-based penalty. (Tr. at 284.)

43. According to the Consolidated Rules, the Administrative Law Judge "shall determine the amount of the recommended civil penalty based on the evidence in the record, and in accordance with any penalty criteria set forth in the Act" and "shall consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b).

44. Pursuant to Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), the Administrator may assess a penalty not to exceed $25,000 per day against Respondent for its violations of Section 313 of EPCRA.

45. The Respondent employed more than 50 people and had more than $10 million in total corporate sales. (Tr. at 296.)

46. The timely filing of Form A and Form R reports are important components of the EPCRA program. This information allows a community to understand the potential hazardous risks in their community. (Tr. at 44.)

47. The ERP contains a penalty matrix having "Extent Levels" A, B, and C on the horizontal axis and six "Circumstance Levels" on the vertical axis. (Complainant's Ex. 39 at 11.) The ERP provides that the extent level of a violation is based upon the quantity of the Section

313 chemical manufactured, processed, or otherwise used by the facility, and 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. Facilities which manufacture, process, or otherwise use less than ten times the threshold of the Section 313 chemical involved in the violation and which have $10 million or more in total corporate entity sales and fifty or more employees are in Extent Level B. (Complainant's Ex. 39 at 9.) 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 the states and to the federal government. The ERP creates two distinct categories, i.e., Category I and Category II, for failing to report in a timely manner. (Complainant's Ex. 39 at 4.) A reporting violation is characterized as a Category I violation if the form is submitted one year or more after the requisite due date. (Id.) A reporting violation is characterized as a Category II violation if the form is submitted after the requisite due date but before next year's reporting due date. (Id.) On the ERP penalty matrix, a Category I reporting violation is a Circumstance Level 1. (Complainant's Ex. 39 at 12; Tr. at 286-89.) A Category II reporting violation is a Circumstance Level 4, and the penalty is calculated on a per day basis. (Complainant's Ex. 39 at 13-14.)

48. Since the Respondent handled less than ten times the threshold amount for Toluene in 1995, and did not submit the Form R until over three years after it was due, the EPA categorized the violation as a Category I, Level 1 under the Circumstance Level, and Extent Level B. Mr. Patel therefore proposed a $17,000 penalty.[2] (Tr. at 299.)

49. The Respondent handled more than ten times the threshold amount of Chromium in 1997 and submitted the Form R one-hundred and ten days late. Mr. Patel determined that this constituted a Category II, Level 4 under the Circumstance Level, and Extent Level A. He then proposed a $15,927 penalty using the per day formula in the ERP. (Tr. at 300-301.)

50. The Respondent handled less than ten times the threshold amount of Nickel in 1997 and submitted the Form R one-hundred and ten days late. Mr. Patel determined that this constituted a Category II, Level 4 under the Circumstance Level, and Extent Level B. He then proposed a $10,213[3] penalty using the per day formula in the ERP. (Tr. at 304.)

51. The Respondent handled less than ten times the threshold amount of Zinc Compounds in 1997 and submitted the Form A fifty-seven days late. Mr. Patel determined that this constituted a Category II, Level 4 under the Circumstance Level, and Extent Level B. He then proposed a $8,456 penalty using the per day formula in the ERP. (Tr. at 305.)

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[2] The Complainant points out the typographical error in the transcript as pertains to the penalty amount calculated ($70,000). The amount assessed in the complaint is $17,000.

[3] Mr. Patel testified that he assessed a $10,230 penalty for Count III. However, the Complaint sought $10, 213 for Count III. (See Complainant's Ex. 1 at 12 "Proposed Penalty for Count - III: $10, 213".)

52. The Respondent handled less than ten times the threshold amount of Zinc Compounds in 1996 and submitted the Form R three hundred fifty-two days late. Mr. Patel determined that this constituted a Category II, Level 4 under the Circumstance Level, and Extent Level B. He then assessed a $18,269 penalty using the per day formula in the ERP. (Tr. at 305.)

53. The Respondent handled less than ten times the threshold amount of Zinc Compounds in 1995 and submitted the Form R almost two years late. Mr. Patel determined that this constituted a Category 1, Level 1 under the Circumstance Level, and Extent Level B. He then proposed a $17,000 penalty. (Tr. at 306.)

54. The Respondent handled less than ten times the threshold amount of Zinc Compounds in 1994 and submitted the Form A over one year late. Mr. Patel determined that this constituted a Category I, Level 1 under the Circumstance Level, and Extent Level B. He then proposed a $17,000 penalty. (Tr. at 306.)

55. The Respondent handled less than ten times the threshold amount of Cadmium in 1997 and submitted the Form R fifty-six days late. Mr. Patel determined that this constituted a Category II, Level 4 under the Circumstance Level, and Extent Level B. He then proposed a $8,423 penalty using the per day formula in the ERP. (Tr. at 307.)

56. The Respondent handled less than ten times the threshold amount of Cadmium in 1996 and submitted the Form R three-hundred fifty-two days late. Mr. Patel determined that this constituted a Category II, Level 4 under the Circumstance Level, and Extent Level B. He then proposed a $18,236 penalty using the per day formula in the ERP. (Tr. at 307.)

57. The Respondent handled less than ten times the threshold amount of Cadmium in 1995 and submitted the Form R over one year late. Mr. Patel determined that this constituted a Category I, Level 1 under the Circumstance Level, and Extent Level B. He then proposed a $17,000 penalty. (Tr. at 307.)

58. The Respondent handled less than ten times the threshold amount of Cadmium in 1994 and submitted the Form R over one year late. Mr. Patel determined that this constituted a Category I, Level 1 under the Circumstance Level, and Extent Level B. He then proposed a $17,000 penalty. (Tr. at 309.)

59. The Respondent handled less than ten times the threshold amount of Lead in1997 and submitted the Form R fifty-six days late. Mr. Patel determined that this constituted a Category II, Level 4 under the Circumstance Level, and Extent Level B. He then proposed a $8,423 penalty using the per day formula in the ERP. (Tr. at 309.)

60. The Respondent handled less than ten times the threshold amount of Lead in 1996 and submitted the Form R three-hundred fifty-two days late. Mr. Patel determined that this constituted a Category II, Level 4 under the Circumstance Level, and Extent Level B. He then proposed a $18,236 penalty using the per day formula in the ERP. (Tr. at 309-10.)

61. The Respondent handled less than ten times the threshold amount of Lead in 1995 and submitted the Form R over one year late. Mr. Patel determined that this constituted a Category I, Level 1 under the Circumstance Level, and Extent Level B. He then proposed a $17,000 penalty. (Tr. at 310.)

62. The Respondent handled less than ten times the threshold amount of Lead in 1994 and submitted the Form R over one year late. Mr. Patel determined that this constituted a Category 1, Level 1 under the Circumstance Level, and Extent Level B. He then proposed a $17,000 penalty. (Tr. at 310.)

III. DISCUSSION

A. The Respondent does not qualify for an article exemption for Lead or Cadmium

The Respondent argues that it is entitled, under 40 C.F.R. § 372.38(b), to an article exemption for Cadmium and Lead, and therefore not liable for the violations alleged in Counts VIII-XV. According to the regulations,

> If a toxic chemical is present in an article at a covered facility, a person is not required to consider the quantity of the toxic chemical present in such article when determining whether an applicable threshold has been met under § 372.25, § 372.27, or § 372.28 or determining the amount of release to be reported under § 372.30. This exemption applies whether the person received the article from another person or the person produced the article. However, this exemption applies only to the quantity of the toxic chemical present in the article. If the toxic chemical is manufactured (including imported), processed, or otherwise used at the covered facility other than as part of the article, in excess of an applicable threshold quantity set forth in § 372.25, § 372.27, or § 372.28, the person is required to report under § 372.30. Persons potentially subject to this exemption should carefully review the definitions of article and release in § 372.3. If a release of a toxic chemical occurs as a result of the processing or use of an item at the facility, that item does not meet the definition of article.

40 C.F.R. § 372.38(b).

The applicable regulation defines an article as:

> a manufactured item: (1) Which is formed to a specific shape or design during manufacture; (2) which has end use functions dependent in whole or in part upon its shape or design during end use; and (3) which does not release a toxic chemical under normal conditions of processing or use of that item at the facility or establishments.

40 C.F.R. § 372.3.

Mr. Wakeland of the EPA testified that even though the ingot came from another party, it is still a manufactured item and an article. (Tr. at 52.) At issue is whether the ingot retains its article status at the facility. The Respondent argues that since the ingot is designed to be melted into a coating, the physical dimensions of the ingot are irrelevant. The Court however, rejects this reasoning as the ingot not only changes its dimensions but also its physical form changes from a solid to a liquid and is thus unidentifiable after it is placed into the molten bath. (Tr. at 173, 456.) The terms "shape" and "design" do not have the same meaning, nor are they defined in the regulations. (Tr. at 206.) The regulations and EPA reporting instructions speak only in terms of "initial thickness or diameter" and "shape or diameter." See In re Sheffield Steel Corp., Docket No. EPCRA-V-96-017, 1997 EPA ALJ LEXIS 100 (ALJ, Nov. 21, 1997). The Respondent argues that "shape" is not the same as "design" and since there is no clear definition of "shape" and "diameter" in the regulations, its interpretation is reasonable. (Respondent's Brief at 19.) Again, however, the case law does not support Respondent's interpretation. The Court concludes that because the ingot does not maintain its shape or design in the process, it is no longer an "article" and is therefore not covered by the article exemption. See Sheffield Steel Corp., supra, at *37.

The Respondent also argues that the end use of the ingot is dependent upon its design. According to the testimony, the end use of the ingot is the bath. (Tr. at 446.) Mr. West testified that the ingot is "designed to have Zinc, Cadmium and Lead as components" which are placed on the guardrail when melted. The ingot is melted in a bath that produces the coating used to protect the guardrail. (Tr. at 445-46.) However, the Respondent has failed to prove the extent that chemicals in the coating are on the guardrail or that the ingot retains its original design after the bath. Mr. West testified that there is a portion of the Cadmium, Zinc and Lead which does not go on the guardrail. However, he was not sure of the concentration. (Tr. at 449.) The guardrails were not tested to determine whether Cadmium or Lead were present on the guardrail when it entered commerce. (Tr. at 458.) Since it is unclear whether the ingot performs its function or retains its components, Respondent has not demonstrated entitlement to the article exemption.

The Respondent fails to meet the third element of an article exemption because it coincidentally manufactures Zinc Ammonium Chloride. (Tr. at 126.) These chemicals are manufactured in the galvanizing process and therefore bring the compounds out of the article exemption. These and the remaining chemicals become part of the skimmings and dross which are removed from the bath. (Tr. at 251.) The Respondent indicated the amount of Zinc dross and skimmings in correspondence to EPA and stated that these amounts were released. (Complainant's Ex. 9.) Mr. West testified that these were sold to an interested party, which was indicated on the TRI forms. (Tr. at 215, 459.) These materials are therefore recycled, not disposed. (Tr. at 450.) Since they are not disposed, the Respondent argues that it qualifies for the exemption. However, regardless of whether the skimmings and dross are recycled, Mr. Patel testified that emissions were released during the galvanizing process based on the boiling points of Lead and Cadmium. (Tr. at 156-57.) Since the Respondent's witness, Mr. West, was unable to refute this testimony, it is reasonable to conclude that there was a release. As a result the Respondent does not qualify for the article exemption.

B. The Respondent is liable for "otherwise using" Cadmium, Lead and Zinc.

According to the Federal Regulations, the reporting threshold for a toxic chemical "otherwise used" at a facility is 10,000 pounds per calendar year while the threshold for chemicals "processed" or "manufactured" is 25,000 pounds. 40 C.F.R. § 372.25(a), (b).

The Respondent argues that it is "processing" Cadmium, Lead and Zinc rather than "otherwise using" these chemicals. This statement contradicts its Form R filings. On the Form Rs, the Respondent indicated that it was "otherwise using" the chemicals. (Complainant's Ex. 34.) Mr. West testified that during the inspection, the inspectors suggested that the Zinc was "otherwise used" and not article exempt and therefore the Respondent indicated that on its forms. (Tr. at 451, 459.) Mr. West tried to explain the inconsistency by arguing that if the chemicals are not article exempt than he believed that they were processed. However, the argument that the chemicals were processed fails because the chemicals do not meet the regulatory definition of "processed." First, the chemicals are not distributed into commerce in the same form or in a different form but rather are components of a coating material. See 40 C.F.R. § 372.3. Second, there must be an incorporation of the material into an article. Id. See also 53 Fed. Reg. 4500 (EPA, Feb. 16, 1988).

The Federal Register, in setting forth guidance on distinguishing "processing" from "otherwise using," states that a "toxic chemical is processed if (after its manufacture) it is ultimately made part of some material or product distributed in commerce." See 53 Fed. Reg. at 4506. On the other hand, "otherwise using" includes activities that "support, promote, or contribute to the facility's activities, where the chemical does not intentionally become part of a product distributed in commerce." Id. While the Respondent has shown that the chemicals are placed on the guardrail, it has not proven that the chemicals are an integral part of the guardrail. There was testimony that while the coating chemicals prevent rust on the guardrail and contributes to its ability to protect, it is not inherently necessary for the manufacture of the guardrail. (Tr. at 446.)

The Respondent has failed to demonstrate how much of the chemicals remain on the guardrail after the bath. Mr. West testified that he had no knowledge as to the amount nor were the guardrails tested to determine if Cadmium remained on the guardrail. (Tr. at 449, 458.) Thus, since the chemicals are not measurably incorporated into the guardrail, they are deemed "otherwise used" and do not qualify for an article exemption.

As to Respondent's argument that it "processed" Lead, it is still required to report as Respondent indicated the threshold levels for Lead was 42,080.52 pounds in 1997, 39,373.95 pounds in 1996, 39,912.33 pounds in 1995 and 37,731.765 pounds in 1994. (Complainant's Ex. 11.) Therefore, at the very least, the Respondent is liable for failing to file Form R's for Lead. However, the Court also concludes that Respondent "otherwise used" Lead thereby making the applicable reporting threshold 10,000 pounds as opposed to 25,000 pounds.

C. Complainant's Compliance Evaluation Inspection of Respondent's facility was Constitutional.

The Respondent contends that the EPA's inspection of its facility did not comport with constitutional standards and was therefore, unconstitutional. Specifically, Respondent posits that even though it consented to the Compliance Evaluation Inspection before granting the EPA inspectors access, that any evidence obtained during the inspection and all derivative evidence flowing from the inspection must be suppressed under the Exclusionary Rule. Respondent's constitutional challenge to EPA's inspection however, is rejected.

The Fourth Amendment to the U.S. Constitution protects individuals and businesses against unreasonable searches and seizures. As a general rule, a warrantless search of a business is unreasonable and thus, unconstitutional. See See v. City of Seattle, 387 U.S. 541, 543 (1967); Marshall v. Barlow's Inc., 436 U.S. 307, 322-24 (1978). However, the Supreme Court has made inroads to this general rule against warrantless searches. One such exception to the warrant requirement is voluntary consent to search. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973). There are several important considerations in determining whether a Respondent's consent to an inspection is valid, such as, whether the person who consented to the inspection had authority to do so, whether the scope of the search was reasonable, and whether the consent was voluntarily given. In the instant proceeding, the Respondent has raised the latter of these considerations. (Respondent's Post-Hearing Brief at 3.)

The Environmental Appeals Board (EAB) has examined this exception to the warrant requirement. See Litton Industrial Automation Systems ("Litton Industrial"), 5 E.A.D. 671, TSCA Appeal No. 93-4 (EAB, Jan. 27, 1995) (stating that "[i]t is well settled that a warrantless search conducted with voluntary consent does not violate the Fourth Amendment"). The EAB specifically addressed the voluntariness of the Respondent's consent to inspect its facility under the inspection provisions of Section 11 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2610. "The constitutional question of whether the consent to a search was in fact 'voluntary' . . . is a question of fact to be determined from the 'totality of all the circumstances.'" See Litton Industrial, supra, at 674 (quoting Schneckloth v. Bustamonte, supra, at 227 (1973). The EAB concluded that the Respondent's consent to the TSCA inspection was voluntary because the plant engineer signed a notice form which identified the purpose of the inspection, and the inspectors clearly identified themselves and the purpose of the inspection. See Litton Industrial, supra, at 675. See also In re Avril, Inc., IF&R Docket No. III-441-C (ALJ, Mar. 24, 1997) (ALJ finding Respondent's consent to an inspection under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") § 9(a), 7 U.S.C. § 136g(a), was voluntary where the inspectors presented proper credentials and the Respondent signed the Notice of Inspection prior to the inspection).

EPCRA does not statutorily authorize inspections, therefore there are no statutory requirements as in Section 11 of TSCA and Section 9 of FIFRA with which the EPA must comport. However, the inspectors in the instant matter employed similar safeguards as required by TSCA and FIFRA. First, prior to the inspection, EPA notified the Respondent that it would

conduct an inspection of its facility for compliance with Section 313 of EPCRA, and provided the Respondent with a Section 313 checklist. (Complainant's Ex. 16 at 4.) Moreover, on the date of the inspection, the inspectors presented their credentials to Respondent's Regional Environmental Manager, Mr. West, and explained the purpose of the inspection, which was to determine compliance with the Section 313 toxic chemical release reporting requirements. Id. Mr. West subsequently signed the Notice of Inspection which iterated the purpose of the inspection. (Complainant's Ex. 18 (copy of the signed "Notice of Inspection").) As discussed in Litton Industrial, Respondent's voluntary consent is a matter of fact to be judged by a "totality of all the circumstances." See Litton Industrial, supra, at 674. Based on this test and using similar factors employed by the EAB in Litton Industrial, Respondent's consent was, as a matter of fact, voluntary. Respondent made a knowing, informed decision to consent to an inspection of its facility for EPCRA Section 313 violations.

Therefore, Respondent's voluntary consent to the EPA inspection of its facility extinguishes its constitutional challenge to the inspection on Fourth Amendment grounds. Because Respondent's consent was voluntary, the Complainant's warrantless inspection of Respondent's facility passes constitutional muster. Yet, the Respondent next urges the Court to find that its consent, though voluntarily given, was nevertheless invalid. (See Respondent's Post Hearing Brief at 3 citing United States v. Harris Methodist Ft. Worth ("Harris Methodist"), 970 F.2d 94 (5th Cir. 1992).)

In Harris Methodist, the Fifth Circuit held that the Department of Health and Human Services' (HHS) proposed compliance review of a Texas hospital's physician staff privileges was an unreasonable warrantless search. HHS had notified Harris Methodist that it had been targeted for an investigation to ensure compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Id. at 96. HHS requested an expansive amount of information. Harris Methodist opposed the scope of the requested materials and refused to allow HHS investigators access to the requested information. Id. Thus, HHS filed suit against Harris Methodist seeking declaratory relief. Harris Methodist objected to the proposed compliance review, contending that it resulted in an unreasonable warrantless search.

On appeal before the Fifth Circuit, HHS argued that Harris Methodist had consented to the administrative compliance review when it signed an assurance of compliance with Title VI regulations in exchange for federal funding. See id. at 99-100. Although the Fifth Circuit was willing to accept this proposition, it stated that "any consent found in the execution of the assurances of compliance is consent only to searches that comport with constitutional standards of reasonableness." Id. at 100. The Fifth Circuit subsequently affirmed the district court's decision that the proposed compliance review was unreasonable because despite HHSs' interest in preventing discrimination, the scope of the proposed search was too broad and HHSs' decision to inspect Harris Methodist was "initiated arbitrarily and without an administrative plan containing neutral criteria." Id. at 103.

In the case at bar, the EPA is not relying upon a contractual agreement entered into between the Respondent and the EPA prior to the Compliance Evaluation Inspection as the basis

for the warrantless search. Rather, the EPA obtained Respondent's voluntary consent on the day of the inspection specifically to perform an EPCRA Section 313 inspection. In this respect, the inspection of Respondent's facility is clearly distinguishable from Harris Methodist in that the inspection here was not overly broad; was not arbitrarily initiated but based on a national TRI database which cross-referenced an "inconsistent pattern of [Respondent's] reporting"(FOF 17); and in that the Respondent did not refuse the inspectors access to the requested materials or question the scope of the inspection.

Respondent also challenges the constitutionality of the administrative plan which the EPA uses to select facilities for EPCRA Compliance Evaluation Inspections. (Respondent's Post-Hearing Brief at 3-6.) However, it is not necessary to reach this issue. Respondent's voluntary consent under the instant facts is consistent with court precedent and the EAB's standard in Litton Industrial, supra, and obviates further discussion of the constitutionality of the EPA's inspection of the Respondent's facility. Had the Respondent objected to the Compliance Evaluation Inspection thereby forcing the EPA to obtain an administrative search warrant, the Court may have had the opportunity to entertain Respondent's challenge to the EPA's administrative plan.[4]

D. Penalty Discussion

1. EPCRA Section 313 Penalty Criteria

Respondent's liability having been established, the Act at issue here, EPCRA, provides that any person violating Section 313 of EPCRA, 42 U.S.C. § 11023, "shall be liable to the United States for a civil penalty in an amount not to exceed $ 25,000 for each such violation." See EPCRA §§ 325(c)(1), (3).[5] However, Section 325(c)(1) of EPCRA fails to enumerate any

[4] See Marshall v. Barlow's Inc., supra, holding that absent consent, a warrant is constitutionally required in order to conduct administrative inspections under § 8(a) of OSHA. For administrative inspections, "probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." Marshal v. Barlow's Inc., supra, at 320 (internal quotations omitted). Lower courts have interpreted this language as requiring either specific evidence of a violation or a neutral inspection scheme. See Industrial Steel Prods. Co. v. OSHA, 845 F.2d 1330 (5th Cir.), cert. denied, 488 U.S. 993 (1988) (OSHA-programmed health inspection plan); In re Texas Tank Car Works, 597 F. Supp. 591 (N.D. Tex. 1984) (OSHA inspection plan); Chicago Zoological Soc'y v. Donovan, 558 F. Supp. 1147 (N.D. Ill. 1983) (OSHA accident investigation policy).

[5] The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, requires the EPA to periodically adjust penalties to account for inflation. The EPA has issued a Civil Monetary Penalty Inflation Adjustment Rule which declares that the maximum civil penalty for violations of Section 313 of EPCRA that

guiding criteria for determining how much of the maximum $ 25,000 per violation civil penalty should be imposed in a particular case. Prior EPA administrative decisions have looked to preceding sections for guidance. See e.g., Catalina Yachts, Inc., EPA Docket No. EPCRA-09-94-0015 (ALJ, Feb. 2, 1998); TRA Industries Inc., EPA Docket No. EPCRA-1093-11-05-325 (ALJ, Oct. 11, 1996); GEC Precision Corp., EPA Docket No. EPCRA-7-94-T-3 (ALJ, Aug. 28, 1996).

Section 325(b)(1)(C) of EPCRA, 42 U.S.C. § 11045(b)(1)(C), governs Class I violations of the emergency notification requirements of Section 304 of EPCRA, 42 U.S.C. § 11004. This provision provides for a penalty of not more than $ 25,000 *per violation* and directs the Administrator to "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." EPCRA § 325(b)(1)(C). Whereas, Section 325(b)(2) of EPCRA, 42 U.S.C. § 11045(b)(2), covering Class II violations of EPCRA's emergency notification provisions provides for a penalty of up to $25,000 per day and incorporates by reference, the penalty assessment procedures and provisions of Section 16 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615. A comparison of the penalty assessment criteria in Sections 325(b)(1)(C) of EPCRA and 16(a)(2)(B) of TSCA demonstrates that the penalty factors are nearly identical, except that the TSCA factor, "effect on ability to continue to do business," is substituted for "economic benefit or savings" in EPCRA – neither of which are at issue in the instant proceeding.

2. Amount of Civil Penalty

The Enforcement Response Policy (ERP) for Section 313 violations

Complainant purports to have calculated the penalty for the fifteen violations alleged in the Complaint, in accordance with the 1992 ERP. The ERP's stated purpose is to "ensure that enforcement actions for violations of EPCRA § 313...are arrived at in a fair, uniform and consistent manner; that the enforcement response is appropriate for the violation committed; and that persons will be deterred from committing EPCRA § 313 violations." ERP at 1.

The ERP contains a gravity-based penalty which may then be adjusted upwards or downwards according to factors listed in the ERP. In determining the gravity-based penalty, the "extent level" for fourteen of the violations at issue was determined to be "Level B", because the amounts of the chemicals involved were less than ten times the applicable thresholds. Trinity's annual sales exceed $ 10 million, and it had fifty or more employees. The "extent level" for Count II was "level A" since the Respondent handled more that ten times the threshold amount. (Tr. at 300.) The ERP provides that Category I violations are those where the Form R was

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occurred on or after January 31, 1997, and assessed under Section 325(c)(1) of EPCRA, is $27,500 per violation. See 40 C.F.R.§ 19.4; 61 Fed. Reg. 69360 (Dec. 31, 1996).

submitted one year or more after the July 1, due date and that Category II violations are those submitted less than one year after the due date. ERP at 4.

The second stage for determining the appropriate penalty under the ERP involves the "adjustments" to the gravity-based penalty. The ERP allows for the gravity-based penalty to be adjusted upward or downward for a number of factors including the following:

A) voluntary disclosures - a downward adjustment of up to 50%
B) delisted chemicals- a downward adjustment of a fixed 25% per chemical
C) attitude- a downward adjustment of up to 30%
D) other factors as justice may require, such as significant-minor borderline violations-a downward adjustment of up to 25%.

Mr. Patel testified that he determined the total gravity-based penalty to be $225,183 and did not feel that an adjustment to the penalty was warranted. (Tr. at 320-23.)

Departure from the ERP

While it is clear that EPA has strictly adhered to the ERP framework, such application to the facts of this case does not result in an appropriate penalty. The Court takes note that the EAB has placed the adherence to penalty policies in perspective. "While the regulations governing this proceeding require that presiding officers consider such civil penalty policies in reaching their penalty determinations, see 40 C.F.R. § 22.27(b), they are not required to follow them, since such policies, not having been subjected to rulemaking procedures of the Administrative Procedure Act, lack the force of law." Robert Wallin, 10 E.A.D. ___, slip op. at 10 n.9, CWA Appeal No. 00-3 (EAB, May 30, 2001). See also, In re Steeltech, Ltd., 8 E.A.D. 577, EPCRA Appeal No. 98-6 (EAB, Aug. 26, 1999). The Board has also advised that presiding officers "must refrain from treating the [Penalty Policy] as a rule, and must be prepared 'to re-examine the basic propositions' on which the policy is based . . ." In re Employers Ins. of Wausau, 6 E.A.D. 735, 761 (EAB, Feb. 11, 1997).

A finding of "extraordinary circumstances" is not required to deviate from the policy's guidance. See Gilbert Martin Woodworking Co. d/b/a Martin Furniture, Docket No. EPCRA 09-99-0016 (ALJ, June 18, 2001). For the reasons that follow, the Court, having considered the Penalty Policy, departs from its guidance in this instance. The Court believes that the Policy, under the particular facts and circumstances of this proceeding, does not yield a penalty that is appropriate for the violations committed and therefore a departure from the Penalty Policy is necessary and warranted.

The Respondent argues that the EPA's penalty calculation should be rejected because it is based upon a policy that, as applied in the instant matter, is "arbitrary and capricious." (Respondent's Brief at 7.) Respondent specifically challenges the efficacy of the "extent" component of the ERP penalty matrix in the instant proceeding. Respondent contends that although the ERP purportedly considers the quantity of the chemical involved as the primary

factor in the extent component, in application in this proceeding, the primary factor is the size of Respondent's business. (Respondent's Brief at 8.) Respondent's criticism of the ERP and Complainant's requested penalty is well-taken.

As discussed above, the penalty factors used in assessing violations of Section 313 of EPCRA include, *inter alia*, the "extent" of the violation. See EPCRA § 325(b)(1)(c); TSCA § 16(a)(2)(B). In the ERP, the EPA interpreted the term "extent" to include both the quantity of each Section 313 chemical manufactured, processed, or otherwise used by the facility as well as the size of the facility based upon its gross sales and number of employees. See ERP at 8. The ERP states that using "the amount of the § 313 chemical involved in the violation as the primary factor . . . underscores the overall intent and goal of EPCRA § 313." ERP at 9. Yet, "the size of the violator is used as a second factor . . . to reflect the fact that the deterrent effect of a smaller penalty upon a small company is likely to be equal to that of a larger penalty upon a large company." ERP at 10. However, the ERP also states that its objective is to ensure that the penalty is both "fair" and "appropriate". See ERP at 1.

The Court is cognizant of the obligation to consider the ERP. See 40 C.F.R. § 22.27(b). However, the applicable regulations and EAB precedent make clear that although the ERP must be considered, the undersigned has significant discretion to assess a penalty other than that calculated pursuant to the ERP. See Lyon County Landfill, 10 E.A.D.___, CAA Appeal No. 00-50, slip op. at 46 (EAB, Apr. 1, 2002). After having considered the ERP, the Court concludes that, based upon the facts of the present case, application of the ERP's "size of the violator" extent criterion produces a gravity-based penalty that is neither fair nor appropriate as compared to Respondent's marginal violations of the Section 313 reporting requirements.

Respondent's unreported exceedences of chemicals "otherwise used" averaged about 23,000 pounds above the 10,000 pound threshold. For five of the fifteen counts, Respondent's exceedences ranged from 2,301 pounds to 4,026 pounds over the 10,000 pound threshold.[6] Yet, under the ERP, these exceedences are treated the same as if Respondent had otherwise used 99,999 pounds of unreported chemicals over the 10,000 pound threshold because the ERP's extent component only considers increments of 10 times greater than or less than the applicable threshold. On the record of the instant proceeding, this seems incongruent with the ERP's goal to achieve a fair and appropriate penalty. Thus, to reflect the ERP's pronouncement that the amount of the chemical involved should be the primary factor, and because of the nominal nature of most of the Respondent's reporting violations in the instant matter, a penalty primarily based upon the quantity of unreported chemical will render a more fair and appropriate penalty. Such an approach is not novel. See In re Hall Signs, Inc., Docket No. 5-EPCRA-96-026, 1997 EPA ALJ LEXIS 99 (ALJ, Oct. 30, 1997).

In Hall Signs, the Administrative Law Judge employed a penalty calculation methodology which emphasized the quantity of the chemical involved as opposed to the size of the violator. See Hall Signs, supra, at *17-20. On appeal, the EAB affirmed the Administrative

[6] See Count I, Count VIII, Count IX, Count X, and Count XI.

Law Judge's rationale, concluding that "although the methodology used by the [Administrative Law Judge] in calculating the penalty in this case represents a substantial departure from the ERP guidelines, his analysis establishes that he *considered* the ERP as required by the regulations, but did not find it appropriate as applied in this case." In re Hall Signs, Inc., EPCRA Appeal No. 97-6, slip op. at 9 (EAB, Dec. 16, 1998) (emphasis in original).

In the instant proceeding, the Court is employing a penalty calculation methodology which uses the circumstance levels articulated in the ERP in conjunction with the lowest extent level as a base penalty for each untimely filing violation with upward adjustments of $1,000 for every 10,000 pounds of toxic chemical used or processed but not reported. Thus, the penalty calculation formula calculates an initial gravity-based penalty by first determining the appropriate Circumstance Level based on the ERP and then is adjusted upward based upon the amount of pounds over the applicable threshold. The methodology accounts for inflation,[7] where appropriate, by adjusting the base penalty. Thus, for Counts I, VI-VII, X-XI, and XIV-XV, the base penalty per each violation is $5,000 because each of these violations constitute Circumstance Level 1 violations and occurred prior to January 31, 1997.[8] See supra, Section II, ¶¶ 10, 13-15 (articulating the pounds of unreported chemical over the applicable threshold for these violations). Whereas, for Counts II-V, VIII-IX, and XII-XIII, the base penalty per each violation is $1,100 because each of these violations constitute Circumstance Level 4 violations and occurred after January 31, 1997.[9] See supra, Section II, ¶¶ 11-15 (articulating the pounds of unreported chemical over the applicable threshold for these violations). Under this formula, Respondent's gravity-based penalty for its fifteen reporting violations is $129,074.[10] The methodology does not use a per-day penalty calculation formula for those untimely filings that did not exceed one year because such an approach would shift the focus of the penalty away from the amount of the chemical involved which, as the Court maintains in the instant

[7] See supra, n.5.

[8] Count I – $5,230, Count VI – $7,105, Count VII – $10,617, Count X – $5,330, Count XI – $5,257, Count XIV – $7,991, and Count XV – $7,773.

[9] Count II – $38, 791, Count III – $17,951, Count IV – $4,560, Count V – $7,210, Count VIII – $1,502, Count IX – $1,412, Count XII – $4,308, and Count XIII – $4,037.

[10] Count I = $5,000 + $230 ($1,000 x 2,301 lbs / 10,000 lbs); Count II = $1,100 + $37, 691 ($1,000 x 376,915 lbs / 10,000 lbs); Count III = $1,100 + $16,851 ($1,000 x 168,512 lbs / 10,000 lbs); Count IV = $1,100 + $3,460 ($1,000 x 34,600 lbs / 10,000 lbs); Count V = $1,100 + $6,110 ($1,000 x 61,107 lbs / 10,000 lbs); Count VI = $5,000 + $2,105 ($1,000 x 21,058 lbs / 10,000 lbs); Count VII = $5000 + $5,617 ($1,000 x 56,177 lbs / 10,000 lbs); Count VIII = $1,100 + $402 ($1,000 x 4,026 lbs / 10,000 lbs); Count IX = $1,100 + $312 ($1,000 x 3,124 lbs / 10,000 lbs); Count X = $5,000 + $330 ($1,000 x 3,304 lbs / 10,000 lbs); Count XI = $5,000 + $257 ($1,000 x 2,577 lbs / 10,000 lbs); Count XII = $1,100 + $3,208 ($1,000 x 32,080 lbs / 10,000 lbs); Count XIII = $1,100 + $2,937 ($1,000 x 29,373 lbs / 10,000 lbs); Count XIV = $5,000 + $2,991 ($1,000 x 29,912 lbs / 10,000 lbs); Count XV = $5,000 + $2,773 ($1,000 x 27,731 lbs / 10,000 lbs).

proceeding, is the primary factor in assessing the penalty. Moreover, by employing the ERP's Category I/Category II distinction for the base penalty, the methodology does embody a time element.

The EAB has noted that "[t]he reporting requirements of EPCRA § 313 are the means determined by Congress to provide residents and local governments with information regarding hazardous chemicals present in the locality." Woodcrest Manufacturing, Inc., 7 E.A.D. 757, 780, EPCRA Appeal No. 97-2 (EAB, July 23, 1998). Thus, failure to comply with the reporting requirements of Section 313 of EPCRA subjects the violator to liability under Section 325(c) of EPCRA. Respondent did violate the reporting requirements and, accordingly, was found liable for its violations. Respondent's compliance with the EPCRA regulations for the other chemicals it used shows that Respondent knew it was subject to the TRI. Second, the Respondent sought previous guidance on whether the ingot qualified for the article exemption. Mr. Patel testified that he did not consider the letter to the Respondent regarding the applicability of the article exemption to the Lead and Zinc ingot. (Tr. at 337.) This guidance document stated that the process the Respondent described did not qualify for an exemption. (Complainant's Ex. 37.) There is no evidence in the record that the Respondent objected to this determination. Rather, the Respondent continued to omit the chemicals in the ingot in its TRI reporting. This document shows that the Respondent was aware that the EPA did not consider the ingot exempt from the TRI reporting requirements.

However, on the facts of the instant record, i.e., Respondent's nominal amounts over the reporting threshold, Respondent's EPCRA violations do not warrant as significant a penalty as proposed by Complainant. This Court does not conclude, as the Chief Administrative Law Judge did in Clarksburg Casket, that "it is reasonable for a non-filing violation which is slightly over the threshold amount to be assessed a significant penalty" where the primary basis for doing so is the size of the violator. Clarksburg Casket Co., Docket No. EPCRA-III-165, 1998 EPA ALJ LEXIS 39, *31 (ALJ, July 10, 1998). Congress may have determined that "failure to comply with the reporting requirements of § 313 alone is sufficient for liability and assessment of a civil penalty," Woodcrest, supra, at 780, but "there is nothing in EPCRA that indicates that the size of the business of the violator should be a significant penalty factor." Hall Signs, supra, at *16 (ALJ, Oct. 30, 1997).

"A primary purpose of civil penalties is deterrence." Ocean State Asbestos Removal, Inc., 7 E.A.D. 552, 548, CAA Appeal Nos. 97-2 & 97-5 (EAB, Mar. 13, 1998) (citing In re Sav-Mart, Inc., 5 E.A.D. 732, 738, FIFRA Appeal No. 94-3 (EAB, Mar. 8, 1995)). To achieve this end, the ERP incorporated the size of the violator criterion in the extent level determination. Even though the aforementioned penalty methodology does not include the size of the violator as one of the factors driving the penalty calculation, the undersigned concludes that in the instant matter, the assessed gravity-based penalty of $129,074 is sufficient to act as a deterrent, regardless of business size, for relatively minor violations of Section 313 of EPCRA.

Adjustment Factors

After determining the gravity-based penalty, the ERP requires consideration of several "adjustment factors" that can either increase or decrease the gravity-based penalty. The penalty policy includes a number of adjustment factors, including, voluntary disclosure, history of prior violations, attitude, ability to pay[11], supplemental environmental projects, and other factors as justice may require. In drafting the penalty, Mr. Patel testified that he did not consider attitude, supplemental projects, ability to pay, or other factors as justice may require because he did not have enough information to make the adjustments. (Tr. at 326.) Thus, the EPA determined that none of these adjustment factors were applicable to the case at bar. However, the court disagrees with the EPA's determination regarding the adjustment factors.

Mr. Patel testified that the voluntary disclosure factor did not apply because the EPA inspected Trinity and discovered the violations as a result of the information requests. (Tr. at 320.) He also testified that there was no prior history of violations, therefore there was no upward adjustment for this factor. The penalty matrix is intended to apply to first time offenders and does not give a reduction for first time offenders. ERP at 16. The EAB has noted that this factor usually only applies to respondents with a prior violation who have not been sufficiently motivated to comply despite the assessment of a penalty for previous violations. ERP at 16; see also In re Mobil Oil Corp., 5 E.A.D. 490, 519 (EAB, Sept. 9, 1994) (noting that a history of full compliance does not give rise to a downward adjustment because the gravity-based penalties are intended to apply to first time violators). Neither the voluntary disclosure factor, nor the history of violations factor will be used to adjust the gravity-based penalty.

According to the ERP "attitude" is comprised of two components, cooperation and compliance, for each of which the ERP provides for an adjustment of up to 15% (fifteen percent). ERP at 18. However the reduction is not mandatory. Mr. Patel testified that under "cooperation" he only considered the inspection. (Tr. at 334.) Although he did not adjust the penalty, Mr. Patel testified that he believed Trinity was eligible for a 15% reduction for each of the factors. (Tr. at 384.) Given the facts in this record, a reduction is reasonable and warranted. At the time of the inspection, Trinity signed the notice of inspection and allowed the inspectors on the property. (Tr. at 336.) Based on testimony from both parties, it appears that the inspection was cordial and that Trinity was very cooperative. (Tr. at 442.) The Respondent's post inspection behavior is also a factor in the penalty. Mr. Patel testified that it took several phone calls before the information was supplied. (Tr. at 99-110.) However, the record shows that the Respondent responded promptly. The EPA submitted an information request on July 22, 1999, which was answered on August 6, 1999, approximately two weeks later. (Complainant's Exs. 7, 9.) It also appears from the record that the EPA and the Respondent spoke a number of times about the information the EPA needed. The Respondent addressed these conversations by

[11] The EPA must show that the Respondent has the ability to pay and the Respondent has the burden of proving otherwise. In re New Waterbury, Ltd., 5 E.A.D. 529, 542-43 (EAB 1994). The EPA has met it's burden of proving that that the Respondent is able to pay the penalty. (Complainant's Ex. 12.) The Respondent does not make an ability to pay defense and therefore the Court concludes that the Respondent has the ability to pay.

submitting the requested information. (Complainant's Exs. 7-11.) Thus, the gravity-based penalty can be reduced by 15 % for Respondent's cooperation.

The second component of attitude is compliance. The fact that it only took the company a few weeks after the inspection to file the overdue Form R's should also be considered in mitigating the gravity-based penalty. The Respondent was made aware of the problem after the inspection and promptly filed the necessary forms. Additionally, the company had been reporting other chemicals throughout the time period in question. (Tr. at 85.) This prompt response and continued reporting demonstrates a commitment to the EPCRA program and weighs in Respondent's favor. Therefore the company is entitled to a 15 % reduction in the penalty based on compliance as well. Thus, under these facts, Respondent is entitled to the full 30% (thirty percent) downward adjustment for its "attitude."

The Respondent also argues that it is entitled to a reduction in the penalty for environmentally beneficial activities. While the ERP provides for a reduction only during settlement negotiations, other cases have found that environmentally beneficial expenditures could be appropriately considered under "other factors as justice may require." Spang & Co., EPCRA Appeal Nos. 94-3 & 94-4, Remand Order, 6 E.A.D. 226 (EAB, Oct. 20, 1995). The broad avenue for potential penalty mitigation apparently available under Spang & Co., however, was severely restricted in Catalina Yachts, Inc., 8 E.A.D.199, EPCRA Appeal Nos. 98-2 & 98-5 (EAB, Mar. 24, 1999), in which the EAB held that penalty mitigation was available under the "as justice may require" statutory criterion only if it were manifestly unjust not to do so. The Respondent asks the Court to consider the $140,000 spent on training its environmental managers in the area of TRI filings as an environmentally beneficial activity. (Tr. at 452.) The Respondent, however, is required to be aware of all environmental regulations. Green Thumb Nursery, Inc., Docket No. IF&F-V-014-94 (ALJ, Aug. 31, 1995). This expenditure does not in and of itself qualify for credit as a supplemental environmental project. However, the fact that the Respondent took steps to educate its employees on the TRI and back-filed the TRI forms shows an effort to comply with EPCRA. This fact can be taken into consideration in the calculation of the penalty.

The final adjustment factor is "other factors as justice may require." The EAB has stated that "the justice factor comes into play only where application of the other adjustment factors has not resulted in a 'fair and just' penalty." Catalina Yachts, Inc., supra, at 216. Based upon the penalty calculation methodology in conjunction with the downward adjustment for attitude, it is not necessary to utilize this final factor. Respondent's arguments regarding the size of the violator and the lateness of the filings have been addressed with the formulation of a penalty calculation methodology that focuses primarily on the amount of unreported chemical that exceeded the applicable threshold. Thus, it is not necessary to adjust the penalty under this factor. Moreover, the Respondent urges the court to reduce the penalty under this final adjustment factor, on the theory that a majority of the chemicals are non-toxic. While this argument has some merit, it will not reduce the penalty in the instant proceeding. The reporting requirements of Section 313 of EPCRA ensure that the EPA, state, and local authorities are aware of the chemicals that are present in our nation's communities. (Tr. at 44.) Failing to

report contravenes the very purpose of Section 313 of EPCRA. Thus, the penalty will not be reduced to account for the non-toxic nature of some of the chemicals at issue in this proceeding.

Under the Court's penalty calculation formula, as discussed above, the gravity-based penalty for the Respondent's fifteen violations of Section 313 of EPCRA is $129,074. After employing the ERP's "adjustment factors," the Court concludes that it is appropriate to adjust the gravity-based penalty downward by 30% for Respondent's attitude, which includes both its cooperation and compliance.[12] Because no other penalty factors were applicable to either increase or decrease the gravity-based penalty, the total penalty assessed against Respondent is **$90,351**.

IV. CONCLUSIONS OF LAW

1. The Respondent, Trinity Industries, Inc., is a "person" as that term is defined by Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).

2. Respondent is the owner or operator of a "facility" as that term is defined by Section 329(4) of EPCRA, 42 U.S.C. § 11049(4).

3. Respondent's facility had 10 or more full-time employees during the reporting years in question and is in an applicable SIC Code.

4. Respondent's facility otherwise used, as that term is defined in 40 C.F.R. § 372.3, approximately 12,301 pounds of Toluene in calender year 1995.

5. Respondent's facility processed, as that term is defined in 40 C.F.R. § 372.3, approximately 401,915 pounds of Chromium in calendar year 1997 and 193,512 pounds of Nickel in calendar year 1997. These quantities exceed the threshold of 25,000 pounds established by Section 313(f) of EPCRA and 40 C.F.R. § 372.25.

6. Respondent's facility otherwise used, as that term is defined in 40 C.F.R. § 372.3, approximately 44,600 pounds of Zinc Compounds in calendar year 1997, 71,107 pounds of Zinc Compounds in calendar year 1996, 31,058 pounds of Zinc Compounds in calendar year 1995, and 66,177 pounds of Zinc Compounds in calendar year 1994. These quantities exceed the threshold of 10,000 pounds established by Section 313(f) of EPCRA and 40 C.F.R. § 372.25.

7. Respondent's facility otherwise used, as that term is defined in 40 C.F.R. § 372.3, approximately 14,026 pounds of Cadmium in calendar year 1997, 13,124 pounds of Cadmium in calendar year 1996, 13,304 pounds of Cadmium in calendar year 1995, and 12,577 pounds of Cadmium in calendar year 1994. These quantities exceed the threshold of 10,000 pounds established by Section 313(f) of EPCRA and 40 C.F.R. § 372.25.

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[12] This thirty percent adjustment of the $129,074 gravity-based penalty, will reduce the penalty by $38,722 ($129,074 x .3 = $38,722).

8. Respondent's facility otherwise used, as that term is defined in 40 C.F.R. § 372.3, approximately 42,080 pounds of Lead in calendar year 1997, 39,373 pounds of Lead in calendar year 1996, 39,912 pounds of Lead in calendar year 1995, and 37,731 pounds of Lead in calendar year 1994. These quantities exceed the threshold of 10,000 pounds established by Section 313(f) of EPCRA and 40 C.F.R. § 372.25.

9. Respondent was subject to the reporting requirements set forth at 40 C.F.R. § 372.30.

10. Respondent's facility was required by 40 C.F.R. § 372.30(a) to submit to the EPA and to the State of Texas a completed Form R or Form A for each toxic chemical known by the owner or operator to be manufactured, processed, or otherwise used in excess of an applicable threshold quantity for a calendar year.

11. Respondent committed fifteen reporting violations of Section 313 of EPCRA for failing to timely file toxic chemical release forms for its processing and otherwise use of Toluene for calendar year 1995, Chromium for calendar year 1997, Nickel for calendar year 1997, Zinc Compounds for calendar years 1994-1997, Cadmium for calendar years 1994-1997, and Lead during calendar years 1994-1997.

12. Strict adherence to the Section 313 Penalty Policy is not appropriate in the case at bar for Respondent's violations of Section 313 of EPCRA and 40 C.F.R. Part 372, as described in Counts I-XV of the Complaint.

13. The gravity-based penalty of $129,074 for Respondent's violations of Section 313 of EPCRA is authorized, and the amount of the penalty is in accordance with the statutory penalty criteria in Section 325(b)(2) of EPCRA. The total penalty of $129,074 ($5,230 for Count I, $38, 791 for Count II, $17,951 for Count III, $4,560 for Count IV, $7,210 for Count V, $7,105 for Count VI, $10,617 for Count VII, $1,502 for Count VIII, $1,412 for Count IX, $5,330 for Count X, $5,257 for Count XI, $4,308 for Count XII, $4,037 for Count XIII, $7,991 for Count XIV, and $7,773 for Count XV) is appropriate under the particular facts and circumstances of this case. See EPCRA § 325(c)(1). A downward adjustment of 30% (thirty percent) for Respondent's attitude is in accordance with the statutory penalty criteria and the applicable EPA penalty guidelines issued under EPCRA. See 40 C.F.R. § 22.27(b); Section 313 Penalty Policy.

14. The total penalty of **$90,351** will deter Respondent, as well as other persons, from future violations of Section 313 of EPCRA and 40 C.F.R. Part 372.

ORDER

As discussed above, Respondent is found liable for Counts I - XV of the Complaint. Based on the foregoing discussion, the undersigned assesses a total penalty of **$90,351.**

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Stephen J. McGuire
United States Administrative Law Judge

Pursuant to 40 C.F.R. § 22.27(c), this **Initial Decision** shall become a final order 45 days after its service upon the parties, unless a party moves to **reopen the hearing** under 40 C.F.R. § 22.28, an **appeal** is taken to the Environmental Appeals Board within 30 days of service of this **Initial Decision** pursuant to 40 C.F.R. § 22.30(a), or the Board elects to review this **Initial Decision**, *sua sponte*, as provided by 40 C.F.R. § 22.30(b).

Unless this hearing is reopened and timely appeal of this **Initial Decision** is taken, or the Board chooses to review this **Initial Decision** on its own initiative, **payment** of the full amount of this civil penalty shall be made **within 30 days** after the effective date of the final order. Payment shall be made by sending a cashier's check or certified check in the amount of **$90,351**, payable to the Treasurer, United States of America, and mailed to:

U.S. Environmental Protection Agency, Region 6
Regional Hearing Clerk
P.O. Box 360582M
Pittsburgh, PA 15251

A transmittal letter identifying the subject case and docket number (EPCRA-6-99-006), as well as Respondent's name and address, must accompany the check. Respondent shall serve copies of the check on the Regional Hearing Clerk and on Complainant. Respondent may be assessed interest on the civil penalty if it fails to pay the penalty within the prescribed period.