12/14/93

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
PACIFIC REFINING COMPANY,	)	Docket No. EPCRA-09-92-0001
Respondent	)	

INITIAL DECISION

[PORTIONS OF THIS INITIAL DECISION CONTAINING CONFIDENTIAL BUSINESS INFORMATION HAVE BEEN DELETED. A NOTATION APPEARS IN THE TEXT WHERE MATERIAL HAS BEEN DELETED. THE COMPLETE VERSION OF THIS DECISION HAS BEEN FORWARDED TO COUNSEL OF RECORD IN THIS PROCEEDING AND TO THE ENVIRONMENTAL APPEALS BOARD]

APPEARANCES

David M. Jones, on behalf of the Complainant.

Lawrence A. Hobel and Jennifer Coppo, on behalf of the Respondent.

I. Background

This case arises from an alleged failure of Respondent, Pacific Refining Company ("Respondent" or "Pacific") to file, in a timely manner, Toxic Chemical Release Inventory Reporting Form Rs (Form Rs) for the calendar year 1989. These forms are required under section 313 of the Emergency Planning and Community Right-to-Know Act ("EPCRA") 42 U.S.C. §§ 11001-11050, and the implementing regulations published at 40 C.F.R. Part 372. The reports were due July 1, 1990. They were filed on June 28, 1991.

On May 31, 1991, the Complainant, the United States Environmental Protection Agency ("Complainant" or "EPA") conducted an inspection of Pacific's petroleum feedstock refining facility located in Hercules, California. Based on that inspection EPA filed a Complaint on October 11, 1991 charging Respondent with twelve counts or violations of the above-described reporting requirements. Complainant proposes a $300,000 penalty.

A hearing was held on June 22, 1993 in San Francisco, California. Witnesses were presented by EPA and Pacific. Briefing was completed on October 29, 1993.

II. Summary of Decision

This decision finds Pacific liable on 10 of the 12 counts and assesses a $25,000 penalty.

III. Liability

A. Position of the Parties

Complainant contends that Pacific failed to timely file Form Rs for twelve chemicals for which it had reportable quantities in calendar year 1989. Complainant seeks a penalty for each of the Form Rs allegedly filed late as follows:

Count I	$ 25,000
Count II	$ 25,000
Count III	$ 25,000
Count IV	$ 25,000
Count V	$ 25,000
Count VI	$ 25,000
Count VII	$ 25,000
Count VIII	$ 25,000
Count IX	$ 25,000
Count X	$ 25,000
Count XI	$ 25,000
Count XII	$ 25,000
Total Proposed Penalty	$ 300,000

Among the twelve Form Rs which Pacific allegedly filed out-of-time were separate Form Rs for the xylene isomers--m-xylene, o-xylene and p-xylene. Complainant asserts that it is appropriate to assess individual penalties for each xylene isomer since the Respondent reported the three xylene isomers separately.

Pacific admits to the late filing of the Form Rs. But, it contends that the EPA regulations permitted it to list all three xylene isomers simply as "mixed isomers" of xylene. Pacific argues that if it had followed this approach, only 10 chemicals would have been listed on the Form Rs for the 1989 reporting year, and that only a 10-count Complaint would have been filed. According to Pacific, there are also other factors which were not considered by Complainant which would have resulted in a lower recommended penalty.

B. Discussion and Findings

Respondent's failure to timely file Form Rs for the 1989 calendar year constitutes a violation of section 313 of EPCRA and the implementing regulations found at 40 C.F.R. Part 372. The only issue with regard to liability is whether Respondent should be held accountable for its failure to file, in a timely manner, Form Rs for the three chemicals m-xylene, o-xylene and p-xylene individually as Complainant asserts, or for one chemical -- "mixed isomers" of xylene as Respondent argues.

40 C.F.R. § 372.65(a) (listing at 403), identifies the chemicals required to be reported pursuant to EPCRA section 313. Xylene is listed first as "mixed isomers" of xylene. The individual isomers of xylene are listed separately as m-xylene, o-xylene and p-xylene.

To help clarify the reporting requirements under section 313 and to supplement the instructions for completing Form R, the EPA issued a document dated January 1991 titled Toxic Chemical Release Inventory Questions and Answers: Revised 1990 version. Respondent Exhibit 21. Question and Answer 80 (page 15) of that document makes clear that an option was available to Pacific to report the isomers separately, or collectively, as mixed isomers.

> 80. Xylene mixed isomers are present in two of a facility's refined products. For section 313 reporting, may the isomers be reported separately? For a mixture of the isomers, how are the thresholds and de minimis to be determined? Reported separately, the facility exceeds thresholds, but is below the de minimis concentrations.

> The CAS number 1330-20-7 on the list of section 313 toxic chemicals is for any combination of the isomers. When the threshold and the de minimis concentration for each isomer are exceeded independently, the facility may report separately or as mixed isomers. When the threshold and/or de minimis are not exceeded independently, but are exceeded collectively, they should be reported under the CAS number for mixed isomers.

When shown this document and passage on cross-examination, the EPA witness responsible for determining the number of counts to be brought acknowledged that the option was available to the Respondent to file one report for the three isomers. Tr. 97.

No other testimony was presented at the hearing concerning the reasoning behind EPA's decision to file three separate counts related to the xylene isomers. Apparently, EPA based its decision to pursue three counts for the xylene solely upon the fact that Respondent reported the three isomers separately.

An option was available to the Respondent to report the xylene individually (as it did) or collectively as "mixed isomers" of xylene. By ignoring this option, Complainant bases the number of violations on the degree to which the regulated community supplies the EPA with more information than minimally required. Further, the assessment of a penalty for a late filing under EPA's approach may depend on the sophistication of the respondents. If a respondent knew that it could file a single Form R, then it would only be penalized for one violation. But,

if it was unaware of the option and filed three Form Rs, then it would be penalized for three violations.

Respondent provided the EPA with more complete information than if it had merely reported all three isomers as "mixed isomers" of xylene. Respondent should not be penalized for furnishing the EPA more information than minimally required. The correct approach is to treat the xylene counts of the Complaint (Counts V, VI and VII) as a single count. Public policy, under these circumstances, should encourage more complete reporting, not retribution.

IV. Penalty

Penalty assessments are not a matter for slide rule calculation. They require the exercise of reasoned judgment applied to the facts of a case. The EPA Enforcement Response Policy for Toxic Chemical Reports Under the Emergency Planning and the Community Right-to-Know Act ("penalty policy") dated December 2, 1988 (Complainant Exhibit 6) provides guidance in the determination of the penalty. The watchword here is guidance. Strict and faithful allegiance must at all times be paid to the underlying EPCRA statute. That statute prescribes EPA's civil penalty authority. It also describes the criteria to be considered in determining the level of penalty. Where the facts warrant, the Judge may adjust the proposed penalties up or down

in recognition of these criteria and to accomplish the purposes and objectives of the statute. 40 C.F.R. § 22.27. See also, discussion under the heading "Penalty Assessment Criteria" in my Initial Decision issued this same day in Pacific Refining Company, Docket No. TSCA-09-92-0010.

Setting a penalty level under the policy is a two-step process. The gravity-based penalty is first assigned. Then upward or downward adjustments to the gravity-based penalty are made based on factors described in the policy.

A. Gravity-Based Penalty

The penalty policy provides a matrix to determine the appropriate gravity-based penalty. Two factors are considered when plotting this matrix. The first is the circumstance level.

Complainant argues that the circumstance level should be determined as 1--failure to report a chemical. Complainant asserts that the only reason reporting occurred at all was due to EPA's May 31, 1991, inspection. According to EPA, this is equivalent to a failure to report and is properly considered a circumstance level 1 violation. Circumstance level 1 carries a $25,000 penalty.

Respondent argues that the circumstance level 2 should be assigned--late reporting after 180 days, a $20,000 infraction. According to the Respondent, what is involved here is merely late reporting due to a myriad of circumstances at Respondent's facility. Respondent asserts that it discovered its own failure to file the 1989 reports in the Spring of 1991 before the EPA inspection and had planned to file the reports in July of 1991 along with the 1990 reports.

I find that the proper circumstance level is 2.

By definition, the penalty policy treats a report filed out-of-time as, ipso facto, a failure to report subject to the circumstance 1 $25,000 penalty level. To apply this definition without examining the facts surrounding the late filing, automatically relegates Pacific's conduct to the worst possible category, which may or may not be deserving. It is here that strict adherence to the policy must give way to strict adherence to the Congressional intent as expressed in the EPCRA statute. In determining the amount of the penalty, EPCRA section 325(b)(1)(C) requires the Administrator to take into account, among other things, the "nature, circumstances, extent and gravity of the violation ....." The policy definition of a failure to report and the corresponding $25,000 matrix-indicated penalty represents a formula approach not reconcilable with

EPCRA's requirement to consider an array of factors in assessing a penalty.

I am not writing on a clean slate. The distinction between filings made before and after inspections has been found to be, in effect, artificial and failing to satisfy the statutory requirement that the Administrator consider the nature, circumstances, extent and gravity of the violation. See, e.g., In re CBI Services, No. EPCRA-05-1990, 1991 WL 310026 (E.P.A. March 13, 1991), In re Colonial Processing, No. EPCRA-89-0114, 1991 WL 310033 (E.P.A. June 24, 1991), In re Crown Metal Finishing Company, EPCRA-II-89-0103, 1992 WL 204416, at *2 (E.P.A. July 31, 1992), In re Pease and Curren, No. EPCRA-I-90-1008, 1991 WL 310035 (E.P.A. March 13, 1991), and In re Riverside Furniture Corporation, No. EPCRA-88-VI-4068, 1989 WL 266355 (E.P.A. March 27, 1989).

The record in this case shows that, prior to the inspection, Pacific had discovered through its own hazardous waste audit that its Form Rs for 1989 had not been filed. Tr. 115-116. When the discovery was made in the Spring of 1991 (April or May) management gave instructions to collect the relevant information so that the forms could be completed and filed along with the 1990 Form Rs in July 1991--the deadline for the 1990 report. Tr. 116. It is clear then that steps were already underway prior to the May 31, 1991 EPA inspection to file the 1989 Form R reports.

Under these circumstances, it would be unfair to categorize the late filings as a failure to file. Accordingly, I agree with Respondent and will consider its Form R filings to be late filings fitting circumstance level 2.

The next factor to consider in determining the gravity-based penalty is the penalty adjustment level. Complainant asserts that the proper adjustment level is "A" for a facility which has sales of over ten million dollars or fifty employees or more and which manufactures/process/uses section 313 chemicals with the violation at ten times or more the threshold level for reporting. Respondent argues that the severe financial pressures on it should be taken into account and that an adjustment level of "B" should be applied.

There is no dispute that the facility has in excess of fifty employees. Respondent cites 230 employees. Initial Brief at 6. It is also uncontested that section 313 chemicals with levels ten times or more of the threshold for reporting were employed in the facility. Accordingly, no grounds exist for assigning an adjustment level other than level "A". Respondent's arguments concerning its financial condition will be addressed later in the context of its ability to pay arguments.

In light of the above, the gravity-based penalty is determined to be $20,000 for each of the surviving ten counts of the complaint.

B. Adjustment Factors

The gravity-based penalty may be adjusted up or down to take into account other factors mentioned in the penalty policy--(1) whether Respondent voluntarily disclosed the violation, (2) the degree to which Respondent was culpable, (3) history of prior violations, (4) effect on respondents ability to continue in business, and (5) such other factors as justice may require.

Pacific at all times acted in a cooperative and compliant manner in its handling of this matter. Pacific's newly hired environmental manager, Mr. Edwards, discovered the company's failure to file the 1989 Form Rs in the Spring of 1991 shortly before the EPA inspection. Tr. 116. Upon discovering the problem he immediately directed that corrective action be taken so that the forms could be filed by July 1, 1991 along with the 1990 Form Rs which were due then. Id. The EPA inspector suggested that they be filed sooner, ie., within 30 days. Complainant Ex. 3. When Mr. Edwards determined that in-house personnel could not complete the forms within that time frame, he retained outside environmental consultants to complete the forms. Tr. 121-122. As a result, they were filed on June 28, 1991--

within the period recommended by the EPA inspector. Tr. 55. The evidence also shows that Pacific's environmental staff cooperated with the EPA during the course of its inspection and enforcement process. See, e.g., Tr. 56.

As a result of a change in ownership, there were sweeping changes in management in late 1989 or early 1990. Tr. 114. The maintenance manager was the only surviving manager that dealt with day-to-day activities at the refinery. Id. Upon assuming the duties of environmental manager in September of 1990, Mr. Edwards took on a number of environmental tasks that needed attention. He initiated an environmental audit to determine the company's status relative to the various environmental regulatory requirements. Tr. 115. He increased the environmental staff from two plus a contractor to seven and established management controls to insure that all environmental reports are filed on time "do or die." Tr. 119.

The record shows that Pacific's failure to file the 1989 Form Rs on time was an aberration (all previous and subsequent Form Rs were filed timely) resulting from the chaotic conditions within the company stemming from a change in ownership and the resulting changes in management. While this disruption within management stemming from the change in ownership does not excuse Pacific's failure, it reveals the extraordinary and turbulent times which gave rise to the violation. Irrespective of the

penalty that may be imposed in this proceeding, the message has already been conveyed within Pacific that future late filings will not be tolerated. Pacific's environmental manager's, Mr. Edwards, could not be more hard nosed.

> As far as I'm concerned, my management principle is simple, you know when you're supposed to do it, if you don't advise me that there's a problem with it and you can't make that date, then I really don't have a need for you on my staff. I mean there's no excuse for it. And to this date we haven't missed a date since that filing back in 1989. Tr. 119.

While the 10 counts each carry an indicated $20,000 gravity-based penalty--one for each chemical that was reported late--there is no indication in this record that the threat or danger to the environment increased 10 fold, or by any measurable extent, as a result of the multiple late filings. The chemicals reported on the 1989 Form Rs were the same chemicals that had been reported to the EPA in 1987 and 1988. The EPA, therefore, was on notice that these particular chemicals were present at the refinery. Indeed, the EPA inspection was triggered by EPA's own computer search which showed that Form Rs had been submitted for 1987 and 1988 but not 1989. Complainant Ex. 2, p 1. This is not a case where new chemicals, not previously known to EPA, were introduced into the refinery operations for the first time in 1989.

There remains an issue raised by Pacific as to its ability to pay the proposed penalties in this case ($300,000) and in

Docket No. TSCA-09-92-0010 ($200,000) and still continue in business. In support of its position in both proceedings, Pacific submitted evidence under a claim of business confidentiality pursuant to 40 C.F.R. §§ 2.203, 2.306(i),and 22.22(a).

Of course, the penalty imposed by this decision ($25,000) and that imposed in the TSCA case ($62,938) differ dramatically from that proposed in the two Complaints ($500,000 combined). Interestingly enough, Pacific does not assert that it cannot pay any penalty that may be imposed in these cases. Pacific's position is that it cannot pay the penalty proposed in the Complaints. On brief, Pacific calculated its own recommended penalties of $19,500 and $15,750 for the EPCRA and TSCA dockets, respectively.

Pacific's briefs were not helpful with respect to its position on "ability to pay". They failed to discuss Pacific's financial position in any detail. On brief, Pacific referred blithely to its confidential exhibits and the related in camera hearing session as sustaining its position. Pacific's reason for not briefing the matter is lame.

> We purposely have not provided detailed information regarding Respondent's financial situation so as to eliminate the need to submit this Opening Post-Hearing Brief under confidential cover. The Presiding Officer may refer to the In Camera Transcript and Respondent's Confidential Exhibits Nos. 19 and 20a for information

related to Respondent's financial situation. Initial Br. p. 16, n.7.

One of the principal purposes of a brief is to garner the evidence that a party relies upon and to summarize it for the judge. Merely stating that a party's evidence supports its position sheds no light on the issues and is of no value to a decisionmaker. Of course, Pacific's evidence would be expected to support its position. Why else would it be submitted?

Respondent has the burden of proof to establish that it will be unable to pay the proposed penalty. Notwithstanding Pacific's reluctance to brief one of its presumably principal defenses, I have reviewed the evidence concerning its alleged inability to pay. I find its evidence not persuasive. Accordingly, no adjustment is warranted for this factor.

Because my conclusion concerning Pacific's alleged inability to pay is based on evidence submitted under a claim of business confidentiality, the following portion of this decision will not be made public. The complete version of this decision has been forwarded to counsel for Pacific and EPA and the EPA's Environmental Appeals Board.

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V. Conclusion

Upon review and consideration of the evidence in this record I conclude that a penalty of $25,000 is appropriate. This represents the gravity-based penalty of $20,000 that may be

associated with one count plus an additional $5,000 for the remaining 9 nine counts. No mathematical formula was used to determine this amount. This penalty gives recognition to the array of factors considered above which bear on the violation--the cooperation shown by Pacific during the inspection and afterwards in supplying information to the EPA, its conduct and actions in response to the violation, the initiatives taken to insure that there will not be a repeat violation, the change in management during the period when the reports should have been prepared, and the lack of evidence to show that any potential threat to the environment multiplied with each late filing.

IT IS ORDERED that:

1. A civil penalty in the amount of $25,000 be assessed against Respondent, Pacific Refining Company.

2. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service date of the final order by submitting a certified or cashier's check payable to Treasurer, United states of America, and mailed to:

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

3. A transmittal letter identifying the subject case and the

EPA docket number, plus Respondent's name and address must accompany the check.

4. Failure upon part of Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty. 31 U.S.C. § 3717; 40 C.F.R. 102.13(b)(c)(e).

Unless appealed in accordance with 40 C.F.R. § 22.30, or unless the Administrator elects to review same sua sponte as provided therein, this decision shall become the final order of the Administrator in accordance with 40 C.F.R. § 22.27(c).

Jon G. Lotis
Administrative Law Judge

Dated: December 14, 1993
Washington, D.C.