UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
BERNTSEN BRASS & ALUMINUM FOUNDRY, INC.,	)	Docket No. 5-EPCRA-97-033
	)	
RESPONDENT	)	

ORDER DENYING MOTION FOR

ACCELERATED DECISION ON PENALTY

The United States Environmental Protection Agency ("EPA"), the Complainant, filed a Motion for Accelerated Decision on Penalty in the above cited proceeding on March 27, 1998. The Respondent, Berntsen Brass & Aluminum Foundry, Inc. ("Respondent"), submitted a Response to the Complainant's Motion for Accelerated Decision on Penalty on April 13, 1998, opposing the motion for accelerated decision. For the reasons discussed below, the EPA's Motion for Accelerated Decision on Penalty is **Denied**.

Proceedings

The Complaint in this matter was filed on June 5, 1997, by the Chief, Pesticides and Toxics Branch, Region 5, EPA, pursuant to Section 325 of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. §§ 11001 et seq., also known as the Emergency Planning and Community Right-to-Know Act ("EPCRA"), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Rules of Practice"), 40 C.F.R. Part 22. The Complaint charged the Respondent with four violations of Section 313 of EPCRA, 42 U.S.C. § 11023, for the Respondent's alleged failure to submit Toxic Chemical Release Forms ("Form Rs") for the chemicals lead and copper for the calendar years 1991 and 1992 to the EPA and the State of Wisconsin (Counts I-IV). The Complaint proposed a civil administrative penalty of $44,000 for the alleged violations.

Pursuant to unopposed motion by the EPA, on January 6, 1998, the undersigned issued an accelerated decision on liability in this matter, holding that the Respondent violated Section 313 of EPCRA, 42 U.S.C. § 11023, as cited in the four counts of the Complaint, for its failure to timely submit Form Rs for the chemicals lead and copper for the calendar years 1991 and 1992 to the EPA and the State of Wisconsin. A hearing for the determination of the appropriate penalty was scheduled for May 6 and 7, 1998, in Madison, Wisconsin. The Order Granting Unopposed Motion for Accelerated Decision as to Liability entered on January 6, 1998, is incorporated herein by reference.

On March 27, 1998, the EPA filed a Motion for Accelerated Decision on Penalty. The EPA asserts that there is no genuine issue of material facts on the appropriateness of the proposed adjusted civil penalty in the amount of $37,400 and that it is entitled to judgment as a matter of law and, therefore, the Respondent should be found liable by accelerated decision on penalty.

On April 13, 1998, the Respondent submitted a Response to the Complainant's Motion for Accelerated Decision on Penalty ["Respondent's Response"], arguing that material facts still in dispute dictate that a hearing be held on the penalty to be assessed. In particular, the Respondent does not contest the accuracy of the EPA's proposed findings of fact which are incorporated in the Motion for Accelerated Decision on Penalty, but rather argues that other material issues, such as the circumstances surrounding the Respondent's eventual filing of the relevant Form Rs, require a hearing to resolve.

Therefore, the issues before me are whether this matter is amenable to accelerated decision on penalty as sought by the EPA and, if so, the appropriate penalty to be assessed against the Respondent.

Standard For Accelerated Decision

The Complainant has filed a motion for partial accelerated decision pursuant to 40 C.F.R. § 22.20, the regulation governing accelerated decisions. Section 22.20(a) provides, in pertinent part, as follows:

The Presiding Officer,[(1)] upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding. (emphasis added)(2)

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP").(3) Rule 56(c) of the FRCP provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law" (emphasis added). Thus, by analogy, Rule 56 provides guidance for adjudicating motions for accelerated decision. See In the Matter of CWM Chemical Service, TSCA Appeal 93-1, 6 EAD 1 (EAB, May 15, 1995).

Therefore, I look to federal court decisions construing Rule 56 of the FRCP for guidance in applying 40 C.F.R. § 22.20(a) to the adjudication of motions for accelerated decisions. In interpreting Rule 56(c), the United States Supreme Court has held that the party moving for summary judgment has the burden of showing the absence of a genuine issue as to any material fact and that the evidentiary material proffered by the moving party in support of its motion must be viewed in the light most favorable to the opposing party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1985); Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). Further, the judge must draw all reasonable inferences from the evidentiary material in favor of the party opposing the motion for summary judgment. See Anderson, supra, at 255; Adickes, supra, at 158-159; see also Cone v. Longmont United Hospital Assoc., 14 F.3d 526, 528 (10th Cir. 1994).

In assessing materiality for summary judgment purposes, the Court has found that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. Anderson, supra at 248; Adickes, supra, at 158-159. The substantive law identifies which facts are material. Id.

The Court has found that a factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in favor of the nonmoving party. Id. Further, in Anderson, the Court ruled that in determining whether a genuine

issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the nonmoving party under the evidentiary standards in a particular proceeding. There must be an incorporation of the evidentiary standard in the summary judgment determination. Anderson, supra, at 252. In other words, when determining whether or not there is a genuine factual dispute, the judge must make such inquiry within the context of the applicable evidentiary standard of proof for that proceeding.

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) then requires the opposing party to offer any countering evidentiary material or to file a Rule 56(f) affidavit.[(4)] Rule 56(e) states: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." However, if the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, then no defense is required. Adickes, supra, at 156.

The type of evidentiary material that a moving party must present to properly support a motion for summary judgment or that an opposing party must proffer to defeat a properly supported motion for summary judgment has been examined by the Court. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); see also Anderson, supra; Adickes, supra. The Court points out that Rule 56(c) itself provides that the decision on a motion for summary judgment must be based on the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, submitted in support or opposition to the motion. With regard to the sufficiency of the evidentiary material needed to defeat a properly supported motion for summary judgment, the Court has found that the nonmoving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. Anderson, supra, at 256 (quoting First National Bank of Arizona v. Cities Service Company, 391 U.S. 253, 290 (1968)).

More specifically, the Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment as Rule 56(e) requires the opposing party to go beyond the pleadings. Celotex, supra at 322; Adickes, supra. The Court has noted, however, that there is no requirement that the moving party support its motion with affidavits negating the opposing party's claim or that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Celotex, supra, at 323-324. The parties may move for summary judgment or successfully defeat summary judgment without supporting affidavits provided that other evidence referenced in Rule 56(c) adequately supports its position.

The regulation governing motions for accelerated decision under 40 C.F.R. § 22.20(a) does not define or provide examples to illustrate the meaning of the phrase "genuine issue of material fact," nor does it provide significant guidance as to the type of evidence needed to support or defeat a motion for accelerated decision. Section 22.20(a) states, in pertinent part, that the Presiding Officer may render an accelerated decision "without further hearing or upon any limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." As an adjunct to this regulation, I note that under another governing regulation, a party's response to a written motion, which would include a motion for accelerated decision, "shall be accompanied by any affidavit, certificate, [or] other evidence" relied upon. 40 C.F.R. § 22.16(b).

Inasmuch as the inquiry of whether there is a genuine issue of material fact in the context of an administrative accelerated decision is quite similar to that in the context of a judicial summary judgment and in the absence of significant instruction from the regulation governing accelerated decisions, the standard for that inquiry as enunciated by the Court in Celotex, Anderson, and Adickes is found to be applicable in the administrative accelerated decision context.

Moreover, review by the Environmental Appeals Board ("EAB") in determining whether there is a genuine issue of material fact requiring an oral evidentiary hearing is governed by an "administrative summary judgment" standard which was articulated recently by the EAB in Green Thumb Nursery, Inc., FIFRA Appeal No. 95-4a, 6 EAD 782, 793 (EAB, Mar. 6, 1997). Under this standard, there must be timely presentation of a genuine and material factual dispute, similar to judicial summary judgment under FRCP 56, in order to obtain an evidentiary hearing. Otherwise, an accelerated decision based on the documentary record is sufficient. Id. Compare In the Matter of Mayaguez Regional Sewage Treatment Plant, NPDES Appeal No. 92-23, 4 EAD 772, 781 (EAB, Aug. 23, 1993) (wherein the EAB adopted the standard for summary judgment articulated by the Court in Anderson to determine whether there is a genuine issue of material fact warranting an evidentiary hearing under 40 C.F.R. § 124.74 for the issuance of a permit under Section 301(h) of the CWA).

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. Thus, by analogy, in determining whether or not there is a genuine factual dispute, I, as the judge and finder of fact, must consider whether I could reasonably find for the nonmoving party under the "preponderance of the evidence" standard.(5) In addressing the threshold question of the propriety of a motion for accelerated decision, my function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for an evidentiary hearing. See Anderson, supra, at 249.

Accordingly, by analogy, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence. In this regard, the moving party must demonstrate, by a preponderance of the evidence, that no reasonable presiding officer could not find for the nonmoving party. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence.

Discussion of Accelerated Decision on Penalty

In the instant matter, the EPA has filed a motion for accelerated decision on penalty pursuant to 40 C.F.R. § 22.20(a). The EPA argues that there is no genuine issue of material fact requiring an evidentiary hearing on any issue of the EPA's prima facie case, and that the EPA is entitled, as a matter of law, to a judgment that the Respondent is liable for the proposed adjusted penalty of $37,400 for the violations alleged in Counts I through IV of the Complaint. See Green Thumb Nursery, supra.

In support of its motion for accelerated decision on penalty, the EPA has proffered an affidavit dated March 27, 1998, from Jim Rioux, an inspector for the EPA. Complainant's Motion for Accelerated Decision on Penalty, Attachment 1. In this affidavit, Mr. Rioux states that he has personal knowledge of certain information which was related to him by James Dudley, vice-president for the Respondent, on the EPA's inspection of the Respondent's facility on December 15, 1993, regarding the number of employees retained by the Respondent and the amounts of the Respondent's gross sales during calendar years 1990, 1991, and 1992. Specifically, according to Mr. Rioux's affidavit, the Respondent retained 70, 72, and 77 employees during the calendar years 1990, 1991, and 1992, respectively, and the Respondent's gross sales were six million dollars, six million dollars, and seven million dollars during calendar years 1990, 1991, and 1992, respectively.

In evaluating the Respondent's position on the proposed penalty, I note initially that in its Answer, the Respondent did not set forth any argument regarding the appropriateness of the proposed penalty other than its generalized and conclusory assertion that the proposed penalty "is excessive and fails to properly consider the nature, circumstances, extent and gravity of the violations, the respondent's

history of no prior violations, the fact that the respondent received no economic benefit or savings as a result of the alleged violation, and such matters as justice requires."

In its Response to the Complainant's Motion for Accelerated Decision on Penalty, on the other hand, the Respondent puts forth a number of specific arguments against reaching an accelerated decision. Although not disputing the accuracy of the EPA's proposed findings of fact on motion for accelerated decision on penalty, the Respondent argues that other facts exist, and may be in dispute, that militate toward a reduction in the penalty proposed by the EPA. In support of its Response opposing the motion for accelerated decision, the Respondent has proffered an affidavit dated April 13, 1998, from James Dudley, Vice-President of the Respondent's company. Affidavit of James Dudley in Support of Response to Complainant's Motion for Accelerated Decision on Penalty ("Dudley Affidavit").

First, the Respondent argues that it had believed that it had filed its Form Rs for 1991 and 1992, and that its failure to do so or "inadvertent commission of the violation" was based on a "good faith but erroneous assumption." Respondent's Response at 3. As such, the Respondent argues that, the gravity-based penalty should be reduced "as justice may require." Second, the Respondent argues that it derived no economic benefit from its failure to file the Form Rs for 1991 and 1992, a fact that should be considered when deciding the appropriate penalty.

Third, the Respondent submits that it was not aware, and was not informed by the EPA during the December 1993 EPA inspection, that it had failed to file its Form Rs for 1991 and 1992. Respondent's Response at 4, Dudley Affidavit at 2. The Respondent alleges that, immediately upon learning of this oversight in March 1997, it filed the relevant Form Rs in early April 1997. As a result, argues the Respondent, it should be accorded a 15% reduction in the gravity-based penalty for its good faith compliance efforts as recognized under the EPCRA ERP.

Finally, the Respondent argues that its release of copper and lead from its operations in 1991 and 1992 did not rise to the reporting threshold under the Wisconsin Clean Air Standards in 1991 and 1992. Respondent's Response at 5; Dudley Affidavit at 3. In connection with this argument, the Respondent also maintains that all the necessary information reported in the Form Rs was timely reported at the local level in 1991 and 1992. Due to its alleged compliance with state requirements, the Respondent argues that the circumstance level of the gravity-based penalty should be reduced or, alternatively, the gravity-based penalty should be adjusted downward under the factor of "as justice may require."

Based on the Respondent's Response and the supporting affidavit of Mr. Dudley, I find that the time at which the Respondent became aware of its failure to file Form Rs for lead and copper for 1991 and 1992 is in dispute. Inasmuch as this timing is relevant to possible compliance adjustments under the EPCRA ERP, I find that a material fact is in dispute, and that an evidentiary hearing is necessary to resolve this disputed fact. Accordingly, an accelerated decision as to penalty would be inappropriate. Because of such a determination, it is unnecessary for me to address the other issues raised by the Respondent in its Response. However, as discussed below, this decision does address certain arguments of the Respondent's that can be disposed of without the requirement of an evidentiary hearing.

Findings of Fact

Based on the undisputed documentary record, the undersigned makes the following additional findings of fact[(6)]:

1. During the calendar years 1990, 1991, and 1992 the Respondent retained 70, 72, and 77 employees, respectively.
2. During the calendar years 1990, 1991, and 1992 the Respondent's gross sales were six (6) million dollars, six (6) million dollars, and seven (7) million dollars, respectively.
3. During the calendar years 1991 and 1992 the Respondent processed lead in amounts less than ten times the reporting threshold.
4. During the calendar years 1991 and 1992 the Respondent processed copper in amounts greater than ten times the reporting threshold.
5. The Respondent has no history of prior violations of Section 313 of EPCRA, 42 U.S.C.§ 11023.

Civil Administrative Penalty For Violation of Reporting Requirements Of Section 313 of EPCRA

Although an accelerated decision as to penalty is not warranted, various arguments concerning the appropriate penalty may be disposed of at this time. See 40 C.F.R. § 22.20(b)(2). As such, and to the extent supported by the undisputed facts, I turn now to the question of the appropriate penalty. In determining the appropriate penalty, I first examine the applicable statutory provisions. Section 313(a) of EPCRA requires owners and operators of facilities who manufacture, process, or otherwise use toxic chemicals referenced in Section 313(c) and listed at 40 C.F.R. § 372.65, in excess of a prescribed threshold amount, to submit annually a Form R to the Administrator of the EPA and to designated state officials. This form is to be submitted by July 1, and it is to include data reflecting toxic chemical releases which occurred during the preceding calendar year.

The assessment of administrative and civil penalties for violations of the reporting requirements of Section 313 of EPCRA is governed by Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1), which provides that any person who violates Section 313 "shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation." Section 325(c)(4) then provides that the penalty may be assessed by administrative order or a civil action in federal district court. Section 325(c)(1), however, does not specify any factors for consideration by the Administrator or court in determining an appropriate civil penalty for violations of the Section 313 reporting requirements.

In the absence of prescribed statutory factors to be considered in the assessment of penalties for reporting violations under Section 313 of EPCRA, I note that prior EPA administrative decisions have looked to the immediately preceding enforcement sections at Sections 325(b)(1)(C) and 325(b)(2) for guidance. Sections 325(b)(1)(C) and 325(b)(2) govern the assessment of civil penalties for Class I and Class II violations of EPCRA's emergency notification requirements, respectively.

In determining the amount of a penalty, Section 325(b)(1)(C) requires the Administrator to consider "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." Section 325(b)(2) incorporates by reference the penalty assessment procedures and provisions of Section 16 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615. It is observed that the penalty factors listed at Section 16 of TSCA are nearly identical to those in Section 325(b)(1)(C) of EPCRA, except that the factor of "effect on ability to continue to do business" is substituted for "economic benefit or savings."

Generally, Section 325(b)(2), which governs Class II administrative penalties under EPCRA's emergency notification provisions, has been referenced in the administrative decisions for statutory guidance on the issue of penalty assessment for EPCRA reporting violations under Section 325(c)(1). See e.g., In the Matter of Apex Microtechnology, Inc., EPCRA-09-92-00-07 (Initial Decision May 7, 1993) (discussing elements of Section 325(b)(1)(C) of EPCRA and Section 16 of TSCA and using Section 16 factors); In the Matter of TRA Industries, Inc., EPCRA 1093-11-05-325 (Initial Decision, Oct. 11, 1996) (using Section 16 of TSCA criteria as directed by Section 325(b)(2) of EPCRA in assessing penalty under Section 313 of EPCRA; In the Matter of GEC Precision Corp., EPCRA 7-94-T-3 (Initial Decision, Aug. 28, 1996). Compare Clarksburg Casket Co., EPCRA III-165 (Initial Decision, December 17, 1997) (using elements of Section 325(b)(1)(C) of EPCRA in discussing penalty factors under Section 325(c)(1)of EPCRA). In assessing a penalty for a violation of the EPCRA reporting requirements, I find the TSCA factor of "effect on ability to continue to do business" is more relevant to that assessment than the factor of "economic benefit or savings." Rarely, would there be a demonstrable "economic benefit or savings" resulting from a failure to file timely a Form R.

After looking to the statutory provisions regarding the assessment of penalties, it is important to note that the purpose of EPCRA is to provide communities with

information on potential chemical hazards within their boundaries and to foster state and local emergency planning efforts to control any accidental releases of toxic chemicals. Local emergency planning committees are charged with developing emergency response plans based on the information provided in the Form Rs by the covered facilities. The public, in turn, has the right to know the toxic chemical release information reported by the facilities, as well as the contents of the emergency response plans. See Huls America, Inc. v. Browner, 83 F.3d 445, 446-447 (D.C. Cir. 1996); see also Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc., 61 F.3d 473, 474 (6th Cir. 1995).

The environmental and public health goals of EPCRA cannot be achieved if a facility, such as the Respondent's, uses a toxic chemical in excess of the chemical's reporting threshold, but does not timely file a Form R with the Administrator for the EPA and with the appropriate state officials. See TRA Industries, supra, at 3. Failure to comply with the reporting provisions of Section 313 of EPCRA seriously impairs the public's right-to-know, as well as the federal and state governments' ability to respond to releases of toxic chemicals. See Huls America, supra.

In addition to the above cited statutory provisions concerning penalty factors under EPCRA, the EPA relies extensively upon its penalty policy in assessing a penalty. Specifically, the EPA has calculated its proposed penalty by following the guidelines set forth in the Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990) ("ERP" or "EPCRA ERP"), dated August 10, 1992. Complainant's Exhibit 3 in Complainant's prehearing exchange.

The ERP was promulgated by the EPA's Office of Compliance Monitoring of the Office of Prevention, Pesticides and Toxic Substances in order to ensure that the EPA's enforcement actions for violations of Section 313 of EPCRA 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 Section 313 violations. ERP at 1. The ERP does not refer to the statutory penalty factors specified in Sections 325(b)(1)(C) or 325(b)(2) of EPCRA which apply to violations of the emergency notification requirements. However, to a great degree, the ERP incorporates those factors into its guidelines for the assessment of penalties for violations of the EPCRA toxic chemical release reporting requirements.

At this point, it is emphasized that under the Administrative Procedure Act, 5 U.S.C. §§ 551-559, which governs these proceedings, a penalty policy, such as the EPCRA ERP, is not unquestioningly applied as if the policy were a rule with "binding effect." See Employers Insurance of Wausau and Group Eight Technology, Inc., TSCA Appeal No. 95-6, 6 EAD 735, 755-762 (EAB, Feb. 11, 1997). However, pursuant to Section 22.27(b) of the Rules of Practice, 40 C.F.R. § 22.27(b), which also govern these proceedings, the Administrative Law Judge ("ALJ") is required to consider civil penalty guidelines issued under the Act, such as the EPCRA ERP, and to state specific reasons for deviating from the amount of the penalty recommended to be assessed in the Complaint. The ALJ "has the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant." In re DIC Americas, Inc., TSCA Appeal No. 94-2, 6 EAD 184, 189 (EAB, Sept. 27, 1995). A. Gravity-Based Penalty

Under the EPCRA ERP, penalties are determined in two stages. The first stage is the determination of the gravity-based penalty. The second stage is the determination of any adjustments to the gravity-based penalty. ERP at 7. To determine the gravity-based penalty, the factors of the "circumstances" of the violation and the "extent" of the violation are considered. These factors are incorporated into a penalty matrix to be used in assessing civil administrative penalties where that is the appropriate enforcement response. ERP at 7-12.

When applying the matrix, each violation is assigned a circumstance level and extent level. The circumstance level depends on the nature of the violation. More specifically, the circumstance level takes into account "the seriousness of the violation as it relates to the accuracy and availability of the information to the community, to states, and to the federal government." ERP at 8. The extent level is

dependent on two factors: the amount of unreported chemical used above the threshold, and the size of the violator's business. The size of the violator's business, in turn, is determined with reference to two parameters: annual sales and number of employees. ERP at 9-10.

In the instant case, the EPA submits that pursuant to the ERP, the total gravity-based penalty for all four counts in the Complaint for which the Respondent previously has been found liable is $44,000.[(7)] See generally In Re Pacific Refining Company, EPCRA Appeal No. 94-1, 5 EAD 607, 613-15 (EAB, Dec. 6, 1994) (discussing the general formulation of a gravity-based penalty). Specifically, the EPA assigned Respondent's violations of failing to submit Form Rs in a timely manner to circumstance level 1, category I, for reports filed more than one year late. ERP at 12. The EPA then assigned the violations cited in Counts I and III to extent level C, for a facility that processed less than ten times the threshold amount of lead, with less than $10 million in gross sales and 50 employees or more. ERP at 9.

For the violations cited in Counts II and IV of the Complaint, the EPA assigned extent level B, for a facility that processed more than ten times the threshold amount of copper, with less that $10 million in gross sales and 50 employees or more. In accordance with the penalty matrix, each of the violations cited in Counts I and III was assigned a penalty of $5,000 and each of the violations cited in Counts II and IV was assigned a penalty of $17,000. The total proposed gravity-based penalty is $44,000. Review of the EPA's application of the ERP to the undisputed facts in the instant matter and the calculation of the proposed gravity-based penalty discloses no error or inappropriate application.

The Respondent argues that the circumstance level of the gravity-based penalty should be adjusted downward in order to reflect the fact that the Respondent's lead and copper emissions for 1991 and 1992 did not reach the level required for reporting under Wisconsin's Clear Air Standards. Such an argument is without merit. First, whether the Respondent's emissions triggered Wisconsin reporting requirements is immaterial to both the harm done by failing to file Form Rs and to the general policy goals of Form R filing under EPCRA. Had the EPA concluded that Wisconsin's Clean Air Standards were stringent enough, it could have adopted those thresholds, or referenced state or local compliance in the ERP. The EPA, however, chose not to follow that approach, and the Respondent may not seek refuge in the fact that it comported with the lesser requirements of the state.

Second, the EAB has stated that "[c]ompliance with other environmental regulations and requirements does not mitigate [Respondent's] failure to comply with § 313 with respect to its [1992 and 1992] Form Rs." Pacific Refining Company, supra, at 622 n. 19. Given the EAB's disinclination to recognize local compliance as a mitigating factor, it would be inappropriate to employ local compliance as a vehicle to modify circumstance levels of the gravity-based penalty. Based on the relevant, undisputed facts in this proceeding, the EPA properly calculated the gravity-based penalty under the EPCRA ERP.

B. Adjustment Factors

After determining a violation's gravity-based penalty from the matrix, the penalty may be adjusted upward or downward by applying various "adjustment factors," such as whether the violator voluntarily disclosed the violation, the violator's cooperative attitude, history of prior violations, ability to pay, and other factors as justice may require. ERP at 8, 14-20. The EPA in the instant matter applied a 15% reduction to the gravity-based penalty amount for the Respondent's violations as authorized by the ERP based on the Respondent's cooperative attitude.

The EPA submits that the only adjustment of the gravity-based penalty warranted is a downward adjustment of 15% for all four counts based on the "attitude" factor which takes into account the Respondent's cooperation with the EPA in the compliance evaluation and enforcement process. ERP at 14-18; see Pacific Refining Company, supra, at 616-17. In particular, the EPA's proposed application of the adjustment factors is as follows: knowledge of the violations identified in Counts I through IV was not provided to the EPA until its inspection of the Respondent's facility on December 15, 1993, and, thus, no downward adjustment is warranted for

voluntary disclosure; the Respondent has no history of prior violations and, thus, no upward adjustment is warranted; no toxic chemical identified in any violation in the Complaint has been delisted and, thus, no downward adjustment is warranted; the Respondent did not file the required information concerning the toxic chemicals until the pendency of this case, four years after the Respondent became aware of its obligation to file the information, and, thus, no downward adjustment is merited for "good faith" efforts to comply with EPCRA; and there is no evidentiary information that the Respondent was confused by new ownership or lacked control over the violation, that the violations were borderline, or that there was any other similar circumstance and, thus, no downward adjustment for "other factors as justice may require" is warranted. Finally, the EPA argues that the Respondent has identified no circumstances or arguments which relate to any identified factor or unidentified factor which could affect the proposed penalty.

As discussed above, the Respondent has offered a number of arguments for adjusting the gravity-based penalty downward. In particular, the Respondent has asserted that it did not become aware of its failure to file the 1991 and 1992 Form Rs for lead and copper until March 9, 1997, and submitted the relevant Form Rs less than one month later, on April 4, 1997. The Respondent argues that such actions should merit an adjustment to the gravity-based penalty for its good faith compliance efforts under the ERP. The Respondent also argues that downward adjustments under "other factors as justice may require" would be appropriate.

In the instant matter, the facts underlying the EPA's proposed gravity-based penalty are not in dispute, and I find that the gravity-based penalty is appropriate and in accordance with the relevant EPCRA criteria as informed by the penalty policy set forth in the ERP. Inasmuch as material facts regarding downward adjustments to the gravity-based penalty remain in dispute, however, the EPA's Motion for Accelerated Decision on Penalty is denied. The hearing previously scheduled for May 6 and May 7, 1998, in Madison, Wisconsin, will be held as scheduled to adjudicate what, if any, downward adjustments should be made to the gravity-based penalty.

Conclusions of Law

1. The Order Granting Unopposed Motion for Accelerated Decision as to Liability entered by the undersigned on January 6, 1998, is incorporated by reference. See 40 C.F.R. § 22.20.
2. The gravity-based penalty of $44,000 for the four violations of the reporting requirements of Section 313 of EPCRA cited in the Complaint is appropriate and comports with the statutory requirements of Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045 (c)(1), as informed by the EPCRA ERP.
3. The Respondent has established that a genuine issue of material fact exists as to potential adjustments to the gravity-based penalty and that an Accelerated Decision on Penalty would be inappropriate. 40 C.F.R. § 22.20(a).

Orders

The Complainant's Motion for Accelerated Decision on Penalty is **Denied**.

Inasmuch as potential adjustments to the gravity-based penalty remain in issue, the hearing scheduled for May 6 and 7, 1998, in Madison, Wisconsin, will be held as scheduled for the determination of the appropriate penalty.

Original signed by undersigned

_____
Barbara A. Gunning
Administrative Law Judge

Dated: 4-21-98
Washington, DC

1. The term "Presiding Officer" means the Administrative Law Judge designated by

the Chief Administrative Law Judge to serve as Presiding Officer. 40 C.F.R. § 22.03(a).

2. 40 C.F.R. § 22.20(a) further provides: "the Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant."

3. The Federal Rules of Civil Procedure are not binding on administrative agencies but many times these rules provide useful and instructive guidance in applying the Rules of Practice. See Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); In re Wego Chemical & Mineral Corporation, TSCA Appeal No. 92-4, 4 EAD 513 at 13 n. 10 (EAB, Feb. 24, 1993).

4. Rule 56(f) states:

> (f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

5. Under the governing Rules of Practice, an Administrative Law Judge serves as the decisionmaker as well as the fact finder. See 40 C.F.R. §§ 22.04(c), 22.20, 22.26.

6. As noted above, the Order Granting Unopposed Motion for Accelerated Decision as to Liability, including the findings of fact, which was entered by the undersigned on January 6, 1998, is incorporated in this Order by reference.

7. The Complainant's Memorandum in Support of its Motion for Accelerated Decision on Penalty at Conclusion of Law #2 states incorrectly that the calculated gravity-based penalty is $47,000 rather than $44,000. Otherwise, the Memorandum correctly states that the calculated gravity-based penalty is $44,000, and that a 15% reduction of the gravity-based penalty results in an adjusted gravity-based penalty of $37,400.