UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
Energy Gases, Inc.,	)	**Docket No. EPCRA-02-2000-4002**
	)	
Respondent	)	

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: August 13, 2003
Washington, D.C.

Appearances

For Complainant: Carol Y. Berns, Esq.
Cynthia L. Psoras, Esq.
U.S. Environmental Protection Agency
Region II
New York, New York

For Respondent: John Powers, Esq.
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I. Statement of the Case

On September 28, 2000, the United States Environmental Protection Agency ("EPA") filed a complaint against Energy Gases, Inc. ("Energy Gases"), charging five violations of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"). 42 U.S.C. § 11001 *et seq*. The complaint alleges that Energy Gases committed one violation of EPCRA Section 311 for failure to timely file a material safety data sheet ("MSDS") for propane with the local emergency planning committee ("LEPC"), the State emergency response commission ("SERC"), and the fire department having jurisdiction over the facility. 42 U.S.C. § 11021. The complaint also charges four violations of EPCRA Section 312 for failure to timely file emergency and hazardous chemical inventory forms (*i.e.,* Tier I or Tier II forms) for propane with the LEPC, the SERC, and the local fire department for calendar years 1996, 1997, 1998, and 1999. 42 U.S.C. § 11022.

Whether respondent committed the five violations cited by EPA is no longer at issue. Energy Gases has stipulated to non-compliance with Sections 311 and 312 of EPCRA, as alleged in the complaint. Consistent with that stipulation, on April 12, 2002, an order was issued by this tribunal granting EPA summary judgment as to liability. The only question that remains, therefore, is what is the civil penalty to be assessed against respondent for the five violations? In the complaint, EPA seeks the assessment of an $83,315 penalty. It is well-established that it is EPA that bears the burden of proving "that the relief sought is appropriate." *See CDT Landfill Corp.,* 2003 EPA App. LEXIS 5, * 85, (June 5, 2003)(EAB), citing 40 C.F.R. 22.24.

A hearing was held in Syracuse, New York, on July 16, 17, and 31, 2002, to determine the penalty to be assessed in this case. Based upon the evidence produced at this hearing, a civil penalty of $50,000, *i.e.,* $10,000 for each of the five violations, is assessed against Energy Gases for the one Section 311 violation and the four Section 312 violations which are the subject of this enforcement proceeding. 42 U.S.C. § 11045(c).

II. The Emergency Planning and Community Right-to-Know Act

The purpose of the Emergency Planning and Community Right-to-Know Act is "to provide communities with information on potential chemical hazards within their boundaries and to foster state and local emergency planning efforts to control accidental releases." *Huls America, Inc. v. Browner,* 83 F.3d 445, 446 (D.C. Cir. 1996), *citing* H.R. REP. NO. 253, 99th Cong., 2d Sess., pt. 1 at 60, and *Emergency Planning and Community Right to Know Program, Interim Final Rule,* 51 Fed. Reg. 41,570, 41,570 (1986). In *Huls America*, the D.C. Circuit further stated: "To achieve this end, EPCRA imposed a system of notification requirements on industrial and commercial facilities and mandated that state emergency response commissions and local planning committees be created." *Id.*

In *Steel Company* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), the United States Supreme Court likewise stated:

> EPCRA establishes a framework of state, regional and local agencies designed to inform the public about the presence of hazardous and toxic chemicals, and to provide for emergency response in the event of health threatening release. Central to its operation are reporting requirements compelling users of specified toxic and hazardous chemicals to file annual "emergency and hazardous chemical inventory forms. . . ."

523 U.S. at 86-87.

With respect to these reporting requirements, Section 311 of EPCRA provides that "[t]he owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970 . . . shall submit a material safety data sheet for each such chemical, or a list of such chemicals." 42

U.S.C. § 11021.[1] Section 311 is a one-time submission. It requires a filing, for each qualifying chemical, with the local emergency planning committee, the State emergency response commission, and the fire department having jurisdiction over the facility. This filing is to occur when such chemical is present at the facility in quantities equal to, or greater than, either 10,000 pounds, or the specific reporting threshold established by EPA, whichever is lower. The initial submission of a material safety data sheet, or list, was to be accomplished no later than 12 months after October 17, 1986, or 3 months after the owner or operator of a facility is required to prepare an MSDS. 42 U.S.C. § 11021(d).

Section 312 of EPCRA provides that "[t]he owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970 . . . shall prepare and submit an emergency and hazardous chemical inventory form." 42 U.S.C. § 11022. Unlike Section 311, this submission is an annual requirement covering all hazardous chemicals present at the facility during the preceding calendar year which meet a prescribed reporting threshold. The Section 312 filing date is March 1. Section 312 can be satisfied by the submittal of either Tier I or Tier II forms.[2]

Pursuant to Section 312(b) of EPCRA, 42 U.S.C. § 11022(b), the Administrator of EPA has set the reporting threshold amount for hazardous chemicals present at a facility, at any one time during the preceding calendar year, at 10,000 pounds. 40 C.F.R. 370.20(b)(4). As is the case with Section 311, this submission under Section 312 is to be made to the local emergency planning committee, to the State emergency response commission, and to the fire department having jurisdiction over the facility.

III. Facts

Energy Gases is in the business of selling propane gas. Tr. 36. It's facility is located in East Syracuse, New York, where it employs seven people. Tr. 24, 30. Energy Gases sells this propane primarily to contractors who use the product for temporary heat during construction in

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[1] Any list of chemicals is to be grouped in categories of health and physical hazards, or in such other categories as the Administrator of EPA may decide. Also, this list is to include the chemical name, or common name, of each chemical as provided on the material safety data sheet, as well as any hazardous component. 42 U.S.C. § 11021(a)(2)(A).

[2] Tier I inventory forms are to include estimates, in ranges, of the maximum amount of hazardous chemicals in each category present at the facility, the average daily amount of hazardous chemicals in each category, and the general location of hazardous chemicals in each category. Tier II inventory forms are to include this information, as well as the chemical name or common name of the chemical as provided on the material safety data sheet, a brief description of the manner of storage of the hazardous chemical, and whether the owner seeks to withhold the location information from the public. 42 U.S.C. §§ 11022(d)(1) & (d)(2).

the colder months. Tr. 357-358. Respondent regularly stores 40,000 gallons, or approximately 176,000 pounds, of propane at its facility. The propane is stored in two large tanks, with a total storage capacity of 48,000 gallons. Tr. 127-128, 367; *see* RX 35.

The Energy Gases facility is located in an industrial area. Next door neighbors include a steel fabricator, a paving company, and a forklift repair facility. Tr. 360-361. A pallet manufacturer is adjacent to the facility, and it repairs and manufactures pallets and stores a large amount of wood at the site. Tr. 419-420. In addition, Interstate Highway 481 is one-eighth of a mile from the facility. I-481 carries traffic almost 24 hours per day. Also, a dentist's office is one-fourth of a mile away from the facility, the police department is located approximately one mile from the facility and the town of Dewitt is within three miles, with some houses as close as one mile. Finally, a shopping mall is approximately one and one-half to two miles from the facility. The nearest fire department is located approximately five miles away. Tr. 361, 363, 417-422.

Thomas Angelicola is the general manger of Energy Gases. He is in charge of the day-to-day operation of the facility. Angelicola reports to James Pipines, who is the president of the company. Tr. 359, 364, 366. Angelicola "wears every hat" in his role as general manager. His duties include propane installation, truck driving, as well as managerial functions. Tr. 360, 364. Angelicola also is responsible for compliance with environmental regulations, including compliance with the reporting requirements of EPCRA Sections 311 and 312. Tr. 407.

On September 29, 1998, Walter Jankowski conducted, on behalf of EPA, an inspection of respondent's propane facility in East Syracuse, New York. Jankowski explained that this inspection was part of a state-wide initiative begun after EPA inspections of propane facilities on Long Island (New York) uncovered EPCRA violations. Tr. 24; CX 2.

Jankowski's inspection of Energy Gases was brief and to the point. He spoke with Angelicola, the facility general manager, during which time Jankowski filled out an EPA inspection form. Tr. 25. This inspection form indicated that respondent had not sent either an MSDS (required by Section 311), or Tier I or Tier II forms (chemical inventory forms required by Section 312), to the LEPC, the SERC or to the local fire department. Angelicola signed the inspection form prepared by Jankowski. Tr. 25, 28; CX 2.

Thereafter, EPA sent a show cause letter to respondent, which was received on July 19, 1999. Tr. 75; CX 4. A show cause letter is designed, in part, to inform an owner or operator of a facility that EPA believes there is a violation. Tr. 74. In this instance, the show cause letter stated that based upon the EPA inspection of September 29, 1998, "it appears that your company is in violation of Section 311 and 312 of EPCRA." The show cause letter included a list of the then suspected EPCRA violations. CX 4.

Shortly after receiving the show cause letter, Angelicola filed, on behalf of Energy Gases, an MSDS form as required by Section 311. Angelicola also subsequently filed Tier II forms, *i.e.,* chemical inventory forms, as required by Section 312, for the years 1996, 1997, and 1998.

These Tier II forms were filed by respondent on July 26, 1999. Tr. 200; CX 6.

Angelicola testified that after this filing of the MSDS and Tier II forms in July of 1999, he believed that Energy Gases was in compliance with EPCRA. Angelicola also testified that at that time he was not aware that the Section 312 chemical inventory form submission was an annual filing requirement. Tr. 385. In September 2000, however, Angelicola learned that he was wrong. It was at this time that EPA notified respondent that it had not filed a chemical inventory form for calendar year 1999. Tr. 388; RX 8. Shortly after receiving the administrative complaint in this case, on September 27, 2000, respondent filed a Tier II form for calendar year 1999. Tr. 391-392, 394.[3] Since 1999, respondent has been in compliance with the chemical inventory form filing requirement of Section 312. Tr. 200-201, 392.

The local emergency planning committee with jurisdiction over the Energy Gases facility is the Onondaga County Office of Emergency Management, located in Syracuse, New York. The State emergency response commission with jurisdiction over the facility is the New York State Emergency Response Commission, located in Albany, New York. Finally, the local fire department with jurisdiction over the facility is the East Syracuse Fire Department in East Syracuse, New York. Stipulation Nos. 9, 10, & 11.

IV. Discussion

As noted, Energy Gases already has been found liable for five violations of the Emergency Planning and Community Right-to-Know Act of 1986. What remains to be determined is the civil penalty.

A. The Statutory Penalty Factors

Section 325(c) of EPCRA authorizes a civil penalty up to $10,000 for each Section 311 violation (*i.e.,* an MSDS filing violation) and up to $25,000 for each Section 312 violation (*i.e.,* a chemical inventory form filing violation). 42 U.S.C. § 11045(c). The Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, has increased these maximum penalty amounts for violations occurring after January 30, 1997. Accordingly, the maximum penalty for a Section 311violation is now $11,000 and the maximum penalty for a Section 312 violation is now $27,500.[4]

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[3] EPA submits that Energy Gases did not file a chemical inventory form for the year 1999. Compl. Br. at 24. Stipulation No. 19 supports EPA's assertion that the inventory form had not been filed. Nonetheless, despite this stipulation by Energy Gases, the testimony of Thomas Angelicola, respondent's general manager, and Ellen Banner, complainant's EPCRA enforcement coordinator, supports a finding that such a filing indeed was made. Tr. 158-159, 390-392.

[4] All five violations in this case occurred after January 30, 1997. In that regard, the Section 311 violation occurred on March 31, 1997, the last date for respondent to file an MSDS for propane, and

While Sections 325(c)(1) and(c)(2) authorize the assessment of a civil penalty, they do not expressly identify any factors to be considered in determining the penalty amount. 42 U.S.C. §§ 11045(c)(1) & (c)(2). Nonetheless, EPCRA does provide penalty assessment guidance elsewhere in the statute. In that regard, Section 325(b)(1)(C) of EPCRA sets forth criteria to be considered in assessing a penalty for a violation of the emergency notification provisions of Section 304. 42 U.S.C. § 11004. Section 325(b)(1)(C) provides:

> In determining the amount of any penalty assessed pursuant to this subsection, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any history of prior such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

42 U.S.C. § 11045(b)(1)(C).[5] The penalty criteria of Section 325(b)(1)(C) shall be used as guidance in determining the penalty in this case.[6]

B. <u>The Penalty Assessment</u>

<u>Nature, Circumstances, and Extent of Violations</u>

The nature of the violations was the failure to timely file the MSDS and the chemical

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the earliest Section 312 violation occurred March 1, 1997, also the last date for respondent to file an inventory form for propane for calendar year 1996.

[5] Section 325 (b)(2) of EPCRA contains substantially the same penalty criteria for a continuing violation of Section 304, as Section 325(b)(1)(C). The Environmental Appeals Board has stated that use of either penalty criteria for guidance is appropriate for determining a civil penalty under EPCRA Section 325(c). *See Woodcrest Mfg., Inc.,* 7 E.A.D. 757, 774 n.11 (EAB 1998), *aff'd,* 114 F. Supp. 2d 775 (N.D. Ind. 1999).

[6] EPA bases it request for an $83,315 penalty on calculations performed pursuant to the agency's "Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act." While EPA represents that this "Penalty Policy" takes into account all the appropriate statutory penalty factors (*see* Compl. Br. at 10, 13), the penalty in this case will be determined by examining the evidence in light of the specific statutory penalty criteria.

inventory forms with the local emergency planning committee, the State emergency response commission, and the local fire department.

As to the extent of the Section 311 violation, respondent had not filed its Material Safety Data Sheet from at least the time that Angelicola became general manager in 1995, until a few days after it received EPA's show cause letter of July, 1999. Thus, for more than three years the EPCRA planning bodies were deprived of this MSDS information.[7]

As to the extent of the Section 312 violations, the chemical inventory forms for calendar years 1996, 1997, and 1998 were due on March 1, of 1997, 1998, and 1999, respectively. Respondent did not file inventory forms for any of those years until a few days after receiving the EPA show cause letter in July of 1999. Thus, the extent of the calendar year 1996 violation was two years and four months, the extent of the calendar year 1997 violation was one year and four months, and the extent of the calendar year 1998 violation was four months. In addition, respondent did not file a chemical inventory form for calendar year 1999, which was due March 1, 2000, until a few days after receiving the administrative complaint on September 27, 2000. Thus, the extent of the calendar year 1999 violation was approximately seven months. While, as noted, Angelicola testified that the local fire department was aware that propane was being stored at its facility, the fire department was not provided with the Tier II forms which would show the amount of hazardous material actually stored on site. Tr. 394-395.

Gravity

The chemical involved in each violation in this case is propane, a "hazardous chemical" as defined under Section 329(5) of EPCRA, 42 U.S.C. § 11049(5), and 40 C.F.R. 370.2. Stipulation No. 7. EPA has presented evidence showing that the amount of propane stored at the Energy Gases facility was 40,000 gallons, or approximately 175,000 pounds. CX 2. In fact, on at least one day in 1996, 1997, 1998, and 1999, respondent stored more than 200,000 pounds of propane at its East Syracuse facility. Stipulation Nos. 14, 15, 16, & 18.[8]

As noted earlier, the purpose of the Emergency Planning and Community Right-to-Know Act is to insure that the community and emergency planners have access to information about hazardous chemicals within the community so that they are able to plan in the event of an accidental release. *See Huls America, Inc. v. Browner,* 83 F.3d 445, 446 (D.C. Cir 1996). It

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[7] Angelicola did testify, however, that the East Syracuse Fire Department was aware that it stored propane at its facility. Tr. 394-395.

[8] While the amount of propane stored at respondent's facility would appear to be substantial and certainly would present a hazard in the event of an accidental release, EPA failed to show with any specificity just who in the community would be affected by such a release and how they would be affected.

stands to reason that this very important mission cannot be accomplished if regulated businesses, such as Energy Gases, fail to report the presence of hazardous chemicals when required to do so by EPCRA.

In that regard, with respect to Section 311, EPA submits that "[t]he purpose of this requirement is to ensure that responders will have sufficient information regarding the hazards associated with the hazardous chemical prior to arriving at a facility to enable them to properly respond to accidental releases of such hazardous chemicals." Compl. Br. at 8, citing, *Agency Information Collection Activities: Proposed Collection; Comment Request; Emergency Planning and Release Notification Requirements; Community Right-to-Know Information,* 61 Fed. Reg. 51107 (1996). This point is well-taken and the obvious need of responders to accidental releases to know the nature of the hazardous chemical involved underscores the seriousness of an MSDS reporting violation.

Also, the failure to comply with Section 312 of EPCRA not only denies critical information to these responders, such as the amount of the hazardous chemical being stored at the facility, but it also prevents the local emergency planning committee and the State emergency response commission from preparing response plans in anticipation of an accidental release. Indeed, Section 303 of EPCRA specifically requires the LEPC to prepare such an emergency plan and to submit this plan to the SERC for review. 42 U.S.C. §11003.

Ability-to-Pay

At the outset of litigation, a respondent's ability to pay the proposed penalty may be "inferred," based upon general financial information. In such a case, the burden is then on the respondent to rebut this inference by producing specific evidence showing that it cannot pay the penalty. *New Waterbury, Ltd.,* 5 E.A.D. 529, 541-42 (EAB 1994). The burden of proof, however, always remains with EPA. 40 C.F.R. 22.24; *see CDT Landfill Corp.,* 2003 *EPA App. LEXIS* 5, *84-85 (June 5, 2003)(EAB). Here, Energy Gases contends that it is unable to pay the penalty proposed in the complaint. EPA takes a contrary position. As explained below, complainant has established by a preponderance of the evidence that respondent is indeed able to pay the $50,000 civil penalty assessed against it.

Energy Gases casts itself as a "very small business" that has been under financial stress as a result of declining propane sales. In particular, respondent cites to testimony that its sales during the winter of 2001 were "quite depressed" due to the "extremely warm" winter weather. Resp. Br. at 23. In addition, respondent in part relies upon the financial analysis of EPA's expert witness, Gail Coad, arguing that three models prepared by this expert show that the company is unable to pay the penalty sought by EPA. Resp. Br. at 23–25.

The testimony of Coad, who was qualified as an expert witness in the area of "ability-to-

pay analysis," is critical in resolving the ability-to-pay issue. Tr. 230-231.[9] Coad testified during EPA's case-in-chief, as well as during the agency's rebuttal phase. Her testimony that respondent is able to pay the penalty in this case is detailed, based upon financial data provided by respondent, and in large measure is not rebutted by respondent. Accordingly, Coad's expert testimony is entitled to considerable weight.

In analyzing Energy Gases's ability to pay, Coad prepared two financial reports. The first report is based upon financial information from fiscal years ending September 30, 1998, to September 30, 2000. Tr. 235; CX 22. The second report, identified as the Supplemental Report, is based upon financial data provided by Energy Gases for the fiscal year ending September 30, 2001, as well as the following six-month period ending March 31, 2002. This Supplemental Report was intended to provide a more up-to-date picture of respondent's financial position. Tr. 231-233; CX 28.

In performing her financial analysis, Coad used the "ABEL" computer program. ABEL assists an analyst in organizing financial information and in making cash flow projections. It is set up on an Excel spreadsheet platform and it is basically a screening tool that is designed to use Federal income tax data. ABEL requires at least three years, and can handle as much as five years, of data. Coad testified that ABEL is not all the analysis; it's just the first step used to get a financial overview. In assessing Energy Gases's ability to pay under ABEL, Coad considered the company's Federal income tax returns for the years 1998 to 2000. Tr. 236-242, 256.

Coad's review of respondent's financial condition was wide-ranging. She explained:

> I examined their expenditures, their pattern of historic expenditures to determine whether there were any areas where they might be able to reduce expenditures in order to pay a penalty, and I looked at their ability to finance a penalty or pay for a penalty out of existing assets or out of acquiring additional debt.

Tr. 256.

It is Coad's expert opinion that Energy Gases "seemed healthy and growing, with a very solid balance sheet." Tr. 257. In that regard, she referred to Exhibit 1-SR of the Supplemental Report (CX 28) to prove her point. Coad showed that in 1998, the company had revenues of $1,117,700, and that by 2001, these revenues had increased to $1,458,000.
Tr. 257-258. She concluded: "So I think I computed in my report that's an increase over a period of about 30 percent, and which is about 8 or 9 a year, which compares certainly more

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[9] Gail Coad is associated with Industrial Economics, Inc. This firm provides economic, financial, and environmental policy consulting services. Tr. 219, 222. Industrial Economics, Inc., was hired by EPA to analyze Energy Gases's ability to pay the penalty in this case. Tr. 231.

substantial than inflation during that period." Tr. 258; *see* Tr. 264.

Another important indicator to Coad was respondent's "current ratio," *i.e.,* its current assets over current liability.[10] According to Coad, Energy Gases's current ratio ranged from 1.84 in 1998, to 2.12 in 2001. In other words, as of September 30, 2001, the company had two times the currents assets as it had current liability. In Coad's opinion, "[t]his is a very strong financial position." Tr. 260. She added, "[i]n my experience, most companies aim for or have a current ratio of somewhere between 1 and 1.2." *Id.*[11]

On rebuttal, Coad stated that she was present when both Angelicola, the general manager, and Pipines, the company president, testified regarding Energy Gases's substantial capital expenditure in in its purchase of six trucks. Coad further stated that the testimony of Angelicola and Pipines did not change her opinion that respondent could afford to pay the penalty proposed by EPA. Tr. 534.

In that regard, despite the fact that Energy Gases paid approximately $300,000 in cash for the six trucks, Coad testified, "I have every reason to think that cash flow, if anything, is greater than what I had assumed in my various analyses." Tr. 535. In that regard, Coad concluded that the purchase of the trucks would save respondent approximately $45,000 a year for the first few years of ownership. *Id.* She also concluded that Energy Gases would now have an ability to depreciate the newly purchased trucks, thus providing an "advantageous cash flow effect." Tr. 536-537. Coad estimated this depreciation would benefit the company to the extent of $50,000 a year for six years. She also opined that the truck purchase could result in an additional tax benefit of approximately $20,000 a year. Tr. 537.

In sum, on rebuttal Coad rejected the conclusions generated by the ABEL program and appearing in her Supplemental Report. Tr. 546. With respect to the ABEL conclusions she explained:

> ... I think these conclusions are meaningless because they don't reflect the reality of Energy Gases's future situation as described by Mr. Pipines and Mr. Angelicola. The history, the recent financial history matches nothing like what it's going to be in the future now that they bought these trucks, *so this analysis is just not very useful anymore.*

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[10] Current assets are assets that are relatively liquid, such as cash, inventory, and receivables. Current liabilities are liabilities due within a year. Tr. 259.

[11] Coad also checked data compiled by Robert Morris Associates for companies in the same business area as respondent. She found that they had a median current ratio of .9 to 1.0. She concluded: "So Energy Gases appears to be in more solid shape than the average median company in that classification." Tr. 260.

Tr. 546-547 (emphasis added). Specifically, Coad found the ABEL analysis no longer useful given Energy Gases's maintenance cost savings resulting from the purchase of the trucks, the trade-in value of the old trucks, and the depreciation effects on the company's cash flow. Tr. 547.

History of Prior Violations

It is undisputed that respondent has no history of EPCRA violations.

Degree of Culpability

The record shows that Energy Gases was highly negligent in failing to satisfy its EPCRA filing requirements stretching over approximately a five-year period. In that regard, James Pipines, the company's president, had been aware of the EPCRA filing requirements at issue in this case ever since the Emergency Planning and Community Right-to-Know Act became law in 1986. Tr. 462, 483. With respect to these MSDS and chemical inventory form filings, Pipines testified, "I knew about them, but I didn't take care of that end of the business." Tr. 462. He added, "I know there was certain documents that had to be filed each year." *Id.*[12] Pipines, however, apparently left such matters in the hands of his general manager. *Id.* The problem though is that respondent never trained Angelicola, its facility general manager, on these EPCRA filing obligations when the latter assumed his duties in 1995. In fact, when Angelicola became general manager, he was not provided any information about environmental compliance. Tr. 408.[13]

As for Angelicola, despite the fact that he was the general manager of a facility which stored between 175,000 to more than 200,000 pounds of propane, a hazardous chemical, he testified that prior to the EPA inspection in 1998, he was unaware of EPCRA's filing requirements. In fact, Angelicola did not even know what the local emergency planning committee and the State emergency response commission were. Tr. 374-375. Energy Gases has offered no explanation as to why its general manager was unaware of the fundamental filing obligations involved in this case.

In addition, Angelicola signed the EPA EPCRA inspection form on September 29, 1998, which stated that Energy Gases had not filed either the MSDS required by Section 311, or the chemical inventory forms required by Section 312. The fact that EPA conducted this inspection, no matter how brief, and the fact that the EPA inspector documented the company's non-

[12] In fact, Pipines is a corporate officer in two roofing companies and some of the roofing materials used by these companies were considered to be hazardous substances subject to the EPCRA reporting statute. Tr. 463, 470.

[13] Pipines testified that Angelicola knew that there was an EPCRA filing requirement, but he provided no details on this matter. Tr. 469.

compliance with EPCRA, should have set off some kind of regulatory compliance alarm with respondent. It did not. Energy Gases did subsequently submit the MSDS and the chemical inventory forms for the years 1996, 1997, and 1998, but this was only in response to EPA's show cause letter of July, 1999.

After both the inspection and the show cause letter, Energy Gases should have had a great level of awareness of its EPCRA responsibilities. The show cause letter, in particular, separately listed each chemical inventory form violation, by calendar year. Despite this, Energy Gases did not timely submit the Section 312 chemical inventory filing for calendar year 1999. (It was not until after the complaint was filed in this case that respondent submitted a Tier II form for 1999). Angelicola's explanation that he did not think the company had to make yearly filings of chemical inventory forms (Tr. 385) is unacceptable.[14]

Economic Benefit

The record evidence shows respondent gained no economic benefit as a result of its non-compliance. Indeed, even EPA makes no such claim.

Other Matters as Justice May Require

There are no other matters which warrant a reduction to the penalty assessed in this case.[15]

V. ORDER

It is held that Energy Gases, Inc., committed one violation of Section 311 and four violations of Section 312 of the Emergency Planning and Community Right-to-Know Act of 1986. 42 U.S.C. §§ 11021 & 11022. For these violations respondent is assessed a civil penalty of $50,000. 42 U.S.C. § 11045(c)(1) & (2). Energy Gases is directed to pay this penalty within 60 days of the date of this order.[16]

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[14] Despite admitting liability, respondent seems to suggest that EPA didn't do all that it should have in order to ensure compliance with EPCRA. Resp. Br. at 3-6. To the extent that Energy Gases is arguing that the actions of EPA in this matter lessen the company's negligence, its argument is rejected.

[15] The fact that the start of the hearing was delayed approximately five and one-half hours due to the failure of the assigned court reporter to appear was determined, under the circumstances of this case, not to warrant a penalty reduction.

[16] Payment of the civil penalty may be in the form of a cashier's or certified check, made payable to the Treasurer of the United States, and addressed to Mellon Bank, EPA Region 2 (Regional

Unless an appeal is taken to the Environmental Appeals Board pursuant to 40 C.F.R. 22.30, or unless a party acts pursuant to 40 C.F.R. 22.27(c), this decision shall become a Final Order as provided in 40 C.F.R. 22.27(c).

Carl C. Charneski
Administrative Law Judge

Hearing Clerk), P.O. Box 360188M, Pittsburgh, Pennsylvania, 15251.