UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
STEELTECH, LIMITED,	)	Docket No. EPCRA-037-94
	)	
Respondent	)	
	)	
MICHAEL F. FARMER,	)	
	)	
Intervenor	)	

INITIAL DECISION

DATED: MAY 27, 1998

EPCRA: Pursuant to Section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 42 U.S.C. §11045, Respondent Steeltech, Limited is assessed a penalty of $ 61,736 for failing to file Toxic Chemical Release forms as to nickel and chromium for calendar years 1989-1993, and cobalt for calendar year 1993, in violation of Section 313 of EPCRA.

PRESIDING OFFICER: CHIEF ADMINISTRATIVE LAW JUDGE SUSAN L. BIRO

APPEARANCES:

For Complainant:

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I. PROCEDURAL HISTORY

On September 2, 1994, Corinne S. Wellish, Director of the Environmental Sciences Division of Region V of the Environmental Protection Agency (hereinafter "Complainant" or "EPA"), filed an Administrative Complaint against Steeltech, Limited (hereinafter "Respondent" or "Steeltech").(1) The Complaint charged Respondent in six counts with violating Section 313 of the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"), 42 U.S.C. §11023, by failing to file Toxic Chemical Release Forms ("Form Rs") for nickel and chromium for calendar years 1988, 1989 and 1990, chemicals which were manufactured, processed or "otherwise used" by Respondent in those years in excess of the reporting threshold. The Complaint proposed a total combined civil penalty of $60,288 which Complainant represented had been determined in accordance with EPA's Enforcement Response Policy for Section 313 of EPCRA ("the ERP"), a copy of which was attached to the Complaint.

Upon Motion granted on March 14, 1995, Complainant filed an Amended Complaint adding to the six original violations charged, five more counts, which alleged Respondent further violated Section 313 of EPCRA by failing to file the requisite Form Rs for nickel and chromium for calendar years 1992 and 1993, and for cobalt in calendar year 1993. The Amended Complaint increased the proposed total combined civil penalty to $84,390.

Respondent answered both the Complaint and the Amended Complaint, wherein it asserted lack of knowledge or information sufficient to form a belief as to the truth of the allegations of violation, and asserted factual issues and affirmative defenses. Respondent requested a hearing before an Administrative Law Judge on all issues.(2)

On April 6, 1995, Michael F. Farmer, former owner of Respondent company, was granted leave to intervene in this action, based on the fact that he had entered into an indemnification agreement when he had sold his stock in Respondent company to the present owners on July 31, 1990. Mr. Farmer subsequently filed a Motion for Partial Accelerated Decision as to Counts I and II of the Amended Complaint, relating to 1988 filing violations, alleging that those violations were barred by the five year statute of limitations set forth in 28 U.S.C. § 2462. Respondent joined in the Motion, and Complainant opposed it on the basis that Counts I and II were continuing violations which are not barred by the statute of limitations.

On January 28, 1997, the undersigned issued an Order staying decision on Intervenor's Motion for Partial Accelerated Decision pending decision by the Environmental Appeals Board (EAB) in *Lazarus, Inc.*, TSCA Appeal No. 95-2, on the issue of whether similar filing violations under the Toxic Substances Control Act are barred by the statute of limitations on the basis that they are not "continuing violations." Additionally, the case was scheduled for hearing.(3)

On July 15, 1997, Complainant filed a Motion for Accelerated Decision as to liability and penalty on all Counts. Respondent opposed the Motion. On August 29, 1997, in accordance with Section 22.20(a) of the Consolidated Rules of Practice

Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Rules") (40 C.F.R. Part 22), the undersigned issued an Order granting accelerated decision as to liability only, as to Counts III through XI. Decision as to liability on Counts I and II continued to be deferred pending the EAB's decision in *Lazarus*.[(4)]

After due notice, a hearing was held in this matter before the undersigned Administrative Law Judge on September 23, 1997 in Grand Rapids, Michigan. Complainant did not present any witnesses at the hearing. Intervenor and two witnesses testified at the hearing on behalf of Respondent. A total of twenty-three joint exhibits were admitted into evidence without objection.[(5)] The transcript of the hearing was received by the undersigned on October 15, 1997.[(6)] The record closed with the filing of Complainant's reply brief on December 8, 1997.[(7)]

In its initial post-hearing brief, Complainant represented that it was no longer pursuing Counts I and II relating to 1988 filing violations in light of the September 30, 1997 decision by the EAB in *Lazarus*. The EAB held therein that the requirement of 40 C.F.R. § 761.180(a) to prepare and maintain annual documents was not continuing in nature, and thus penalties for failure to prepare such documents in the years preceding the five-year statute of limitations period were time barred. As a result of this decision, Complainant stated in its post-hearing brief that it was reducing the total combined proposed penalty sought to $74,390, reflecting a deduction of $5,000 for each of the two 1988 Counts. Accordingly, since no issue or controversy remained as to Counts I and II, they were formally dismissed by Order dated December 3, 1997. As a result, left for decision here is the penalty to be applied for the nine violations set forth in Counts III-XI of the Amended Complaint, as to which Respondent's liability has already been established.

II. FACTUAL BACKGROUND

During all time relevant hereto, Respondent Steeltech, Limited owned and operated a facility located at 1252 Phillips Avenue, S.W., Grand Rapids, Michigan, 49507 ("facility"). At its facility, Steeltech manufactures high temperature alloys for use in heat treating and steel mills. Tr. 26, 41, Ex. 1, 23 and 26 (Stips. 2, 4, and 6).

Intervenor Michael F. Farmer began Respondent company in 1986, coincidentally the same year that EPCRA was enacted,[(8)] and was Steeltech's president and sole stockholder until 1990. Tr. 26, 43. While Mr. Farmer acknowledged that Steeltech never specifically hired an environmental consulting firm (tr. 32), in an effort to assure the company's compliance with governmental reporting requirements, Respondent retained what Mr. Farmer characterized as the "best CPA [certified public accounting] firm in Grand Rapids" and a "respected" law firm specializing in environmental law. Tr. 26-27, 31-32. In addition, Mr. Farmer hired as a company employee a certified public accountant to, *inter alia*, approve invoices and otherwise assure the company's compliance with environmental laws. Tr. 27, 36-37. According to Mr. Farmer's testimony, Respondent also hired an experienced foundry manager who was familiar with industry filing requirements, and Mr. Farmer attended industry conferences and received regular informational mailings from a number of national industry organizations regarding newly enacted laws and regulations affecting the industry. Tr. 27-29. Nevertheless, Mr. Farmer testified that he never became aware of EPCRA's filing requirements and Steeltech never filed any Form Rs during his tenure as owner. Tr. 29, 34-35.[(9)]

On July 31, 1990, Mr. Farmer sold his stock in Steeltech to Gary Salerno, who had been the company's manager of marketing since 1987, and Mr. Salerno's father, Armand Salerno. Tr. 42-44, Ex. 11, 12 and 26 (Stip. 3). As a condition of the sale, Mr. Farmer agreed to indemnify Gary Salerno against a portion of future costs (not to exceed $153,500) incurred as a result of Steeltech's failure to comply with any environmental law prior to sale. Ex. 11, p. 5.[(10)]

Gary Salerno testified at the hearing that, at the time he purchased a controlling

interest in Steeltech in 1990, he was unaware of EPCRA's filing requirements and the company's existing EPCRA violations.[(11)] Mr. Salerno testified that he personally did not become aware of EPCRA's filing requirements until September 1994, when he received the Complaint. Tr. 44, 57. It was at that point, Mr. Salerno said, that he discovered that on February 12, 1992, his father, Armand, had participated in an EPA EPCRA compliance inspection, which revealed that Respondent had violated EPCRA by failing to file Form Rs regarding the nickel and chromium it manufactured, processed or otherwise used during calendar years 1988, 1989 and 1990. A day after the inspection, Armand Salerno filed the missing forms.[(12)] Subsequently, Armand Salerno turned over responsibility for future EPCRA compliance to Ron Wells, the company's vice president of operations, who timely filed the Form Rs for 1991.[(13)] Mr. Salerno testified that in late 1992 or early 1993, Mr. Wells changed positions within the company and John Decker was hired as vice president of operations. Unfortunately, the responsibility of complying with EPCRA was not specifically transferred from Mr. Wells to Mr. Decker and, as a result, Mr. Decker did not file any Form Rs for Respondent in 1992 or 1993. After receiving the Complaint, Gary Salerno testified that he placed the responsibility for EPCRA filings on James Pews, the company's chief financial officer. Tr. 45-50.

James Pews, Respondent's chief financial officer and vice president of finance, testified at the hearing that when Steeltech hired him on September 26, 1994 (shortly after the original Complaint was filed), he was tasked with the responsibilities of researching the company's history of EPCRA compliance and filing future Form Rs. Tr. 73-74. Mr. Pews stated that his research not only confirmed the accuracy of the allegations in the original Complaint regarding the 1988, 1989 and 1990 Form Rs being filed only after the 1992 inspection, but also revealed that after 1991 "the ball was dropped," and no subsequent Forms Rs were filed either, which was "consistent with" the allegations *made to him* by Bob Allen of EPA. Tr. 75-76. As a result, in a telephone conversation with Mr. Allen on October 24, 1994, Mr. Pews made this "disclosure" as to the additional violations not set forth in the original Complaint. Tr. 76-77. Steeltech then filed its 1992 and 1993 Form Rs on November 15, 1994, and thereafter timely filed its 1994, 1995 and 1996 Forms Rs.[(14)] Tr. 77, 81. Mr. Pews testified at the hearing that, to assure future compliance with the EPCRA filing requirements he "just now" placed the deadlines for obtaining blank Form Rs and filing the Form Rs on the spreadsheet he maintains of tax related filing deadlines that is part of a ticker system on his computer. Tr. 79.[(15)]

Finally, there was testimony at the hearing regarding Respondent's financial position. Although he always earned a good living from the business (tr. 48, 62-64, 86), Mr. Salerno testified that Steeltech was in serious financial trouble at the time he purchased the business from Mr. Farmer and the first year there was a possibility of the company filing for bankruptcy. Tr. 46, 60, 63. Mr. Pews testified that Steeltech's financial statements show that the company had a significant deficit in 1990-1993. However, Steeltech's fortunes turned in 1992 and it began to make money, which the company has done every year since then. Mr. Pews testified that in 1993, the company made a profit of about $100,000, in 1994 it made $400,000, and in 1995 it made $500,000, before taxes. However, in 1996, Steeltech made only $100,000 in profit. Mr. Pews indicated that all the profits were poured back into the business. Tr. 83-86.

III. LEGAL CRITERIA APPLICABLE TO § 313 PENALTY DETERMINATIONS

Section 22.27(b) of the Rules provides in pertinent part that:

> . . . the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, *and* must consider any civil penalty guidelines issued under the Act.

40 C.F.R. §22.27(b) (emphasis added).

A. Statutory Civil Penalty Criteria

The Act at issue here, EPCRA, provides that any person violating its Section 313 (42 U.S.C. §11023), the filing requirements at issue in this case, "shall be liable to the United States for a civil penalty *in an amount not to exceed $25,000* for each such violation." *See,* 42 U.S.C. 11045(c)(1) (emphasis added). However, EPCRA fails to enumerate any guiding criteria for determining how much of the maximum $25,000 per violation civil penalty should be imposed in a particular case.[(16)]

B. EPA's Civil Penalty Guidelines

On August 10, 1992, EPA's Office of Compliance Monitoring of the Office of Prevention, Pesticides and Toxic Substances issued the EPCRA Section 313 Enforcement Response Policy ("ERP"). Ex. 2. The ERP's stated purpose is to "ensure that enforcement actions for violations of EPCRA §313 . . . are arrived at in a fair, uniform and consistent manner; that the enforcement response is appropriate for the violation committed; and that persons will be deterred from committing EPCRA §313 violations . . . ." Ex. 2, p. 1.[(17)]

The ERP utilizes a matrix and/or a per-day formula to determine a "gravity-based" penalty accounting for the circumstance level and extent level of the violation at issue. Once this gravity-based penalty is determined, the ERP provides that upward or downward adjustments in that penalty may be made in consideration of other factors such as voluntary disclosure, history of prior violations, delisted chemicals, attitude, and ability to pay. Ex. 2, p. 8.

All of the EPCRA violations at issue here charge Respondent with the failure to submit yearly Toxic Chemical Release forms (commonly known as a "Form Rs") when such forms came due on July 1 of the following calendar year. The ERP defines a violation under these "circumstances" as a "failure to report in a timely manner violation" and divides such violations into two categories. Category I covers instances where the Form R reports are submitted *one year or more after the July 1 due date*; Category II covers instances where the reports are submitted after the July 1 due date *but before July 1 of the following year*. Ex. 2, p. 4. Category I violations are considered as "circumstance level 1" violations. Category II violations are "circumstance level 4" violations. Ex. 2, pp. 4, 11-12.

The ERP determines a violation's "extent" level by looking at the size of the violator's business and the quantity of the chemical used that is the subject of the violation. Violations by businesses of Steeltech's size as of the date the original Complaint was filed, *i.e.*, those with less than 10 million in total yearly corporate sales (Ex. 1), which used *more than* 10 times the reporting threshold for the non-reported toxic chemical in the applicable calendar year are designated "extent level B." Violations by the same size businesses, which used *less than* 10 times the threshold, are designated extent level "C".[(18)] Ex. 2, p. 9.

After the circumstance and extent levels are determined in accordance with the ERP, those levels are mapped on a matrix in order to determine the "gravity-based penalty" amount applicable to the violation. Where the violator filed less than one year after the filing deadline, the ERP provides a per-day formula which establishes the percentage of the gravity-based penalty applicable to the violation. Ex. 2, p. 8.

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

(a) voluntary disclosure - a downward adjustment of up to 50%

(b) history of prior violations - an upward adjustment of up to 100%

(c) delisted chemicals - a downward adjustment of a fixed 25%;

(d) attitude - a downward adjustment of up to 30%

(e) other factors as justice may require - a downward adjustment of up to 25%.

In addition, adjustments are allowed in consideration of a respondent implementing a "supplemental environmental project" ("SEP") and Respondent's financial inability to pay the proposed penalty.

The ERP indicates that adjustments for voluntary disclosure, history of prior violations and delisting may be made by EPA prior to issuing a civil complaint, but an adjustment for "attitude," a SEP and/or inability to pay, is made only after a complaint is issued. Ex. 2, p. 8. Further, the ERP indicates that an adjustment may not be made for both attitude and voluntary disclosure, because those adjustments are considered "mutually exclusive." Ex. 2, pp. 16, 18.

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 unquestionably applied as if the policy were a rule with "binding effect." *See, Employers Ins. of Wausau and Group Eight Technology, Inc.*, TSCA Appeal No. 95-6, 6 EAD 735, 755-762 (EAB, Feb. 11, 1997). In setting the penalty, Administrative Law Judges have "the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where circumstances warrant." *DIC Americas, Inc.*, TSCA Appeal No. 94-2, 6 EAD 184, 189 (EAB, Sept. 27, 1995). However, as indicated above, the procedural Rules governing this proceeding require that "any civil penalty guidelines" be "considered" and that deviations from the amount of penalty recommended to be assessed in the complaint be accompanied by specific reasons therefor. *See,* Rule 22.27(b) (40 C.F.R. §22.27(b)).[(19)]

IV. EVALUATION OF COMPLAINANT'S PENALTY CALCULATIONS

Utilizing the ERP, Complainant has proposed a total penalty of $74,390 for the nine violations set forth in Counts III-XI as to which liability has already been established. In reaching this figure, Complainant exclusively utilized the ERP and adjusted downward the gravity-based penalties for the violations set forth in Counts VII-XI (*i.e.*, those added in the Amended Complaint), by a total of 35% in light of Respondent's "voluntary disclosure" of those violations (25%) plus its remediation of the violations within 20 days of disclosure (10%). Complainant made no additional adjustments to the gravity-based penalties established by the ERP.

In detail, the record evidences that Complainant calculated the proposed penalty in accordance with the ERP as follows:

A. Circumstance Level

As indicated above, the ERP provides that violations arising from the failure to file a Form R in a timely manner may be classified either as a "circumstance level 1" violation or a "circumstance level 4" violation depending on when the violator remedied its delinquency by filing the missing form. "Circumstance level 1," the highest level, is applied to violations arising out of a failure to file a Form R within one year of the July 1 due date. For filing a timely Form R after the July 1 deadline but before July 1 of the following year, the violation is classified as "circumstance Level 4, to which a per day formula is applied to calculate the penalty.

Complainant classified four of the violations (Counts III, IV, VIII and VIII) as involving circumstance level 1 and five of the violations (Counts V, VI, IX, X, XI) as involving circumstance level 4 (Ex. 3), and this classification appears supported by the record. There is no dispute that Respondent filed its Form Rs for 1989 (due July 1990) and 1990 (due July 1991) on February 13, 1992, and filed its Form Rs for 1992 (due July 1993) and 1993 (due July 1994) on November 15, 1994. Ex. 26 (Stips. 23, 27, 32, 34, 41, 44, 50, 53, and 56). Respondent was *more than* one year late in filing its 1989 and 1992 Forms and *less than* one year late in filing its 1990 and 1993 Form Rs. Thus, Complainant correctly classified Counts III (1989

nickel), IV (1989 chromium), VII (1992 nickel) and VIII 1992 chromium) as involving circumstance level 1 violations, and the per-day formula under circumstance level 4 applies to Counts V (1990 nickel), VI (1990 chromium), IX (1993 nickel), X (1993 chromium) and XI (1993 cobalt).

B. Extent Level

As indicated above, the "extent" of the violation is assessed in the ERP in three levels (A, B and C) taking into account: (a) the size (gross annual sales and/or number of employees) of the facility *at the time the Complaint was issued*; and (b) the quantity of the chemical at issue. Ex. 2, pp. 8-9.

In its calculations, to the benefit of Respondent, Complainant categorized Steeltech as a company with *less than* 10 million dollars per year in gross annual sales, as to each count. Ex. 3. The Complaint in this case was issued in September 1994. There was no testimony at the hearing nor were any records introduced establishing exactly what Respondent's gross annual sales were as of September 1994. Ex. 8. However, admitted into evidence without objection was a Dun & Bradstreet Report dated December 1995, which indicates that Steeltech represented to Dun & Bradstreet that its 1994 annual gross sales totalled $8.8 million dollars. Ex. 8. Therefore, Complainant's categorization is supported by the record.[(20)]

With regard to the quantity of chemicals at issue, relying upon usage amounts stipulated by the parties, Complainant categorized Respondents usage as to five of the nine counts, specifically Count III (1989 nickel), Count IV (1989 chromium), Count V (1990 nickel), Count VII (1992 nickel), and Count IX (1993 nickel) as being *more than* 10 times the usage threshold. Ex. 3. These categorizations also appear well supported by the record. The threshold amount requiring EPCRA § 313 reporting is 25,000 pounds per year for processing nickel, chromium or cobalt in 1989 and subsequent years. EPCRA § 313(f)(1)(B), 40 C.F.R. § 372.25(a). Respondent stipulated that it manufactured, processed or otherwise used 351,625 pounds of nickel in 1989 (Count III), 256,238 pounds of chromium in 1989 (Count IV), 285,890 pounds of nickel in 1990 (Count V), 283,901 pounds of nickel in 1992 (Count VII), 347,933 pounds of nickel in 1993 (Count IX). Ex. 1, 3, 5 and 26 (Stips. 22, 26, 31, 39, and 48).

As a result, combining the categorization of Steeltech as a company with *less than* 10 million dollars per year in gross sales and the facility having used *more than* 10 times the threshold of the §313 chemical involved, Complainant assigned an extent level of "B" to these five Counts: Counts III (1989 nickel), Count IV (1989 chromium), Count V (1990 nickel), Count VII (1992 nickel), and Count IX (1993 nickel).

With regard to the remaining four Counts - Count VI (1990 chromium), Count VIII (1992 chromium), Count X (1993 chromium), and Count XI (1993 cobalt), Complainant categorized these Counts as involving violations where the unreported chemical was manufactured, processed or otherwise used to an extent *less than*

10 times the threshold for reporting. These categorizations also appear well supported by the record. For each of the years at issue (1989-1993), the reporting threshold for chromium and cobalt was 25,000 pounds of the toxic chemical. Respondent stipulated that it manufactured, processed or otherwise used 208,335 pounds of chromium in 1990 (Count VI), 189,268 pounds of chromium in 1992 (Count VIII), and 231,955 pounds of chromium in 1993 (Count X) and 162,369 pounds of cobalt in 1993 (Count XI). Ex. 1, 3, 5, and 26 (Stips. 33, 42, 51, and 54).

As a result, combining the categorization of Steeltech as a company with *less than* 10 million dollars per year in gross sales and the facility having used *less than* 10 times the threshold of the §313 chemical involved, Complainant assigned an extent level of "C" to those four Counts: Count VI (1990 chromium), Count VIII (1992 chromium), Count X (1993 chromium), and Count XI (1993 cobalt).

In sum, Complainant categorized the nine violations at issue here as follows: Count III (1989 nickel) Circumstance level 1 & Extent level B

Count IV (1989 chromium) Circumstance level 1 & Extent level B
Count V (1990 nickel) Circumstance level 4 & Extent level B
Count VI (1990 chromium) Circumstance level 4 & Extent level C
Count VII (1992 nickel) Circumstance level 1 & Extent level B
Count VIII(1992 chromium) Circumstance level 1 & Extent level C
Count IX (1993 nickel) Circumstance level 4 & Extent level B
Count X (1993 chromium) Circumstance level 4 & Extent level C
Count XI (1993 cobalt) Circumstance level 4 & Extent level C

Thus, of the nine violations, three were classified as circumstance level 1/extent level B (Counts III, IV, VII), one was classified as circumstance level 1/extent level C (Count VIII), two were classified as circumstance level 4/extent level B (Counts V and IX); and three were classified as circumstance level 4/extent level C (Counts VI, X and XI).

C. Gravity-Based Penalty

For circumstance level 1/extent level B violations (Counts III, IV and VIII), the ERP penalty matrix assigns a fixed gravity-based penalty of $17,000. For circumstance level 1/extent level C violation (Count VIII), the ERP penalty matrix assigns a fixed gravity-based penalty of $5,000.

As to the circumstance level 4 violations, the gravity-based penalty is not a fixed amount but is calculated on a per day basis utilizing the figures set forth in the matrix.

The ERP provides the following per-day formula:

$$\text{Level 4 Penalty} + \frac{(\#\text{ of days late} - 1) \times (\text{Level 1-Level 4 Penalty})}{365}$$

Applying that formula to the circumstance level 4/extent level B violation set out in Count V results in a gravity-based penalty of $6,000 plus $6,811 or $12,811 and for Count IX a gravity-based penalty of $6,000 plus $4,099, or $10,099. Applying the formula to the circumstance level 4/extent level C violation set out in Count VI results in a gravity-based penalty of $1,000 plus $2,477, or $3,477. Applying the formula to Counts X and XI results in a gravity-based penalty of $1,000 plus $1,490, or $2,490 per Count.

Thus, pursuant to the ERP, Complainant correctly calculated the total unadjusted gravity-based penalties for the nine violations to be as follows:

Count III (1989 nickel)	- Cir 1/Ext B =	$17,000
Count IV (1989 chromium)	- Cir 1/Ext B =	$17,000
Count V (1990 nickel)	- Cir 4/Ext B =	$12,811
Count VI (1990 chromium)	- Cir 4/Ext C =	$ 3,477
Count VII (1992 nickel)	- Cir 1/Ext B =	$17,000
Count VIII(1992 chromium)	- Cir 1/Ext C =	$ 5,000
Count IX (1993 nickel)	- Cir 4/Ext B =	$10,099
Count X (1993 chromium)	- Cir 4/Ext C =	$ 2,490
Count XI (1993 cobalt)	- Cir 4/Ext C =	$ 2,490
		$87,367

D. Adjustments- Voluntary Disclosure

As indicated above, the ERP provides that the gravity-based penalty may be adjusted in consideration of a number of factors, including voluntary disclosure, history of prior violations, delisted chemicals, attitude, ability to pay, and "other factors as justice may require." Ex. 2, p. 8. In this case, the only adjustment made by Complainant to the penalty was made on the basis of voluntary disclosure. Specifically, in calculating the proposed penalty under the ERP against Steeltech,

Complainant reduced the gravity-based penalties for Counts VII-XI (the 1992 and 1993 violations) by a total of 35% for voluntary disclosure, or a monetary reduction of $11,234.65, bringing the total proposed penalty to $74,390.

The ERP provides that the gravity-based penalty may be adjusted downward "up to 50%" for "voluntary disclosure" of a violation. To be eligible for voluntary disclosure, the violator must submit a signed written statement of voluntary disclosure and/or submit complete and signed Form Rs within 30 days of disclosure. At the outset it must be noted that the ERP provides that "the Agency will not consider a facility eligible for any voluntary disclosure reductions if the company has been notified of a scheduled inspection or the inspection has begun." As indicated in detail above, Steeltech did not disclose the 1992 and 1993 violations, until after the 1992 inspection occurred and after the original Complaint was filed, albeit the inspection and original Complaint related only to the 1988 and 1989 violations. Tr. 76-77. However, the testimony of Mr. Pews indicates that Steeltech's "voluntary disclosure" was not spontaneous; rather, it merely consisted of his confirmation to EPA of the accuracy of information concerning the existence of the additional violations, information which EPA had previously provided to him. Nevertheless, Complainant, in its enforcement discretion, chose to consider those violations to have been "voluntarily disclosed" within the meaning of the ERP and Complainant's discretion in this instance will not be disturbed.[(21)]

There was no testimony at the hearing proffered by Complainant as to how the figure of 35% was reached for voluntary disclosure. The only explanation for the adjustment is set forth in the Amended Complaint wherein EPA proffered that Respondent was given a 25% reduction for voluntarily disclosing the violations and an additional 10% for remediating the violations within 20 days after disclosure. The ERP, however, provides for an initial 25 percent reduction for "voluntary disclosure," that is, disclosure *and remediation* within 30 days of disclosure, and an additional 25 percent reduction only if certain criteria are met. Prompt remediation is not one of the criteria for receiving all or some portion of the additional 25%. Rather, those criteria are:

> 1) The violation was immediately disclosed within 30 days of discovery by the facility;
>
> 2) The facility has undertaken concrete actions to ensure that the facility will be in compliance with EPCRA § 313 in the future. Such steps may include but are not limited to: creating an environmental compliance position and hiring an individual for that position; changing the job description of an existing position to include managing EPCRA compliance requirements; and contracting with an environmental compliance consulting firm; and
>
> 3) The facility does not have a "history of violation" as to EPCRA § 313 for the two reporting years preceding the calendar year in which the violation is disclosed to EPA.

Ex. 2, p. 15.

It is clear that Respondent met the first two, but not the third, criterion. As to the first criterion, Mr. Pews testified that he discovered the 1992 and 1993 violations in October 1994, that he confirmed their existence to EPA that month, and filed the Form Rs for 1992 and 1993 on November 15, 1994. Tr. 76-77. Further, as to the second criterion, Respondent showed that it has ensured future compliance with EPCRA § 313 by hiring Mr. Pews, a certified public accountant, and giving him the specific responsibility for EPCRA compliance. Tr. 50, 73-75, 86-87. Mr. Pews testified that to assure that he fulfills this responsibility, he monitors and updates a computer spreadsheet which shows dates of expected receipt of EPCRA forms and Form R filing dates. Tr. 68, 79, 88. As a result of Mr. Pews efforts, Steeltech has timely filed its Form Rs for 1994, 1995 and 1996. Ex. 26 (Stip. 59), Tr. 81.

However, as to the third criterion, although Respondent did timely file Form Rs for 1991, Respondent failed to timely file Form Rs for 1990, which is two reporting years preceding the reporting years for the violations of Counts VII through XI.

Respondent thus has a "history of violation" for purposes of this criterion.

Therefore, since Respondent met two of the three criteria, it is entitled to an additional reduction beyond the first 25%. The ERP provides that the 25% second reduction "can be applied in full or in part according *to the extent* to which the facility meets the criteria for the second 25% reduction." Ex. 2, p. 15 (italics added).

While Complainant proposed that Respondent receive the first 25% reduction and only 10% of the second 25% reduction, I conclude it is more appropriate to reduce the gravity-based penalties for Counts VII through XI by the first 25% plus two-thirds of the second 25%, for a total reduction per Count of 42%.

IV. EVALUATION OF RESPONDENT'S PENALTY CONSIDERATIONS

In this proceeding, Respondent both challenged the application of the ERP to calculating the penalties to be applied to the violations, and raised its right to additional adjustments within the framework of the ERP.

A. Application of the ERP

Respondent argues that the ERP should not be utilized at all in calculating the penalties to be imposed against it, claiming that the gravity of the violations "in no way equates to the amount of the penalty being proposed by the EPA." Tr. 12. Steeltech characterized the ERP and its monetary matrix as applying "to the most recalcitrant violator of these statutory requirements . . . someone who files false information and intentionally refuses to file these forms, is trying to hide something in effect." Tr. 14. In comparison, Respondent stated it was at "the other end of the spectrum." Tr. 14-15. Specifically, Respondent argued that the ERP creates penalties for multiple violations for multiple chemicals when Respondent claims, it did only "one thing" wrong, that is, being unaware of the filing requirement, it did not file the necessary paperwork. Tr. 12-13. In addition, Respondent argued the violation resulted in no harm to the environment. Further, Respondent asserted that the "actual enforcement in the matter is unfair" because: (a) EPA did not place Steeltech on its mailing list to annually receive the Form R instructions and blank forms, despite Respondent's request to be placed on the list and the promise made by EPA employees to do so; and (b) this action was not instituted until 2 1/2 years after the inspection and there was no communication between the EPA and Respondent during the interim period. Tr. 13-14. Respondent suggests that a penalty of no more then $10,000 would be appropriate. Tr. 17. Intervenor raised essentially the same points at the hearing. Tr. 18-22.

It must be noted that EPCRA is a strict liability statute; "intent" is not an element. The purpose of the statute is to provide communities with information on potential chemical hazards within their boundaries and to foster state and local community planning efforts to control accidental releases of toxic chemicals. Local emergency planning committees are charged with developing emergency response plans based upon the information provided in the Form Rs by covered facilities. The public, in turn, has the right to know of the toxic chemicals manufactured, processed or otherwise used and/or released at facilities in their communities 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 Steeltech, uses toxic chemicals in excess of the reporting threshold but does not timely file a Form R with the EPA Administrator and state officials. *See, TRA Industries*, EPA Docket No. EPCRA-1093-11-05-325 (Initial Decision, Oct. 11, 1996). Failure to comply with the reporting provisions of Section 313 seriously impairs the public's right to know about toxic chemicals, as well as the Federal and state government's ability to respond to releases of toxic chemicals. *See, Huls America, supra*. This is particularly clear in this case since prior to the inspection, Respondent had never filed any Form Rs so that an emergency plan of action could be created and, even after the inspection, the

Respondent was not able on its own to consistently comply with the filing requirement so as to keep the emergency planning officials up to date as to the toxic chemicals being handled on the premises of the facility. This error is made more egregious by the fact that in many cases Steeltech was manufacturing, processing or otherwise using more than ten times the reportable threshold of the toxic chemicals.

Consistent with the statute, EPA has set forth a policy in the ERP of strict liability as to violations of EPCRA § 313 with the intent of strongly discouraging ignorance of EPCRA and its requirements. Ex. 2, p. 15. The circumstances, or seriousness, of the violation, takes into account the accuracy and availability of the information to the community, states, and Federal government. Ex. 2, p. 8. Penalties for violations of EPCRA § 313, failure to timely file Form Rs, are not based upon direct harm to the environment, but upon harm to the integrity of the toxic chemical data and public's right to know that data, and the deprivation from industries and Federal, state and local governments of that data to manage and control toxic chemicals.[22] Contrary to Respondent's claim, the Policy is not directed solely towards intentional, recalcitrant misfeasors, but rather encompasses a whole range of violators and circumstances under which violations occur, providing flexibility in the penalty proposed based upon circumstances.

This case presents no extraordinary circumstances which would suggest any deviation from the ERP, so the gravity-based penalties calculated above, which are consistent with Complainant's proposed gravity-based penalties, will be assessed, except for the further adjustments provided for herein.[23]

B. Additional Adjustments Under the ERP

In the event the ERP applied in this case, Respondent has raised factual issues supporting a claim of entitlement to additional adjustments within the framework of the ERP for attitude and other factors as justice may require.[24]

1. Attitude

As noted above, the ERP provides that reductions for "attitude" and for "voluntary disclosure" are mutually exclusive, since both factors address a facility's concern with timely compliance. Ex. 2, p. 16. Therefore, only Counts III through VI are eligible for reduction on the basis of "attitude" under the ERP.[25]

The ERP provides that up to a 15 percent reduction may be made for a respondent's cooperation throughout the compliance and enforcement process, such as degree of cooperation and preparedness during the inspection, allowing access to records, responsiveness and expeditious provision of supporting documentation requested by EPA, and cooperation and preparedness during the settlement process. According to the ERP, the penalty may be additionally reduced by up to 15 percent for good faith efforts to comply with EPCRA, and the speed and completeness with which it comes into compliance. Ex. 2, p. 15.

The record shows that Respondent submitted Form Rs for 1989 and 1990 on the day following the EPA's inspection which revealed the violations. Tr. 75, Ex. 15, 16, 17. The record shows also that Respondent made several requests to get onto EPA's mailing list for EPCRA forms, including Mr. Pews' requests by telephone in October 1994 and April 1995 and in writing in December 1994 and May 1995. Tr. 68-69, 75, 77-78, 87. Respondent was not on EPA's mailing list for EPCRA forms until after May 1995. Tr. 75, 77-78. The record shows that Respondent responded to EPA's Notice of Technical Error on Respondent's 1993 Form Rs by correcting them within a month. Tr. 78.

There is no testimony or evidence in the exhibits, such as the inspection report, stating that Respondent was or was not cooperative during the inspection or settlement process. In fact, none of the participants in the inspection testified at the hearing. However, Respondent appears to have been reasonably prepared for the inspection and forthcoming in supplying Complainant with information. Ex. 1, 5.

Respondent generally asserts that it has been "most cooperative" once it learned of the reporting requirements, and Complainant has not denied this assertion. Respondent's Post-Hearing Brief at 11.

It is clear that after the initial violations occurred, the steps undertaken by Respondent to prevent further violations after the inspection were far from thorough, in that apparently the President/majority stockholder was never even informed of the inspection and EPCRA issues by his father/minority stockholder so he could be aware of the need to take steps to assure compliance. Moreover, Respondent did not timely respond to a Notice of Noncompliance it received on June 26, 1992 in that it was still outstanding during the course of this litigation in 1997. Ex. 26 (Stip. 25).

In consideration of all these factors, a reduction of 20% will be made to the penalties for Counts III through VI, for Respondent's cooperation and good faith efforts to comply with EPCRA.

2. Other Factors as Justice May Require

The ERP provides that gravity-based penalties may be reduced up to 25% based upon "other factors as justice may require," including such matters as "new ownership for history of violations," 'significant-minor' borderline violations, and "lack of control over the violation." Ex. 2, p. 18.

Respondent argues that it is entitled to the full 25% "other factors" reduction based upon new ownership and lack of control over the violations.

As to new ownership, it is true that the Form Rs for calendar year 1989 were due prior to the time that Steeltech's current owners (Gary and Armand Salerno) acquired the company. Thus, a judgment against Steeltech for the 1989 violations could be seen as penalizing the current owners for a violation that is attributable solely to the misfeasance of the prior owner, Michael F. Farmer. Normally, this might be a reasonable basis for a reduction in the penalty as to these counts. However, because of the existing indemnification arrangements between Mr. Farmer, Steeltech's prior owner, and Gary Salerno, one of Steeltech's current owners, Steeltech and its current owners will not have to pay the penalty for Mr. Farmer's misfeasance. Therefore, I see no basis for reducing the penalty on 1989 counts the basis of the change of ownership.

Respondent also asserts it is entitled to a reduction because of lack of control over the violations based upon employee turnover. However, the record clearly indicates that the employee turnovers were not sudden, unexpected, or so numerous such that Respondent could not have easily transferred responsibility for filing the Form Rs in the ordinary course of business. After the inspection occurred in February 1992, Armand Salerno, one of Steeltech's owners, took it upon himself to bring the company into compliance. He then turned over the responsibility for filing the Form Rs to Ron Wells, who timely filed the form Rs for 1991 by July 1, 1992. Ex. 14, 16, 17; Tr. 45-47, 56-57, 75. In late 1992 or early 1993, Mr. Wells position was changed to technical director of Respondent company, where he did not have responsibility for filing Form Rs. Tr. 49, 75. Neither Mr. Wells nor anyone else in the company informed the employee taking Mr. Wells place of the duty to file Form Rs. Tr. 49-50, 54. Steeltech's failure to appropriately train Mr. Wells replacement and transfer corporate duties does not constitute an understandable and/or excusable "lack of control" over the violations due to employee turnover or otherwise warranting a reduction in the penalty on the basis of "other factors as justice may require."

Another factor Respondent insists on having considered is EPA's lack of diligence in pursuing this action. Respondent points out that Complainant waited over two years after the inspection to file the Complaint, and did not correspond with Respondent during that time. If Complainant had promptly filed the Complaint after the inspection, Respondent asserts that it could have raised an inability to pay defense.

First, it is unclear that had the case been timely filed, Respondent would have been able to successfully raise an inability to pay defense. The earliest the case could have been reasonably filed would be about February, 1992, immediately after the inspection which revealed the 1988, 1989 and 1990 violations. As to the 1988 and 1989 violations, in light of the indemnification provision, it would arguably not simply be Steeltech's own inability to pay which would be at issue, but also Mr. Farmer's ability to pay for those years. There is no evidence that Mr. Farmer could not pay the penalty sought for the four violations charged in those years (totalling $44,000), in accordance with the indemnification agreement. As to the remaining year, 1990, the total penalty sought for the violations occurring for that year total approximately $16,000. Mr. Pews testified that in 1992, Steeltech started to make money and has done so ever since. In 1993, the company made a profit of about $100,000. Thus, Respondent may not have had a viable "inability to pay" defense in any year. On the other hand, it is noted that the delay in filing this case clearly economically benefitted Respondent and Intervenor, at least in one way, since it resulted in two counts of the Complaint being withdrawn/dismissed on statute of limitations grounds.

Second, EPA *did* contact Steeltech after the inspection and before this action was instituted. In June of 1992, EPA sent Steeltech a Notice of Noncompliance as to its 1989 Form R for nickel. Steeltech never responded to that Notice and never filed a corrected Form R for 1989. Ex. 26 (Stips. 24 and 25). Thus, in terms of contact during the interim period after the inspection and before the lawsuit, the ball was in Steeltech's court.[(26)]

In sum, I find that the only adjustments which should be made to the gravity-based penalty derived from application of the ERP is 20% for attitude as to Count III, IV, V, and VI and 42% for voluntary disclosure as to Counts VII, VIII, IX, X and XI.

Therefore, the penalties appropriate for the violations alleged in the Complaint for which Respondent is liable are calculated to be as follows:

Count III:	$17,000	gravity-based penalty
	- 20%	less adjustment for attitude
	$13,600	
Count IV:	$17,000	gravity-based penalty
	- 20%	less adjustment for attitude
	$13,600	
Count V:	$12,811	gravity-based penalty
	- 20%	less adjustment for attitude
	$10,249	
Count VI:	$ 3,477	gravity-based penalty
	- 20%	less adjustment for attitude
	$ 2,782	
Count VII	$17,000	gravity-based penalty
	- 42%	less adjustment for voluntary disclosure
	$ 9,860	
Count VIII	$ 5,000	gravity-based penalty
	- 42%	less adjustment for voluntary disclosure
	$ 2,900	
Count IX	$10,099	gravity-based penalty
	- 42%	less adjustment for voluntary disclosure
	$ 5,857	
Count X	$ 2,490	gravity-based penalty
	- 42%	less adjustment for voluntary disclosure
	$ 1,444	

Count XI	$ 2,490	gravity-based penalty
	- 42%	less adjustment for voluntary disclosure
	$ 1,444	

CONCLUSION

I find that Respondent, Steeltech failed to file Toxic Chemical Release forms as to chromium and nickel for calendar years 1989, 1990, 1992 and 1993, and as to cobalt for calendar year 1993, in violation of Section 313 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. §11023. As a result, I find the imposition of a civil penalty in the amount of $61,736 is appropriate in light of all the factors in this case.

ORDER

1. Respondent is assessed a civil penalty of $61,736.

2. Payment of the full amount of this civil penalty shall be made within 60 days of the date this Initial Decision becomes the Final Order of the Agency, by submitting a certified or cashier's check in the amount of $61,736, payable to the Treasurer, United States of America, and mailed to:

EPA - Region V
P.O. Box 70753
Chicago, IL. 60673

3. A transmittal letter identifying the subject case and the EPA docket number, as well as Respondent's name and address must accompany the check.

4. If Respondent fails to pay the penalties within the prescribed statutory period after entry of the Order, interest on the penalty may be assessed.

5. Pursuant to 40 C.F.R. §22.27(c), this Initial Decision shall become the Final Order of the Agency forty-five (45) days after service upon the parties and without further proceedings, unless an appeal is taken pursuant to 40 C.F.R. §22.30 or the Environmental Appeals Board elects, *sua sponte*, to review this decision. An appeal must be filed within twenty (20) days after service of this Initial Decision upon the parties. 40 C.F.R. § 22.30(a).

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Susan L. Biro
Chief Administrative Law Judge

Date: May 27, 1998
Washington, D.C.

1. The Director's authority to institute the action was delegated to her by the Regional Administrator of EPA Region V, who, in turn, was delegated such authority by the Administrator of the Environmental Protection Agency. *See*, EPA Region V Manual, Delegation No. 22-3 (August 15, 1989) (Ex. 6) and EPA Administrator Delegation Manual, Delegation No. 22-3-A (October 31, 1989 ed.) (Ex. 7).

2. Respondent requested and was granted leave to file an Amended Answer.

3. This case was originally initially assigned to Judge Daniel M. Head. Upon Judge Head's retirement, in January 1997, the case was reassigned to the undersigned Presiding Judge.

4. Thereafter, the Respondent filed a Motion for Reconsideration and Complainant filed a Motion to Strike Defenses and both Motions were denied on September 17,

1997.

5. At the hearing, the parties unequivocally represented that a total of twenty-six sequentially numbered joint exhibits were being moved into evidence. However, upon review after the hearing, only twenty-three exhibits were actually offered and admitted into evidence, including one exhibit (Exhibit 18) produced after the hearing. Missing from the evidence introduced were exhibits 15, 21 and 22.

6. Citation to the transcript will be in the following form: "Tr. ."

7. On December 16, 1997, Respondent filed a Motion to Strike Complainant's Reply Brief as untimely. Pursuant to an Order issued by the undersigned on October 20, 1997, reply briefs were due to be filed 20 days after receipt of the opposing party's initial post-hearing brief. The Order stated that "[b]riefs filed after the deadlines established will not be considered unless an extension for time was previously granted." Respondent's initial post-hearing brief was sent to Complainant via Federal Express on November 13, 1997, and was delivered to EPA's mailroom on November 14, 1997. Respondent asserts that Complainant was required to file its reply by December 4, 1997, which is twenty days from November 14th.

Complainant opposed Respondent's Motion to Strike on the basis that its reply brief was filed in response to both Respondent's brief and Intervenor's brief, since they raised similar issues. Complainant asserts that it received Intervenor's initial brief on November 18, 1997 by regular mail making the December 6th filing timely. Complainant further asserts that a relocation of counsel's office resulted in counsel's delay in receiving Respondent's initial brief until November 18, 1997. For the reasons stated in Complainant's opposition, Respondent's Motion to Strike Complainant's Reply Brief will be denied.

8. EPCRA, enacted as Pub.L. 99-499, Title III, §§ 300-330, became effective as of October 17, 1986 (100 Stat. 1733). Section 313 required that covered entities submit Toxic Chemical Release Forms (Form Rs) on or before July 1, 1988 and annually thereafter. *See*, 42 U.S.C. §11023(a).

9. Mr. Farmer testified that he first learned about the filing requirements under EPCRA in 1994, when the current owners asserted their indemnification rights against him under the sales agreement. Tr. 29. Mr. Salerno testified that Steeltech was only one of Mr. Farmer's many businesses and the time he spent at Steeltech was "very limited." Tr. 60.

10. The parties did not introduce into evidence the final executed sale agreement between the Intervenor and Armand Salerno. The draft agreement presented (Ex. 12) did not contain the same indemnification provision as included in Intervenor's agreement with Gary Salerno.

11. Both Mr. Farmer and Mr. Salerno testified that they were represented in the sale by law firms familiar with environmental laws and regulations who did a due diligence review of the company's compliance with environmental laws before including the indemnification provision in the contract. Despite hiring such experts, both gentlemen claimed that the due diligence review never uncovered the EPCRA filing violations or the application of EPCRA to the business and the indemnification provision with its peculiar amount ($153,500) was included as a "normal clause." Tr. 33-34, 61-62.

12. Gary Salerno testified at the hearing that upon purchasing the company, he took responsibility for sales and marketing and was away from the facility most of the time, while his father ran the day to day plant operations. Tr. 46, 62. Although Armand Salerno held a significant, but minority (40%) shareholder position in the company, and worked therein for 3-4 years, Gary Salerno claimed his father never held a "title of vice president or manager or anything like that" and never received any renumeration for his work. Tr. 47-48, 62. A number of exhibits, however, indicate that Armand Salerno held himself out as having the title of "Director, Corporate Planning." Ex. 1, 16

13. Gary Salerno testified that, in about 1993 or 1994, his father "retired," that is, he stopped actively working in the business, but did not specifically indicate that his father's status as the minority stockholder changed at any point. Gary Salerno stated that his father never contemporaneously informed him of the EPCRA inspection, the violations found, or the future filing requirements. Tr. 64-65. Armand Salerno did not testify at the hearing.

14. Although the Form Rs introduced into evidence do not reflect any releases of toxic chemicals from Respondent's facility (Ex. 16-20), Mr. Pews testified that a minimal amount of fumes containing toxic chemicals are released from the processing system into the air and into sand used in the molding process that is removed by a third party hauling company. Tr. 81-83, 90-93. Mr. Farmer also testified that a minimal amount of fumes containing toxic chemicals were released from the processing system into the air. Tr. 37-38. *See also*, Tr. 13. Mr. Pews testified that the non-reporting of these releases on the original 1993 Form R triggered issuance of a Notice of Technical Error and the corrected 1993 Forms were refiled in May of 1995. Tr. 78, 81.

15. Both Mr. Pews and Mr. Salerno testified as to the fact that Steeltech has not been annually receiving from EPA the Form Rs instructions and blank form package, even though the Company had requested that it be placed on EPA's mailing list. Tr. 75, 44

16. Some judges have relied upon criteria for other types of EPCRA violations to guide their administrative penalty assessments for violations of Section 313. *See e.g., Catalina Yachts, Inc.*, EPA Docket No. EPCRA-09-94-0015 (ALJ, Feb. 2, 1998); *TRA Industries Inc.*, EPA Docket No. EPCRA-1093-11-05-325 (ALJ, Oct. 11, 1996); *GEC Precision Corp.*, EPA Docket No. EPCRA-7-94-T-3 (ALJ, Aug. 28, 1996). EPCRA §325(b)(1)(C) (42 U.S.C. §11045(b)(1)(C)), provides, with respect to Class I violations of the emergency notification requirements of Section 304 (42 U.S.C. §11004), for which a penalty of not more than $25,000 *per violation* may be assessed, that in determining the exact amount of the civil penalty to be imposed in a specific case, 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 prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." EPCRA §325(b)(2) (42 U.S.C. §11045(b)(2)), covering Class II violations of EPCRA's emergency notification provisions provides for a penalty of up to $25,000 *per day* for violations of EPCRA § 304. 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. A comparison of the two penalty assessment criteria reveals, however, that the penalty factors listed in TSCA Section 16 are nearly identical to those in EPCRA Section 325(b)(1)(C), except that the factor of "effect on ability to continue to do business" is substituted for "economic benefit or savings." Neither of these factors is an issue in this case.

17. The page citations to the ERP are to the page numbers used in the document itself and not to the number of pages of the exhibit counting chronologically.

18. Violations committed by businesses with over 10 million dollars in corporate sales and 50 employees or more, which used in the applicable calendar year *more than* 10 times the reporting threshold of the chemical, are designated as "extent level A."

19. The Rules also require that "The dollar amount of the proposed civil penalty shall be determined in accordance with . . . any civil penalty guidelines issued under the Act." However the Rules do not define such "civil penalty guidelines." An EPA policy entitled, "Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations," 60 Fed. Reg. 66706 (December 22, 1995) (Self-Policing Policy), provides for 100% elimination or reduction by 75% of the gravity-based penalty for voluntary disclosure. The Self-Policing Policy states that it supersedes any inconsistent provisions in other penalty and enforcement policies, but to the extent that they are not inconsistent, they apply in

conjunction with the Self-Policing Policy. 60 Fed. Reg. at 66712. However, that Policy also states that it is not intended for use in pleading, at hearing or at trial. *Id.* Therefore, and further, because the Self-Policing Policy has not been relied upon by the Complainant in calculating the penalty in this case, it will not be considered herein. *See, Harmon Electronics,* RCRA (3008) Appeal No. 94-4, slip op. at 59-60 (EAB, March 24, 1997); cf. *Bollman Hat*, EPA Docket No. EPCRA-III-182 (ALJ, Apr. 17, 1998).

20. It is noted, however, that EPA could have argued that Steeltech should be classified as a company with over 10 million dollars in gross sales as to at least some of the Counts. The Dun and Bradstreet report indicates that as of December 31, 1995, Steeltech had increased its annual sales to approximately $11.3 million dollars. Ex. 8. Thus, if EPA had characterized the company's size as of the date of the Amended Complaint (March 1995), when it added Counts VII-XI, it could have fallen into category A providing for a higher gravity-based penalty. However, to Respondent's benefit, even as to the subsequently added Counts, EPA calculated Steeltech's size as of the date of the original Complaint.

21. There is no explanation in the record as to why Complainant did not include the 1992 and 1993 violations in the original Complaint filed in September 1994. One would have assumed that, as a matter of course, before an action is filed and a penalty proposed, EPA would take a few moments to determine if there are any additional similar violations which have occurred since the original inspection, especially where EPA has waited two years from the inspection to file suit.

22. Furthermore, EPA says that the data can be used to "compare facilities or geographic areas, to identify hot spots, to evaluate existing environmental programs to more effectively set regulatory priorities . . . to track pollution control and waste reduction progress . . . and identify potential environmental justice concerns." Office of Pollution Prevention and Toxics, EPA Public Data Release, 1993 Toxic Release Inventory (March 1995) p. 4.

23. Respondent and Intervenor assert that there was only one violation, of failure to know the EPCRA reporting requirements. Sections 313 and 325(c) of EPCRA are clear, however, that a separate penalty may be assessed for each Form R that was not timely filed. Section 313 provides that a separate "form . . . for each toxic chemical . . . processed . . . during the preceding year" must be submitted for each year that it was processed in excess of the threshold amount. Section 325(c) provides, "Any person who violates *any requirement* of section [313]. . . shall be liable . . . for a civil penalty in an amount not to exceed $25,000 for *each such violation*" (emphasis added). Moreover, the argument that Respondent simply did not know of its legal obligations cannot reasonably be applied to the violations occurring after the 1992 inspection, which provided direct personal notice of EPCRA's filing requirements to Respondent.

24. The parties do not dispute that Steeltech has no prior violations and that no delisted chemicals are at issue, and Respondent has not claimed inability to pay the proposed penalty, so the penalties will not be adjusted for those factors. *See, New Waterbury, Ltd.*, 5 E.A.D. 529, 541, TSCA Appeal No. 93-2, at 15 (EAB, Oct. 20, 1994)("where a respondent does not raise inability to pay as an issue in its answer, or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process . . . the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived under the Agency's procedural rules and thus this factor does not warrant a reduction of the proposed penalty").

25. In that "voluntary disclosure" (prior to litigation) and positive "attitude" (during the inspection/litigation) can encompass different positive responses to violations, both of which the Agency should reward, its decision to treat them always as "mutually exclusive" seems questionable. However, since in this case, EPA considered Steeltech's mere confirmation of information told to it by the Agency as "voluntary disclosure," for which I have found Steeltech entitled to a 42% reduction as to five counts, I find an additional adjustment based upon attitude as to those Counts unwarranted.

26. Complainant could have included in the original Complaint filed in this case an additional violation for Respondent's failure to respond to the Notice of Noncompliance as to the 1989 Form R, but apparently, within its prosecutorial discretion, chose not to. The ERP classifies failure to respond to a Notice of Noncompliance as a Level 5 violation warranting up to a $5,000 penalty. Ex. 2, pp. 11-12.

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